THE

LAW JOURNAL REPORTS

FOR

THE YEAR 1883:

COMPRISING

REPORTS OF CASES

IN

The House of Lords and in the Privy Council,

IN

The Court of Appeal, the Court for Crown Cases Reserved, and the Court of Bankruptcy;

AND IN

THE HIGH COURT OF JUSTICE

VIZ.

Chancery; Queen's Bench; and Probate, Divorce and Admiralty, Divisions.

MICHAELMAS 1882 TO MICHAELMAS 1883.

The Appellate Cases, in the House of Lords, and in the Court of Appeal, are with the Reports of Cases in the respective Divisions and Courts from which the Appeals come. These Cases form five distinct Volumes, having separate Indexes of Subjects and Tables of Cases: viz., the Privy Council Volume; the Chancery and Bankruptcy Volume; the Queen's Bench or Common Law Volume; the Probate, Divorce and Admiralty Volume; and the Magistrates' Cases.

THE CASES RELATING TO THE POOR LAW, THE CRIMINAL LAW, AND OTHER SUBJECTS CHIEFLY CONNECTED WITH THE DUTIES AND OFFICE OF MAGISTRATES, ARE SEPARATELY ARRANGED, AND FORM A DISTINCT VOLUME OF REPORTS, VIZ. THE MAGISTRATES' CASES.

THE PRIVY COUNCIL CASES HAVE THEIR OWN INDEX AND TABLE OF CASES, AND FORM A DISTINCT VOLUME OF REPORTS.

THE REPORTS ARE EDITED BY

MONTAGU CHAMBERS, ESQ., ONE OF HER MAJESTY'S COUNSEL,

FREDERICK HOARE COLT, ESQ.,

AND

JOHN GEORGE WITT, ESQ., BARRISTERS-AT-LAW.

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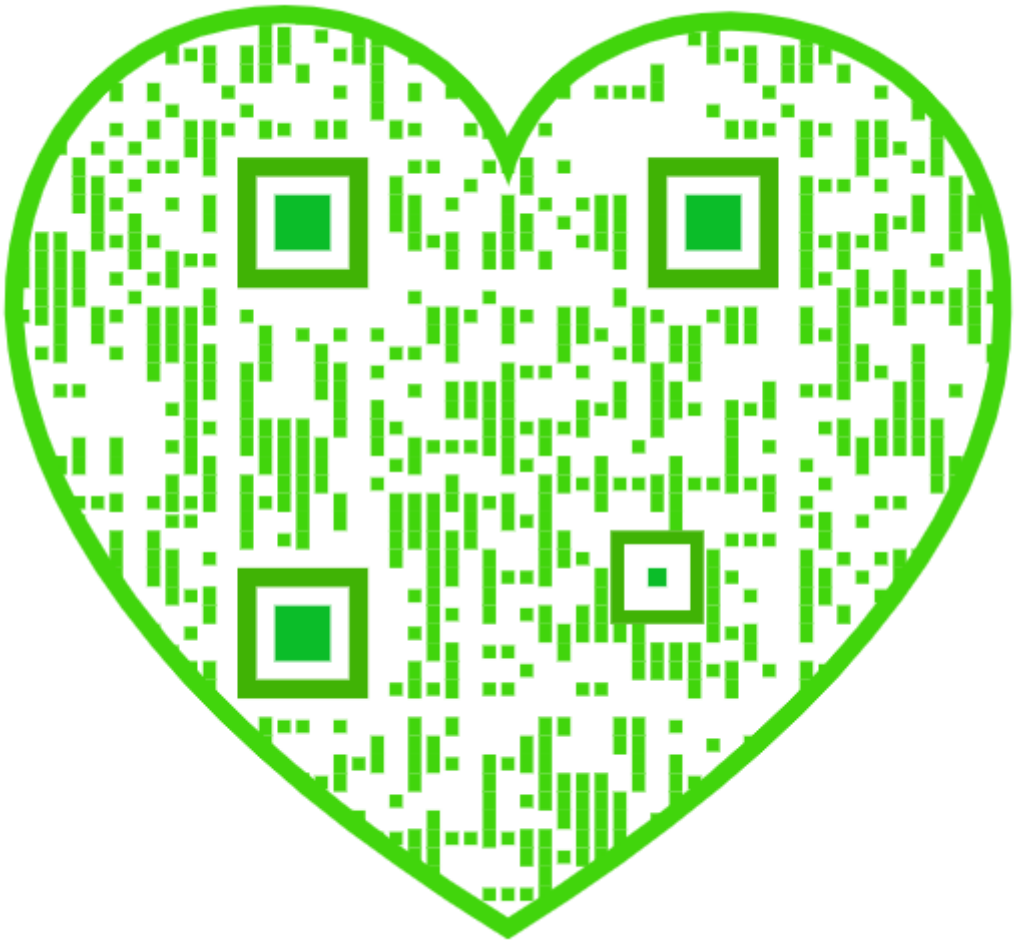

CASES

ARGUED AND DETERMINED

IN THE

Queen's Bench Division

OF THE

HIGH COURT OF JUSTICE,

REPORTED BY

W. DECIMUS I. FOULKES, J. H. ETHERINGTON SMITH,
GILBERT GEORGE KENNEDY, RICHARD HOLMDEN AMPHLETT,
FRANCIS PARKER AND EDWARD BENNETT CALVERT,
BARRISTERS-AT-LAW;

AND ON APPEAL THEREFROM

IN

Her Majesty's Court of Appeal,

REPORTED BY

ARTHUR CLEMENT EDDIS, H. LACY FRASER,
ROBERT BRUCE RUSSELL, WILLIAM EDWARD GORDON AND
GEORGE ABBOTT STREETEN,
BARRISTERS-AT-LAW,

AND IN

The House of Lords,

REPORTED BY

LIONEL LANCELOT SHADWELL,
BARRISTER-AT-LAW.

MICHAELMAS 1882 TO MICHAELMAS 1883.

SUPREME COURT OF JUDICATURE.

THE COUNTY COURT RULES, 1883.

1. These Rules may be cited as "The County Court Rules, 1883," or each Rule may be cited as if it had been one of "The County Court Rules, 1875," and had been numbered therein by the number of the Order and Rule placed in the margin opposite each of these rules.

2. An Order and Rule referred to by number in these Rules shall mean the Order and Rule so numbered in "The County Court Rules, 1875."

Order IV.

Commencement of Action.

3. Order IV. Rule 4, shall be read as if the words "in England or Wales" had been inserted after the word "else" in such Rule.

4. To Order IV. Rule 7, there shall be added, "Provided that the Registrar may allow further time for the delivery of the affidavit."

Order V.

Parties.

5. Order V. Rule 7, shall not apply where it is otherwise provided by statute as to the suing or being sued by a married woman, or as to the suing by an infant.

6. Any person carrying on business in the name of a firm apparently consisting of more than one person may be sued in the name of such firm.

Order VII.

Particulars and Statement of Claim.

Order VII. Rule 8, is hereby annulled, and the following shall stand in lieu thereof.

7. In all actions the defendant may, within three clear days of his being served with the summons, give notice to the plaintiff that he requires further particulars, and the plaintiff shall, within two clear days of service of such notice, file full particulars of his claim, and of the relief or remedy to which he claims to be entitled, and within the same time shall deliver to the defendant a copy thereof. If the plaintiff fails to comply with such notice, or complies therewith insufficiently, the Judge at the trial, if satisfied that the defendant has thereby been prejudiced in his defence, may order the plaintiff to file and deliver full particulars, and may adjourn the action, and stay all proceedings therein until such order has been complied with, and may make such order as to costs as he may think fit. Provided that a plaintiff may without any order file and deliver amended particulars of demand at any time before the return day. And the Judge at the trial, if satisfied that the defendant has not had a reasonable opportunity of preparing his defence to any new matter introduced by such amendment, may disallow the amendment, or may adjourn the action, and may make such order as to costs as he may think fit.

Order VIII.

Plaint Note and Summons.

8. In Order VIII. Rule 7, for the words "shall be delivered" the words "should, in order to ensure its service, be delivered" are hereby substituted.

9. Order VIII. Rule 23, shall apply to a default summons as well as to an ordinary summons.

ORDER XIV.

EVIDENCE.

10. Order XIV. Rule 5 is hereby annulled, and the following shall stand in lieu thereof:—

Where any documents which would, if duly proved, be admissible in evidence are produced to the Court from proper custody, they shall be read without further proof, if, in the opinion of the Judge, they appear genuine, and if no objection be taken thereto; and if the admission of any document so produced be objected to, the Judge may adjourn the hearing for the proof of the documents, and the party objecting shall pay the costs caused by such objection, in case the documents shall afterwards be proved, unless the Judge shall otherwise order.

11. Any party may, at the trial of an action or issue, use in evidence any one or more of the answers of the opposite party to interrogatories without putting in the others: Provided always, that in such case the Judge may look at the whole of the answers, and if he shall be of opinion that any other of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

ORDER XIX.

ENFORCEMENT OF JUDGMENTS AND ORDERS.

12. Where a judgment is against partners in the name of the firm, execution may issue in manner following:

(*a.*) Against any property of the partners as such:

(*b.*) Against any property of any person who has admitted that he is or has been adjudged to be a partner.

If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Registrar for leave so to do; and the Registrar may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be determined by the Court on motion.

ORDER XXXVI.

COSTS.

13. Where a bill of costs has not been taxed on the day of trial, it shall be delivered to the Registrar of the Court within seven clear days of the day of trial.

14. Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate or allocatur is signed, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the item or items, or parts or part thereof, objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

15. Upon such application the taxing officer shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof, and, if so required by either party, he shall state either in his certificate of taxation or allocatur, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

16. Where in any action brought under the Employers' Liability Act, 1880, or the Rivers Pollution Prevention Act, 1876, or for the recovery of property exceeding in value twenty pounds, or of any sum exceeding twenty pounds, scientific witnesses are summoned, the Judge may order them to be allowed such costs as they would be allowed in the High Court of Justice.

17. Where a Judge certifies under section 5 of the County Courts Costs and Salaries Act, 1882, the certificate shall be entered on the Minutes of the Court.

ORDER XXXVII.

PRACTICE.

18. Order XXXVII. Rule 2, is hereby annulled, and the following shall stand in lieu thereof.

Where any party changes his solicitor, he shall give notice in writing to the Registrar, and to the solicitor, if any, acting for any other party to the action or proceeding, of the change and of the name or firm and place of business of the new solicitor, and the Registrar shall file the notice given to him.

19. A solicitor acting for a party in an action may give notice in writing by post or otherwise to the Registrar and to the other party or parties, or his or their solicitor, that he is so acting, whereupon service of any document, notice, or proceeding whatsoever authorised by these rules to be served

by or upon a solicitor so acting shall be served by or upon such solicitor accordingly, and he shall be deemed to be the solicitor acting for the party on whose behalf he has given such notice, until notice of change of solicitor has been duly given. No notice need be given under this rule by a solicitor acting for the plaintiff where the plaint has been entered by such solicitor and the particulars duly signed by him.

20. Order XXXVII. Rule 11, is hereby annulled, and the following shall stand in lieu thereof.

Any notice relating to or any Order made upon any interlocutory proceeding may be served by the solicitor of the party requiring to effect such service.

21. Order XXXVII. rule 12, is hereby annulled, and the following shall stand in lieu thereof.

Where by reason of the absence of any party or from any other sufficient cause, the service of any summons (other than a default summons), notice, order, proceeding or document cannot be made, the Judge or Registrar may, upon an affidavit shewing grounds, make an order for substituted service.

22. Order XXXVII. Rule 16, is hereby annulled, and the following shall stand in lieu thereof.

Parties may from time to time by consent enlarge or abridge any of the times fixed by these rules for taking any step or filing any document, or giving any notice in any action or proceeding, but where such consent cannot be obtained either party may apply to the Judge or Registrar, on notice to the non-consenting party, for an Order to effect the object sought to have been obtained, with the consent of the other party.

23. Order XXXVII. Rules 26 and 29, are hereby annulled, and the following shall stand in lieu thereof.

Any party may apply before an action is called on to the Judge or Registrar for its adjournment, and, if granted, no trial fee shall be paid where the application is made for the first time during the progress of the action.

24. An affidavit shall not be filed which has been sworn before a Commissioner who is the solicitor acting for any party in the action, or a partner or a clerk of such solicitor.

ORDER XXXIX*b*.

THE EMPLOYERS' LIABILITY ACT, 1880.

25. In Order XXXIX*b*. Rule 1, for the words "shall be delivered" the words "should, in order to ensure its service, be delivered" are hereby substituted.

ORDER XLI.

INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

26. Where, under section 3 of the Inferior Courts Judgments Extension Act, 1882, application is made for the grant of a certificate of a judgment, a fee of two shillings and sixpence shall be paid, and proof that the judgment has not been satisfied and of the amount remaining unsatisfied shall be given to the satisfaction of the Registrar by affidavit, if required.

27. If the judgment is for payment within a period therein mentioned or by instalments, and such period shall not have expired or default shall not have been made in payment of some instalment, the certificate shall not be granted.

28. The names, businesses or occupations and addresses of the parties to be set forth in the certificate shall be those set forth in the books of the Court.

29. The Registrar shall indorse on the certificate the number of the plaint and the amount remaining due on the judgment, according to the books of the Court, and, after his signature, shall add to the certificate the date on which it is granted.

30. Where a certificate of a judgment is granted by a Registrar of a County Court he shall make on the minute of the judgment a memorandum of having granted such certificate, and thenceforth no further proceeding shall be taken or had upon such judgment in such Court, until the Court or Registrar, upon being satisfied that the execution issued in the Court in which the certificate was registered was unproductive, shall order that the judgment may be acted on as if such certificate had not been granted.

31. There shall be allowed to a solicitor for the costs of obtaining the certificate five shillings, and where an affidavit is required seven shillings.

32. The costs, if any, allowed, with the addition of the fee of two shillings and sixpence to be paid for the granting of the certificate, shall be endorsed on the certificate by the officer granting the same, which endorsement shall be an authority for the Court in which the certificate is registered to add the said costs and fee to the amount to be recovered by execution against the goods and chattels of the person against whom the judgment shall have been obtained.

33. The person presenting a certificate for registration shall add to his note of presentation, to be appended to the certificate, a description of the place within the jurisdiction of the Court in which the goods and chattels of the person against whom the

judgment has been obtained are, and shall also present a copy thereof, with the endorsement thereon, written on foolscap paper. Payment of a fee of two shillings and sixpence shall be made at time of presentation.

34. On the presentation of a certificate for registration with a copy as aforesaid, the Registrar shall, if the place within which the goods and chattels of the person against whom the judgment has been obtained are stated to be is within the jurisdiction of the Court of which he is the Registrar, seal the certificate and register the same by pasting it into the then current Minute Book of the Court, on the last page or so of such book, and shall seal and date the copy of the certificate and return it to the person presenting the certificate.

35. There shall be allowed to a solicitor for the cost of registering a certificate the sum of five shillings which, with the fee for registry and the cost, if any, allowed for granting the certificate as shewn by the indorsement thereon, shall be added to the amount to be recovered. The warrant of execution shall be according to the form in the schedule hereunto.

36. No money shall be paid out of Court unless on production of the sealed copy of the certificate. Provided that in the event of such copy being lost or destroyed another copy may be sealed and given to the proper person upon proof by affidavit or otherwise to the satisfaction of the Registrar that the person applying is the proper person and that he is entitled to the moneys recovered on the judgment, and upon payment of the fee of one shilling.

ORDER XLII.

MARRIED WOMEN'S PROPERTY ACT, 1882.

37. Where application is made under section 17 of the Married Women's Property Act, 1882, particulars of the question to be submitted to the decision of the Court shall be filed, and thereupon a summons shall be issued according to the form in the Schedule, and the same fee shall be taken as upon the entry of a plaint, and all subsequent proceedings shall be had as if the proceeding had been commenced by the entry of a plaint, and the proceeding shall be reckoned a plaint.

38. The Court shall direct upon what scale the costs of the proceeding shall be taxed.

SCHEDULE.

314. *Certificate to be given by a County Court.*

INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882.

I , certify that [*here state name, business, or occupation and address of person obtaining judgment, and whether plaintiff or defendant*] on the day of 18 , obtained judgment against [*here state name, business, or occupation and address of person against whom judgment was obtained, and whether plaintiff or defendant*] in the County Court of holden at for payment of the sum of on account of [*here state shortly the nature of the claim with the amount of costs (if any) for which judgment was obtained.*]

Registrar.

Date.

ENDORSEMENT to be made on CERTIFICATE granted by a COUNTY COURT.

	No. of Plaint.		
Amount for which judgment was obtained . . .			
Paid into Court . . .			
Remaining due on judgment .			
Fee and costs for obtaining certificate of the judgment (45 & 46 Vict. c. 31. s. 4) . .			
Total			

NOTE OF PRESENTATION to be appended to a Certificate sought to be registered in a County Court.

The above certificate is presented by me for registration in the County Court of , holden at , in accordance with the provisions of the Inferior Courts Judgments Extension Act, 1882.

Here insert place, &c., in which the goods are
Solicitor or Creditor,
Address.
Date.

315. *Warrant of Execution.*

INFERIOR COURTS JUDGMENT EXTENSION ACT, 1882.

In the County Court of holden at

Between

Plaintiff,

Address and description,*

and

Defendant,

Address and description,*

* As given in Certificate.

Whereas on the day of 188 , the Plaintiff [*or* defendant] obtained a judgment in against the defendant [*or* plaintiff], in [*here set forth the Court mentioned in the certificate*], for payment of the sum of £ for debt and costs [*or* damages and costs *or* for costs] *add where the certificate shews that judgment was to be paid by instalments*, and it was thereupon ordered by the said Court that the defendant [*or* plaintiff] should pay the same by instalments of for every days.

And whereas the said judgment has been duly registered in this Court, pursuant to the Inferior Courts Judgments Extension Act, 1882: These are therefore to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant [*or* plaintiff], wheresoever they may be found within the district of this Court (except the wearing apparel and bedding of him or his family and the tools and implements of his trade, if any, to the value of five pounds), the sum stated at the foot of this warrant, being the amount due to the plaintiff [*or* defendant] under the said judgment, including the costs of this execution; and also to seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money of the defendant [*or* plaintiff] which may there be found, or such part or so much thereof as may be sufficient to satisfy this execution, and the costs of making and executing the same, and to pay what you shall have so levied to the Registrar of this Court, and make return of

what you have done under this warrant immediately upon the execution thereof.

Given under the seal of the Court, this day of 188 ,

By the Court,

, *Registrar of the Court.*

To the High Bailiff of the said Court and others the Bailiffs thereof.

	£	s.	d.
Amount for which judgment was obtained . . .			
Paid as stated in certificate .			
Costs for obtaining and registering certificate of the judgment (45 & 46 Vict. c. 31. s. 4).			
Remaining due . . .			
Poundage for issuing this warrant			
Total amount to be levied . . £			

NOTICE. — The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the Debtor.

19 & 20 Vict. c. 108. s. 46. Application was made to the Registrar for this warrant at minutes past the hour of in the noon of the day of 188 .

Here state for the information of the High Bailiff the place &c. where the goods are stated to be.

316. *Summons.*

MARRIED WOMEN'S PROPERTY ACT, 1882.

You are hereby summoned at the instance of of , to appear at a County Court to be holden at , on the day of at hour of in the noon, when the Court will proceed to consider the question hereunto annexed, and to make an order with respect to the property in dispute.

Dated this day of .

Registrar.

We, John Bury Dasent, Rupert Alfred Kettle, Alfred Martineau, Henry J. Stonor, and James Motteram, being Judges of County Courts appointed to frame Rules and Orders for regulating the Practice of the Courts, and Forms of Proceedings therein, under the 32nd section of "The County Courts Act, 1856," have by virtue of the powers vested in us thereby, and of all other powers enabling us in this behalf, framed the foregoing Rules and Forms, and we do hereby certify the same to the Lord Chancellor accordingly,

J. B. DASENT.
RUPERT KETTLE.
A. MARTINEAU.
H. J. STONOR.
J. MOTTERAM.

I approve of these Rules and Forms, to come into force in all County Courts on the first day of March, 1883.

SELBORNE, C.

SUPREME COURT OF JUDICATURE.

CASES ARGUED AND DETERMINED

IN

The Queen's Bench Division

OF

THE HIGH COURT OF JUSTICE,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

MICHAELMAS 1882 TO MICHAELMAS 1883.

46 *Victoriæ.*

[IN THE COURT OF APPEAL.]

1882. Nov. 3. } ABOULOFF *v.* OPPENHEIMER AND ANOTHER.*

Foreign Judgment—Fraud of Plaintiff—Defence to Action on Judgment.

It is a good defence to an action upon a foreign judgment to allege that the judgment in question was obtained by the fraud of the plaintiff.

To an action on a foreign judgment the defendants pleaded as a defence that the plaintiff had obtained the judgment in an action in which the defendants were sued for the detention of the plaintiff's goods, and that both at the time when the action was brought and when judgment was obtained the goods were in the actual possession of the plaintiff and her husband, and that the plaintiff fraudulently concealed that fact from the foreign Court:—Held, *a good defence.*

Appeal from a judgment of the Queen's Bench Division overruling a demurrer to a paragraph of the statement of defence.

The action was brought upon a judgment obtained by the plaintiff in a suit in the district Court of Tiflis, in Russia, by which it was ordered, as alleged in the statement of claim, that the defendants should return to the plaintiff certain goods belonging to the plaintiff, or in default pay their value, together with a further specified sum for costs and expenses. The High Court of Tiflis on appeal affirmed the judgment of the district Court, and further ordered the defendants to pay an additional sum for the costs and expenses of the appeal. The judgment remaining unsatisfied, the plaintiff in the present action claimed the above-mentioned sums, together with interest thereon.

To this statement of claim the defendants pleaded, *inter alia*, the following defence:—

And for a separate and distinct defence the defendants say that, if the judgments or either of them were obtained as alleged (which is not admitted), the same and each of them were obtained by the gross fraud of the plaintiff, and of her husband G. M. Abouloff acting in collusion with her, in fraudulently representing to the district Court of Tiflis and the High Court of Tiflis that the goods in question were not in the possession of the plaintiff and her husband at the time the said suit (if any, which is not ad-

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J., and Brett, L.J.

mitted) was commenced, and at the time the said judgment (if any) was given, and during the whole time the said suit (if any) was depending, and by fraudulently concealing from the Courts that the whole of the goods were, as the fact was, and as the plaintiff and her husband well knew at the time the suit (if any) was commenced, and during the whole time it was depending, and at the time of the alleged judgment, in the actual possession of the plaintiff, and concealed by the plaintiff and her husband, except as to so much of the goods as the plaintiff and her husband had from time to time secretly and fraudulently disposed of.

Demurrer thereto, on the ground that the facts therein alleged could and ought to have been pleaded to the suit in the district Court and in the High Court of Tiflis.

The Queen's Bench Division (Mathew, J., and Cave, J.) overruled the demurrer.

The plaintiff appealed.

Sidney Woolf (with him *F. M. Abrahams*), for the plaintiff.—It is perfectly consistent with this defence that all the matters there alleged were enquired into by the Courts at Tiflis. The defendants ought to aver that those matters had not been enquired into by those Courts. The facts themselves must be looked to, and a general allegation of fraud, however strong may be the words used, is not sufficient to amount to an averment of fraud of which the Court ought to take any notice—*Wallingford* v. *The Mutual Society* (1). The facts relied upon in support of the charges of fraud must be stated. The defence does not shew that the fact of fraud having been committed was contested; it amounts merely to a statement that perjury was committed either by the plaintiff or by persons who knew that they were committing perjury. The authorities shew that the fraud necessary to render a foreign judgment void, must be fraud outside the merits of the case; as, for instance, fraud in recovering judgment—*Ochsenbein* v. *Papelier* (2) and *The Duchess of Kingston's Case* (3). A foreign judgment is examinable where the Court pronouncing the judgment have no jurisdiction to pronounce it, either because they had exceeded the jurisdiction given to them by the foreign law, or because the defendant was not subject to the jurisdiction—*Godard* v. *Gray* (4) and *Schibsby* v. *Westenholz* (5). In *Godard* v. *Gray* (4) a suggestion is thrown out by Blackburn, J., that probably a defendant might shew that the judgment had been obtained by the fraud of the plaintiff, but the question was left to be decided when it should arise. *Cammell* v. *Sewell* (6), as regards the facts, is the nearest case to the present one; but there it is suggested that there may be species of fraud that would not affect the judgment.

[Lord Coleridge, C.J.—The true principle upon which foreign judgments are enforced in England is stated by Blackburn, J., in *Schibsby* v. *Westenholz* (5), to be founded on this—namely, that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently anything that negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.]

The decision in *Schibsby* v. *Westenholz* (5) is not applicable, for the only question there was that the defendant was not within the jurisdiction of the foreign Court, and consequently was not bound by its judgment. The facts stated in the defence here are quite consistent with the fact that the question as to the fraud of the plaintiff was raised before the Courts at Tiflis. The defendants cannot have this case tried over again on the merits—*The Bank of Australasia* v. *Nias* (7). Fraud, whereby a judgment has been obtained, would no doubt vitiate the judgment, but the defence here is quite consistent with the fact

(1) 50 Law J. Rep. Q.B. 49; Law Rep. 5 App. Cas. 685, 697, 701.

(2) 42 Law J. Rep. Chanc. 861; Law Rep. 8 Chanc. 695.

(3) 2 Sm. L.C. (8th ed.) 784.

(4) 40 Law J. Rep. Q.B. 62; Law Rep. 6 Q.B. 139.

(5) 40 Law J. Rep. Q.B. 73; Law Rep. 6 Q.B. 155.

(6) 3 Hurl. & N. 617; in error, 5 ibid. 728; 27 Law J. Rep. Exch. 447; in error, 29 ibid. 350.

(7) 16 Q.B. Rep. 717, 737; 20 Law J. Rep. Q.B. 284.

that the defendant knew the facts alleged here when the action was before the Courts at Tiflis. The judgment cannot now be impeached.

Flower v. *Lloyd* (8) and *Crawley* v. *Isaacs* (9) were also referred to.

Benjamin, Q.C., and *Cohen, Q.C.* (with them *Horne Payne*), for the defendants.—The proposition of the plaintiff amounts to this, that, even assuming that she had knowingly concealed her own goods, and that they were in her possession when the question was before the Courts at Tiflis, yet she can bring this action, and, having deceived those Courts, make the defendants pay the value of the goods. The statement that the judgment was obtained by the fraud of the plaintiff must be taken to be admitted upon demurrer. Therefore the fraud of the plaintiff was what caused the foreign Courts to go wrong. The exact test to be applied is that given by De Grey, C.J., in *The Duchess of Kingston's Case* (3), that a judgment is impeachable from without where it can be shewn that the Court has been misled. A foreign judgment is conclusive on the merits unless it has been obtained by fraud. In *The Bank of Australasia* v. *Nias* (7), where the action was brought upon a judgment obtained in New South Wales, an attempt was made to impeach the contract upon which the plaintiff had there sued and obtained judgment, but the reasoning of Lord Campbell, C.J., is conclusive that such an attempt must fail. There it was contended, not that the foreign judgment had been obtained by fraud, but that the contract upon which the plaintiff originally sued had been fraudulently obtained. The Court had all the materials upon which to give the original judgment, and in fact decided the point.

The enquiry here is, whether this judgment has been obtained by the fraud of the plaintiff; and in all the cases where judgments have been sued upon, it was held to be sufficient to shew that the Court before whom the defendant is brought ought not to enforce the judgment, because, in point of fact, it was no judgment at all—as, for instance, where the Court had no jurisdiction, or had been deceived into giving the judgment. It is not enough to shew that the Court has gone wrong and given a mistaken judgment, it must be shewn that the Court has been misled.

In *Don* v. *Lippmann* (10) one of the issues was, whether a French judgment could be sued upon as a substantive cause of action, and whether it could be impeached on the ground of fraud; and there it was said that a foreign judgment was regarded only as *prima facie* evidence of a debt. If, therefore, the judgment had been obtained by fraud, an English Court is not bound to enforce it. That proposition never has been disputed. The real ground of the decision in *Buchanan* v. *Rucker* (11) is construed by Blackburn, J., in *Schibsby* v. *Westenholz* (5), to be, that laws passed by our country are not obligatory on foreigners not subject to their jurisdiction. With regard to the statement that English Courts enforce a foreign judgment, Blackburn, J., in *Godard* v. *Gray* (4), simply followed the judgment of Parke, B., in *Williams* v. *Jones* (12), that an action lies on a foreign judgment which adjudges that a sum of money is due. That the judgment has been obtained by the fraud of one of the parties is always a good defence to the action. It is incorrect to say that the English Courts enforce a foreign judgment; in fact the Courts allow an action to be brought, and after giving judgment therein, enforce that second judgment. It is immaterial how the obligation has been contracted, for the English Courts will always enforce it, unless there is a legal excuse for not doing so. Moreover, it is a good defence to every action that the obligation was contracted by the fraud of the plaintiff, for, *prima facie*, every obligation contracted by fraud is voidable. In order that the judgment may create an estoppel between the parties, it is essential that the same question as that adjudicated upon in the Court below should be raised; but a different question—namely, whether the plaintiff obtained the foreign judgment by fraud, and not whether the defendants detained the plaintiff's goods—is here raised. This judgment is impeach-

(8) Law Rep. 10 Ch. D. 327, 333.
(9) 16 Law Times, N.S. 529.
(10) 5 Cl. & F. 1, 20.
(11) 9 East, 192; 1 Campb. 63.
(12) 13 Mee. & W. 628, 633; 2 Dowl. & L. 680; 14 Law J. Rep Exch. 145.

able on the ground that it was obtained by the fraud of the plaintiff.

Woolf, in reply, cited *Henderson* v. *Henderson* (13) and *Robertson* v. *Struth* (14).

LORD COLERIDGE, C.J.—In this case we have to decide upon the validity of a demurrer to a plea which has been pleaded under these circumstances. It appears that an action was brought by the plaintiff in the district Court at Tiflis, in which the defendants were sued by the plaintiff for the detention of certain goods, and, in the alternative, for damages for the detention. The district Court and the High Court both decided that the defendants detained the goods, and that the value was so much, and judgment was given against the defendants.

The defendants, to an action brought by the plaintiff upon that judgment in the English Courts, plead—true it is that judgment was obtained against us in an action brought in the Courts at Tiflis, but that judgment was obtained by the fraud and perjury of the plaintiff in swearing that the goods were detained by the defendants, whereas they were in her own possession; and this is an attempt to obtain judgment in these Courts upon the judgment obtained in the Russian Courts by her own fraud. It was argued upon demurrer that this defence was bad, upon the ground that, inasmuch as the allegation of the fraud of the plaintiff must have been before the Court at Tiflis, and inasmuch as the Court could not have decided against the defendants if they had stated not only that they had not the goods, but that the plaintiff had; or, at all events in the alternative, that that was a fact which it was within the jurisdiction of the Court at Tiflis to examine into, it must be taken that the Courts at Tiflis did examine into that fact, and the question whether they were right or wrong is one which cannot be tried in the English Courts. In other words, the argument is that, although it must be taken upon these pleadings that the Court at Tiflis was led to its conclusion by believing the false statement made on the part of the plaintiff, yet the defendants, who had judgment obtained against them by that fraud, are not at liberty to object to it now and say that the statement was false. I am, however, unable to perceive in any authority which has been cited to us as to the mode of enforcing a foreign judgment, from *The Duchess of Kingston's Case* (3) down to the present time, anything to throw doubt upon the broad statement that, where a judgment has been obtained by the fraud of the person who has so obtained it, the question can be litigated in the Courts of the country where the judgment so obtained is sought to be enforced. The justice of that proposition is obvious, because otherwise we should have to hold in the case of judgments, contrary to the well settled rule of law that no one can take advantage of his own wrong, that where a person had obtained a judgment by gross wrong and fraud, he could take advantage of that wrong and fraud, and enforce the obligation in the Courts of this country by an action grounded on the judgment so obtained.

It is not necessary to enquire what is the strictly accurate mode of stating how the obligation created by the foreign judgment is enforced in the Courts of this country. This has been variously stated by Baron Parke in *Williams* v. *Jones* (12), with the consent of Mr. Justice Blackburn in *Godard* v. *Gray* (4), and by Lord Brougham in *Don* v. *Lippmann* (10). It is enough to say that the Courts of this country recognise that an obligation is created by a foreign judgment, and that it has always been held to be an answer to an action on a judgment to shew that the obligation was created by the fraud of the person seeking to enforce it.

It has been laid down in the broadest way by Chief Justice De Grey in *The Duchess of Kingston's Case* (3) that "fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts ecclesiastical or temporal." Again it is said that judgments "like all other acts are impeachable from without, and that although it is not permitted to shew that the Court were mistaken, it may be shewn that they were misled."

The question for the Courts of this country to consider is whether in the case

(13) 6 Q.B. Rep. 288; 13 Law J. Rep. Q.B. 274.

(14) 5 Q.B. Rep. 941.

of a foreign judgment which is sought to be enforced by action in this country, the Court has been misled intentionally by the person seeking to enforce it, and by fraud committed upon the Court in order to procure the judgment, and in fact procuring the judgment thereby.

If those things have occurred it seems that from *The Duchess of Kingston's Case* (3) down to the present time it has been held that that is a matter which can be pleaded in answer to an action on the judgment, and which if made out by proof vitiates the judgment and discharges the defendant from the obligation created by it. It is not necessary to go through the various authorities in which that principle is stated —but it was suggested that a doubt was expressed by Mr. Justice Blackburn in *Godard* v. *Gray* (4). Lord Selborne, however, in *Ochsenbein* v. *Papelier* (2) treated it as a perfectly clear proposition, and dealing with the observations of Mr. Justice Blackburn in *Godard* v. *Gray* (4) gives his high authority for saying that so far as those observations seem to conflict with this clear proposition he is satisfied that they were not intended to conflict.

It is therefore a clear proposition of law that the obligation arising on a foreign judgment can be set aside on the ground that the foreign Court were misled by the fraud of the person who seeks to enforce the judgment.

An ingenious attempt was made here to accept that proposition, and also to distinguish the case so as to take it out of that general statement. It was sought to bring in aid an equally clear proposition, namely, that the Courts here in dealing with a foreign judgment will not enquire whether the judgment was right in point of law or on the merits. It is said that the question now sought to be raised must be taken to have been brought before the foreign Court and to have been decided against the existence of fraud in the plaintiff, and therefore, in the words of Chief Justice De Grey, the Court was mistaken and not misled. The answer to that was given by the counsel for the defendants—that the question whether the Court was misled or not is one which was not in issue before the foreign Court, and therefore never could have been decided by that Court. The Court may have been misled, but the question whether they were misled or not was not in issue, and therefore could not have been decided. The English Courts therefore in deciding that question would not be discussing any question which had been submitted to the foreign Court.

It was also suggested that there must be a limitation to the rule that the obligation arising on the judgment of a foreign Court can be answered by a plea if it was possible that that question was submitted to the foreign Court, or was a matter which could have been within the purview of the foreign Court in any conceivable circumstance. I think that the breadth of the general proposition is not to be subject to such a limitation. I am of opinion that the fraud of a person who has obtained a foreign judgment is none the less capable of being pleaded or of being sustained by proof in answer to proceedings in this country, although it may be that all the facts which have to be proved in these Courts might have been proved in the foreign Court, but which were proved in the foreign Court by perjury which misled the foreign Court into the judgment which was pronounced. It is a fallacy to say that where there is conscious and deliberate fraud by which the judgment has been obtained, and because the Court believes what it has no means at that moment of knowing to be fraud, the Court is mistaken and not misled. It is plain that if the Court had been in the position of having such means judgment would not have been given against the defendants.

I am of opinion that as it is a principle of law that no man can take advantage of his own wrong, no action can be maintained in this country upon a judgment which has been obtained by the fraud of the person who seeks to enforce it.

The defence, therefore, is a good defence, and the demurrer must be overruled.

BAGGALLAY, L.J.—I agree that this appeal should be dismissed. The plaintiff relies on a judgment given in a foreign Court. An action was brought in the district Court of Tiflis in form to recover possession of certain goods alleged to have been detained by the defendants, or in the alternative to recover damages. Judgment

was given for the plaintiff for the delivery of the goods or for the payment of a sum of money, and that judgment was affirmed by the High Court. If that judgment had been properly obtained, and in the absence of evidence that it was improperly obtained, the right of the plaintiff to recover would be clear. I use the expression "improperly obtained" because I desire to be understood to use it as not limited only to cases where absolute fraud has been perpetrated, but as applicable both where the fraud was perpetrated and the Court were ignorant of the existence of the fraud, and also where the Court are cognisant of the facts. In the present case the allegations in the defence to which this demurrer has been put in, meet the case completely in itself. It is alleged that the goods were in the possession of the plaintiff when the action was commenced, and remained in her possession at the time when the judgment was pronounced, except so far as she or her husband had fraudulently disposed of them. It is distinctly stated that the goods were in her possession, and that she fraudulently stated that the goods were not in her possession at the time of the trial, and fraudulently concealed the fact that they were. As to this I can only say that the Court were misled by the fraudulent statement made by the plaintiff in order to obtain the judgment.

It has been contended on behalf of the plaintiff that it may fairly be inferred from the terms of the paragraph that all the facts were, or might have been, brought before the foreign Courts, which were wrong in inferring that the goods were in the possession of the defendant; or, to use the language of Chief Justice De Grey, that those Courts were mistaken and not misled as to the facts of the case. I desire, as far as at present advised, not to limit those words to cases where the foreign Courts are imposed upon by the plaintiff, nor to those cases where all the facts from which fraud might be inferred are before the Court, but the Courts do not infer it. If the Court here were called upon to give effect to the judgment, and fraud is proved, I should be prepared to hold that the judgment could not be enforced.

BRETT, L.J.—The statement of claim asserts that a judgment which was obtained in the district Court of Tiflis against the defendants ordered them to return certain goods, or in default to pay certain sums of money. The statement of claim does not contain any allegation with regard to the return of the goods, but I think the true construction is that the goods were not returned, and that that money, which is therefore payable, is now sought to be recovered in the present action. The defendants have stated in their statement of defence what they allege is a complete answer. The paragraph seems to me to contain an allegation that the plaintiff, for the purpose of deceiving the Court and of obtaining the judgment sued upon, committed a successful fraud upon the Court. The question is, whether that is a defence to an action brought upon the judgment in the English Courts. The action is solely an English action brought to enforce an obligation which is imposed by the judgment of a foreign Court, and which is acknowledged by the English law. I care not to enquire why the English Courts have recognised this as an obligation, but, at all events, an action is allowed to be brought and judgment to be recovered in England. The obligation asserted in that action is one which has been imposed on the defendant by the judgment of a foreign Court. The doctrine applicable to foreign judgments would, I cannot help thinking, be obligatory in an action brought upon any other judgment obtained in another Court in England, with distinct jurisdiction to that of the Court in which the action is brought. It is different, however, where a person is seeking to enforce a judgment of the Court itself; for if that judgment has been obtained by improper means, the question which then arises is with regard to the power of the Court over its own process. With regard to an action which is purely an English action brought on a foreign judgment, I think the doctrine to be applied is the English doctrine. I am prepared to say, according to the judgment of the House of Lords in *Don* v. *Lippmann* (10), adopting the proposition laid down by Chief Justice De Grey in the *Duchess of Kingston's Case* (3), that if the judgment upon which the action is brought was

procured from the other Court by the fraud of the party seeking to enforce it in the second action, and which fraud, committed with the intention of procuring, has successfully procured the judgment, there the action will not lie. That proposition is without any limitation, and is founded on the principle that no one shall succeed in an English Court by virtue of his own wrongful and fraudulent act; and also on the ground stated on behalf of the defendants, that no obligation can be enforced in the Courts here by a person who has recourse to fraud in order to create that obligation. The doctrine so far was hardly disputed, but it was said there was another doctrine which prevented a defendant from relying on that doctrine as a defence; and that inasmuch as this defence did not negative what I am about to state, therefore it did not exist. It was said that it must be assumed that in the Court below it was asserted by the defendants that the facts relied upon as the fraud of the plaintiff did exist, and further that it might be and must be taken to be the fact that the defendants gave evidence in support of the contention that the facts now relied upon were existing, and shewed that the plaintiff was then endeavouring to deceive the Court. Whether such an allegation ought to be asserted by way of reply or not, seems to me to be a very minor consideration. The question which has been argued before us is whether, assuming the facts as to the fraud to be true, the defendants are prevented by reason of this assertion in the former action from relying on them in this action. The fact that the defendants made the allegation to the other Court in the former cause, and produced evidence, does not prevent them from bringing forward the same evidence; and, if the Court here is satisfied with the truth of the facts, does not prevent them from relying on them. It was said this should not be so, in order to prevent a reiteration of trials upon the same question. I agree that, as an issue in the case, the question whether the Courts had been deceived in the former action never could have been raised. The issue in the first cause might be whether the defendant wrongfully detained the plaintiff's goods, and the question of fact whether the goods were in the possession of the plaintiff would be material to that issue. In the second action, the only issue would be whether the judgment had been obtained by the fraud of the plaintiff, intentionally and successfully committed upon the Court; and the defendants are not prevented from setting up this second issue. No question can be raised as to whether the judgment of the original Court was erroneous merely by reason of a wrong appreciation of the evidence or of the law, or by reason of a fraud practised on the Court by witnesses other than the parties themselves. The question whether the judgment is not effective on account of want of jurisdiction is not before the Court. I do not think that any of the expressions in the judgments which have been cited militate against the view we are taking, except it be that of Lord Justice James, in *Flower* v. *Lloyd* (8). The other judgments expressly state that fraud committed by a party is of itself to be construed to be an extrinsic and collateral act, and therefore will vitiate a judgment. Lord Justice James, in *Flower* v. *Lloyd* (8), has, however, expressed certain doubts. He says, "there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative." The Lord Justice was there speaking of all the alleged falsehood and fraud which was alleged in that action; but I think that the falsehood and fraud was that of servants, and was not fraud brought home to the party himself. Moreover, the fraud was committed, not before the Court, but previously to the case being brought before the Court. If it is to be assumed that the fraud was fraud committed by the party before the Court, and for the purpose of deceiving the Court, I must say, after having heard the present argument, that I am unable to agree with the doubt expressed by Lord Justice James. Falsehood and fraud, committed by the party himself, is a bar to an action brought by that party upon the judgment. If the argument of Mr. Woolwere to prevail, we should have to come to

the conclusion that a plausible deceiver would be able to succeed. But plausible falsehood and fraud are not matters to be upheld by the Court. I accept the whole doctrine, without any limitation, that where a judgment has been obtained by the fraud of the party who seeks to enforce it, such fraud is an absolute answer; and that the English Courts will not enforce a judgment against a party against whom it was obtained by such means.

Appeal dismissed.

Solicitors—M. Abrahams & Co., for plaintiff; Emanuel & Simmonds, for defendants.

1882. Nov. 11.

KEARSLEY *v.* PHILIPS AND OTHERS.

Practice — Discovery — Inspection of Documents—Joint Possession of Party and Stranger—Rules of the Supreme Court, Order XXXI. *rule* 11.

A defendant said, in an affidavit of documents, that certain documents were in the joint possession of himself and a person named, not a party to the action, saying also that the documents were their joint title-deeds. The plaintiff applied for an order for inspection:—Held (*irrespectively of any privilege of title-deeds*), *that inspection could not be ordered, although the defendant did not say either that he was physically unable to produce the documents, or that consent to their production was refused and could not be obtained.*

This was an appeal from an order of North, J., at chambers, dismissing an application by the plaintiff for liberty to inspect the documents mentioned in the second schedule to an affidavit of documents made by the first-named defendant Philips, the facts being as follows:—

The action was for a seizure, at the instance of the first two defendants, Philips and Ducane, by the other defendants, Mapleston & Son, of goods of the plaintiff upon certain coachworks, at Cheetham, in Lancashire, justified as a distress for rent under an indenture whereby the coachworks were mortgaged to Philips and Ducane for a loan of 6,000*l.* trust money, and the mortgagor became tenant to them at a rent.

The affidavit of documents made by the defendant Philips was, so far as material, in the following terms:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in . . . . the first schedule hereto.

2. I and G. W. W. Blathwayt, of 35 Church Street, Manchester, jointly have in our possession or power the documents mentioned in the second schedule hereto.

3. I object to produce the documents mentioned in . . . . the said second schedule.

5. The documents mentioned in the said second schedule are muniments of title of myself and the said G. W. W. Blathwayt to the coachworks in Cheetham, as mortgagees thereof, the mortgage to myself and Ducane, mentioned in the statement of defence, having been transferred to myself and Blathwayt upon the appointment of Blathwayt as a trustee in the place of Ducane of the sum of 6,000*l.* thereby secured.

6. According to the best of my knowledge, information and belief, I have not now and never had in my possession, custody or power, or in the possession, custody or power of my solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any . . . . document whatsoever relating to the matters in question in this action . . . . other than the documents set forth in the first and second schedules hereto.

Objection being taken to the application before North, J., on the ground that the documents in question were only in the joint possession of the defendant and a stranger to the action, it was contended for the plaintiff that the defendant must shew he was positively unable to produce them; *Seton on Decrees* (1) being cited, where it is said: "The affidavit or answer must shew that the party *cannot* produce the documents, and it is not enough to say that to the best of the deponent's information

(1) 4th ed. p. 152.

and belief, the person in whose custody they are will not produce them—*Taylor* v. *Rundell* (2), and see *Mertens* v. *Haigh* (3); and the nature of the joint possession must be shewn—*Bovill* v. *Cowan* (4)."

The following written reasons were given, in dismissing the application, by North, J.: "The passage in Seton, 152, seems to me incorrect. *Taylor* v. *Rundell* (2) was a case of discovery, not inspection, and the decision is expressly based upon that (5). In *Mertens* v. *Haigh* (3) the documents in question were in possession of the defendant's own agent, and therefore he was bound to produce them, and could not escape doing so unless he shewed that he had done all he could to enable him to do so, including the making of all necessary enquiries from his own agents. *Bovill* v. *Cowan* (4) does not affect this present case. The present case is governed by *Murray* v. *Walter* (6), in which it does not appear that the defendant had taken any steps to get the leave of the person who had the joint custody of the documents desired to be produced, and yet it was held that he was not bound and could not be compelled to produce them. In the present case the joint (and material) interest of Blathwayt in the documents in the second schedule is clearly shewn. The case of *Hadley* v. *McDougall* (7) shews the course which the plaintiff can, if so advised, adopt in the present case. In *Hutchinson* v. *Glover* (8) the documents ordered to be produced were in the exclusive possession of the defendant, and the order for production was matter of course, though other parties might have had an interest in it. The language of Blackburn, J.'s judgment is not quite consistent with the facts nor intelligible. If the document in question had not been in the possession of the defendants (treating the possession of their solicitors or agents as their possession), it is quite clear that the Court could not have ordered the defendants to produce it. The objection to production was based, not on joint possession, but alleged joint interest—a totally different matter. The case of *Reid* v. *Langlois* (9) there cited is also in point in the present case."

Bigham and *C. A. Russell*, for the plaintiff.—The plaintiff is entitled to the inspection sought. The allegation that the documents are in the joint possession of the defendant and a person not a party to the action is not a sufficient ground of objection. Order XXXI. rule 11 (10) gives power to order the production by any party to an action of any documents in his "possession or power" relating to the action; and the form of affidavit referred to in Order XXXI. rule 13 (Form No. 9 in Appendix B) makes the deponent say, among other things, that he has not and never had in his "possession, custody or power" any documents relating to the action other than those mentioned. The defendant must (privilege apart) produce these documents unless he shews both that he is physically unable of himself to do so, and that he has endeavoured to procure production and cannot. In *Walburn* v. *Ingilby* (11) a defendant was ordered to give inspection of certain documents, although they were the common property of himself and co-defendants no longer before the Court, and the latter objected; and although, further, the documents were held by a solicitor on behalf of all the co-owners, and the solicitor, by direction of the defendant's co-owners, had refused to allow the inspection. Lord Brougham there said (12) that if in such a case inspection were not ordered, means would

(2) Cr. & Ph. 104 (s.c. on like point at later stage, 1 Ph. 222; 13 Law J. Rep. Chanc. 20).

(3) 3 De Gex, J. & S. 528.

(4) 39 Law J. Rep. Chanc. 768; Law Rep. 5 Ch. App. 495.

(5) Cr. & Ph. at p. 111.

(6) Cr. & Ph. 114.

(7) 41 Law J. Rep. Chanc. 504; Law Rep. 7 Ch. App. 312.

(8) 45 Law J. Rep. Q.B. 120; Law Rep. 1 Q.B. D. 138.

(9) 1 Mac. & G. 627; 19 Law J. Rep. Chanc. 337.

(10) Order XXXI. rule 11: "It shall be lawful for the Court or a Judge at any time during the pendency therein of any action or proceeding to order the production by any party thereto upon oath of such of the documents in his possession or power relating to any matter in question in such action or proceeding as the Court or Judge shall think right, and the Court may deal with such documents when produced in such manner as shall appear just."

(11) 1 Myl. & K. 61.

(12) Ibid. p. 83.

never be wanting to evade the jurisdiction of the Court, and that the Court had a right to give whatever access the party himself was entitled to. No doubt that case was commented upon in *Murray* v. *Walter* (6) by Lord Cottenham, who said (13) he never considered the practice of the Court to be altered by it; but he expressed the reason for the practice thus: "When documents are stated in an answer to be in the possession of A, B and C, you cannot order that A shall produce them . . . . for the best possible reason, namely, that he could not produce them;" and *Murray* v. *Walter* (6) is consistent in principle with holding that where a defendant can give production there (privilege apart) he must. In respect of discovery by interrogatories it is clear that it is no excuse for not answering to say that they cannot be answered without inspecting documents held by an agent for the party answering and persons not parties, even if such inspection has been objected to—*Taylor* v. *Rundell* (2) before Lord Cottenham, and afterwards before Lord Lyndhurst; and there is no tenable distinction of principle between inspecting documents for the purpose of answering interrogatories of an opposite party, and giving inspection to the opposite party. *Mertens* v. *Haigh* (3) shews that the objection of inability to produce documents is not to be lightly entertained. In *Hutchinson* v. *Glover* (8) Blackburn, J., said that it must at least be shewn that the person jointly interested in the document objected to its production. *Reid* v. *Langlois* (9), *Edmunds* v. *Foley* (14) and *Hadley* v. *McDougall* (7), in re-affirming the rule laid down in *Murray* v. *Walter* (6), either simply followed *Murray* v. *Walter* (6), or proceeded upon the ground that inspection, like other relief in equity, could not be granted unless the person seeking it brought before the Court all persons interested. That requirement was, as pointed out by Blackburn, J., in *Hutchinson* v. *Glover* (8), a technical one; and it is not binding under the existing rules as to obtaining inspection. Under the present procedure, by a summons at chambers in lieu of a bill in Chancery, a party seeking inspection cannot bring additional parties before the Court merely in order to obtain inspection. If the application was rightly dismissed there is no remedy for obtaining what we seek.

Further, the affidavit does not sufficiently shew the nature of the joint possession—*Bovill* v. *Cowan* (4).

[FIELD, J.—The nature of the joint possession is clearly shewn.]

Smyly, for the defendant, was not heard.

FIELD, J.—This is an appeal from a refusal by North, J., at chambers, to order that the plaintiff should be at liberty to inspect certain documents mentioned in an affidavit as to documents made by the defendant Philips.

The facts are these: The action is for a seizure, at the instance of the first two defendants, Philips and Ducane, by the other defendants, Mapleston & Son, of goods of the plaintiff, justified as a distress for rent under an indenture whereby certain coachworks were mortgaged to Philips and Ducane to secure a sum of 6,000*l.* advanced by them as trustees, and the mortgagor became tenant to them. The documents of which inspection is sought, and which the defendant Philips objects to produce, are documents mentioned in his affidavit in the following manner:—

Par. 2. I and G. W. W. Blathwayt, of 35 Church Street, Manchester, jointly have in our possession or power the documents mentioned in the second schedule hereto.

Par. 5 explains the nature of the joint possession of the documents, saying that they are muniments of title of himself and Blathwayt to the coachworks, as mortgagees thereof, the mortgage to himself and Ducane, mentioned in the statement of defence, having been transferred to himself and Blathwayt upon the appointment of Blathwayt as a trustee, in the place of Ducane, of the 6,000*l.* thereby secured.

The defendant thus objects to produce the documents on the ground that they are in the joint possession of himself and Blathwayt. It has been contended on the part of the plaintiff that the defendant should have gone on to say that he was unable of himself to produce the documents, and

(13) Cr. & Ph. 125.

(14) 30 Beav. 282; 31 Law J. Rep. Chanc. 384.

that he had endeavoured to procure production, and could not. Is that so? With regard to discovery by interrogatories it seems to be clear that a party cannot excuse himself from answering by saying that he can only obtain the information from documents in the joint possession of himself and another person, without going on to satisfy the Court that he cannot get access to the documents. But with regard to inspection, the law, I think, stands otherwise. *Walburn* v. *Ingilby* (11) would no doubt be a strong authority in favour of the plaintiff if the law had not undergone discussion subsequently to that case. But in *Murray* v. *Walter* (6), Lord Cottenham said that he never considered the practice of the Court was altered by that case, in which, he said, there must have been some peculiarity not appearing in the report; and he there applied the rule that when documents are stated in an answer to be in the possession of A, B and C, the Court cannot order that A shall produce them, "and that," he said, "for the best possible reason—namely, that A could not produce them." Again, in *Reid* v. *Langlois* (9), where the defendant said that certain documents of which production was sought were in his possession, shewing by other parts of his answer that he meant for himself and partner, Lord Cottenham held that production could not be ordered, saying, "To find out what the defendant means you must take the whole case as it is stated; and it is certain from the whole answer that what the defendant means by 'possession' is not a legal possession but an actual possession. In the common use of language that is a possession; but when you are speaking of possession for the purposes of production, you mean, not an actual corporeal possession merely, but a legal possession, where the party is authorised to deal with the subject-matter." And as in *Murray* v. *Walter* (6) so in *Reid* v. *Langlois* (9) it does not appear to have been considered necessary that the defendant should apply to his joint owner for consent to production. Are not *Murray* v. *Walter* (6) and *Reid* v. *Langlois* (9) decisive of the matter before us? Not only are they both decisions of Lord Cottenham, the one pronounced forty-two years ago, and the other thirty-three years ago, and decisions which have always been followed in the practice in Chancery; but *Reid* v. *Langlois* (9) rests on a principle which covers the present case—namely, that the Court will not compel a man to give discovery of a deed which belongs to another man. In *Taylor* v. *Rundell* (2) access to documents for the purpose of giving information to the opposite party in answer to interrogatories was expressly distinguished from production of documents for the opposite party's inspection (5). In *Mertens* v. *Haigh* (3) the documents in question were held by the defendant's own agent. I agree in the remarks of North, J., upon *Hutchinson* v. *Glover* (8), and my concurring, as I appear to have done, in what was apparently there said as to its being incumbent on the defendant to shew that the other persons interested in the documents objected to their production may have been caused by my not duly distinguishing between interrogatories and inspection.

STEPHEN, J.—I also am of opinion that this application was rightly dismissed, and I shall add very little to what has been said by my brother Field. There has been some apparent conflict in the decisions, but *Murray* v. *Walter* (6) and *Reid* v. *Langlois* (9) seem to be expressly in point, and afford a fully sufficient answer to *Walburn* v. *Ingilby* (11). As to *Hutchinson* v. *Glover* (8), that was a very different case from the present. There the defendant in scheduling to his affidavit the documents in question—the agreement of compromise and the average statement attached to it—objected to produce them on the ground that they were irrelevant; but they clearly were relevant, and production was accordingly ordered, as everything which tends to throw light on a case must *prima facie* be produced.

Appeal dismissed.

Solicitors—Pritchard, Englefield & Co., agents for Storer & Lloyd, Manchester, for plaintiff; Johnson & Weatherall, agents for Wigglesworth & Rogerson, Manchester, for defendants.

[IN THE COURT OF APPEAL.]

1882. Nov. 16. BOLCKOW, VAUGHAN AND COMPANY *v.* FISHER AND OTHERS.*

Practice—Discovery—Interrogatories—Sufficiency of Answer—Matters within Knowledge of Agent or Servant.

In an action by the owners of cargo against shipowners for loss of the cargo by the negligent navigation of the ship, the plaintiffs delivered interrogatories containing questions relating to the navigation of the ship, to the mode in which the watches were kept, to the soundings taken, and to the time at which certain headlands were sighted. The defendants answered that they had no knowledge or information save that contained in the protest, that they had not obtained statements from the officers or crew of what occurred on board the ship, that they were not mariners, and had no knowledge or information of the management of a ship at sea.

On an application by the plaintiffs for a further answer,—

Held, *that the answer was insufficient, and that a further answer must be given, for that it did not shew that the defendants had attempted to procure information from their agents or servants and that it was impossible for them to do so.*

Action by the owners of cargo against shipowners for loss of cargo by negligence of the servants of the defendants.

The plaintiffs shipped, under a charter-party and a bill of lading, a cargo of iron on board the *Claremont*, a ship belonging to the defendants. The *Claremont* was wrecked off the Isle of Wight, and the cargo and the ship's log were lost. The plaintiffs sued the defendants, who alleged that the loss was caused by perils of sea excepted in the bill of lading. The plaintiffs, after the delivery of the statement of defence, administered interrogatories to the defendants, of which the following are material:—

"5. At what time of the day on the 27th of January, 1881, was Portland or Portland Bill sighted by those on board of the steamship *Claremont*, and how did Portland or Portland Bill then bear, having regard to the position of the ship. What was the course on which the steamship *Claremont* was being steered when Portland or Portland Bill was first sighted on or about the 27th of January, 1881? How far from the land was the said ship at that time? Were the Portland lighthouses, or either of them, seen or distinguished by any, and what, person on board the said ship, and when, on the said 27th of January? Was not the land covered with snow? What means, if any, were taken to verify the distance of the *Claremont* from the land, or her position when Portland or Portland Bill was sighted? What was the state of the weather at the time? State whether the weather was then foggy or hazy."

"14. Was the lead cast, or were any and what soundings taken, and when and where, by those on board the steamship *Claremont* after Portland or Portland Bill was sighted on the said 27th of January, 1881, and prior to the time when the steamship *Claremont* stranded or struck? Was there anything, and what, to prevent such soundings being taken? If yea, give the result of such soundings."

"18. Was any, and what, calculation made on the 27th day of January, 1881, and by whom, and when, after Portland or Portland Bill was sighted, of the distance run by the steamship *Claremont* from any and what point."

The defendants made the following answer to the above interrogatories:—

"Neither of us, or either of the above-named defendants, were on board the ship at any of the times referred to in the said interrogatories, and we have no personal knowledge of the matters enquired into. We do not possess the information necessary to enable us to answer the said interrogatories correctly. The matters enquired into by the said interrogatories, with the exception of such matters as can be ascertained by reference to tide tables and weather reports, can only be answered by taking, in great detail, the statements of the officers and crew who were from time to time on watch on board the said steamship during the several times of the happening of the matters enquired

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

into, and comparing their statements and drawing inferences therefrom. We have not yet obtained full and accurate statements from the said several persons, many of whom are no longer in our employment, some of them we hope to obtain as witnesses at the trial; and we submit that we are not bound to answer as to our belief as to the various matters referred to in the said interrogatories, for to do so would be to disclose the details of the evidence of the witnesses for the defence and our belief as to the same. We believe that very serious prejudice may be caused to us if we are compelled to answer these interrogatories in detail before the trial, and especially before all the proofs to be used at the trial have been prepared. We submit that the said interrogatories have been exhibited unreasonably and vexatiously, and that under the circumstances aforesaid we ought not to be called upon to give any further answers to them."

This answer was held insufficient, and a further answer being ordered the following answers were delivered:—

"To the fifth interrogatory we say that we believe that Portland Bill was sighted, the ship being on a course about east by south, about 11 a.m. on the 27th of January, 1881, bearing from the ship about north-east, and more than twelve miles distant. The exact distance is matter of judgment, and we cannot form any belief as to the distance further than as above stated from the materials now before us. The weather was hazy. As to the other matters enquired into by this interrogatory, we say that they relate to matters of detail, concerning which we have not personal knowledge, and that we cannot answer them without disclosing in detail the evidence of witnesses we intend to call at the trial.

"In answer to the 14th, 15th, 16th, 17th, 18th, 19th and 20th interrogatories, we say that we have no personal knowledge of these matters, and that it is impossible for us to answer these interrogatories without examining the officers and crew of the ship and disclosing the detail of the evidence we intend to call at the trial."

These answers were also held insufficient, and a further answer to the three interrogatories above set out was ordered. The following further answer was then delivered by the defendants:—

"By way of further answer to the said interrogatories, we say that we believe Portland Bill was sighted, the ship being on a course about east by south, about 11 a.m. on the 27th of January, 1881, bearing from the ship about north-north-east, and more than twelve miles distant; that the weather was then hazy. Save as aforesaid we have no knowledge or information respecting the matters enquired into by the said interrogatories, save as appears by the protest dated on the 1st of February, 1881, a copy of which the plaintiffs have had produced for their inspection, and also all the documents referred to in the defendants' affidavit of discovery, filed on the 21st of March, 1882. We have not obtained statements of the officers or of the crew who were from time to time in charge of the said vessel, or on watch on board during the several times of the matters enquired into, beyond what appears from the said protest and documents scheduled to the defendants' affidavit of discovery. We further say that we are not mariners, and we have no knowledge of the management or navigation of a ship at sea which would enable us to give an opinion upon any of the matters enquired into by the said interrogatories."

The plaintiffs applied for a further and better answer, and Williams, J., ordered that a further answer should be delivered; but the Divisional Court rescinded that order, holding that the answer last set out was sufficient.

The plaintiffs appealed.

Edge, for the appellants.—The log being lost the plaintiffs can only discover by interrogatories what was done on the ship before the accident, and only in this way can they learn whether there was negligence or not. The defendants are the shipowners, and they must know, or can easily learn, what their servants did. They are the bailees of the plaintiffs' goods and they are bound to give the information sought for. The answer objected to does not aver that they have changed their servants, or that it would be difficult, unreasonable or impossible for them to get

the necessary information. The facts of this case entitle the plaintiffs to the information asked for.

[BRETT, L.J.—Sometimes it might be oppressive to insist on a party to a suit making the enquiries necessary to procure the information.]

That may be, and in such a case it would not be ordered; but there is no such allegation here—*Freeman* v. *Fairlegh* (1).

He was stopped by the Court.

G. Bruce, for the defendants.—This answer would certainly have been deemed sufficient under the Common Law Procedure Act. Before the Judicature Acts, a party to a suit was only obliged to give such information as he himself possessed. In *Phillips* v. *Routh* (2) Brett, J., says, "Is there any obligation on a party interrogated to answer what he does not himself know? Is he bound to procure information for the purpose of answering?"

[BRETT, L.J.—That is only a question put during argument.]

In *Bechervaise* v. *The Great Western Railway* (3) Willes, J., said that, "to ask the secretary of a railway company to state the cause of an accident at which he was not present hardly accords with common sense," and that is exactly what it is proposed to do here.

[BRETT, L.J.—It may well be that a secretary could not know all about arrangements at stations all over the line.]

But as the secretary is allowed to answer for the company he would be bound, if any one could be bound, to get all the information required. Under the Common Law Procedure Act it was a sufficient answer to say that the person interrogated did not himself know that which he was asked to state, and there is nothing in the Judicature Acts or the Rules which alters this principle. A defendant to an action for libel was not obliged to state what the contents of a letter were which she had written to a third person, and of which she had no copy—*Dalrymple* v. *Leslie* (4). In *Parker* v. *Wells* (5) it was held that the practice of the Court of Chancery was not binding with respect to answers to interrogatories, and that the answer there sought for was oppressive, unreasonable and immaterial. That reasoning applies to this case, and the true principle is, that a party must give information which he himself possesses, but that he is not bound to procure information for the benefit of his adversary—that is, to get up his brief long before the trial and to disclose the details of the evidence which he is going to bring forward in support of his case—*Benbow* v. *Low* (6). In the *Minnehaha* (7) the defendant was required to answer interrogatories according to his knowledge, information and belief; but that decision was expressly based on the ground that the Court of Admiralty would adopt the principles of the Court of Chancery. *The Earl of Glengall* v. *Fraser* (8) and *The Attorney-General* v. *Rees* (9) were also cited.

BAGGALLAY, L.J.—This is an action brought by the owners of the cargo carried on a certain ship against the owners of that ship, the cause of complaint being the negligence of the servants of the defendants, whereby, as is alleged, the ship and cargo were lost. Certain interrogatories have been administered by the plaintiffs to the defendants, in which questions have been asked with reference to the navigation of the ship. To these the defendants put in an answer, which was held not to be sufficient; a further answer was then directed; and, as that was also held to be insufficient, a further answer was ordered by the Judge at chambers. This answer, which is by arrangement an answer to the three interrogatories, is as follows: [His Lordship read the further answer already set out.] The plaintiffs, however, are not satisfied with this answer, and they seek to have fuller information from the defendants. The defendants now contend that they are not bound to give any further or better answer, and they maintain that no further discovery could

(1) 3 Mer. 24.
(2) 41 Law J. Rep. C.P. 111; Law Rep. 7 C.P. 287.
(3) 40 Law J. Rep. C.P. 8; Law Rep. 6 C.P. 36.
(4) 51 Law J. Rep. Q.B. 61; Law Rep. 8 Q.B. D. 5.
(5) Law Rep. 18 Ch. D. 477.
(6) 50 Law J. Rep. Chanc. 35; Law Rep. 16 Ch. D. 93.
(7) Law Rep. 3 Adm. & Ecc. 148.
(8) 2 Hare, 99.
(9) 12 Beav. 50.

have been enforced in this form in an action which was brought prior to the Judicature Acts; further, it is alleged that the Judicature Acts do not apply to this case; and the Divisional Court having rescinded the order for the further answer, this appeal is brought. No doubt, there was before the Judicature Acts a difference between the practice of the Courts of common law and the Court of Chancery with regard to enforcing discovery. The old rule in the Court of Chancery was stringent, to the effect that, if an interrogatory was not objected to, and if it was answered at all, it must be answered fully. That rule sometimes pressed hardly on a party, and the rules made under the Judicature Acts have modified the practice as it existed in Chancery. The rules as to discovery which are now in force are found in Order XXXI. The first rule is drawn in a wide and general form; but it is limited and guarded by the subsequent rules. The 11th sub-section of section 25 of the Judicature Act, 1873, provides that generally in all matters not particularly mentioned, the rules of equity are, in the case of conflict or variance between them and the rules of law, to prevail. Having mentioned this, I proceed to consider the provisions of Order XXXI., as far as they relate to discovery by affidavit. Rule 1 provides that "the plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories for the examination of the opposite party or parties . . . ."

That rule imposes a certain fetter on the parties in that it fixes a time before which interrogatories cannot be delivered without leave. A modification is introduced by rule 5, which provides that "any objection to answering any one or more of several interrogatories, on the ground that it or they is or are scandalous or irrelevant, or not *bona fide* for the purpose of the action, or that the matters enquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer;" and rule 19 also enables the Court to regulate in certain cases the discovery to be granted.

In *Benbow* v. *Low* (6), which has been relied on by the defendants, there was a preliminary question to be decided, and that was whether there had been an infringement of the trade mark of the plaintiffs, and it was held that the defendants were not entitled to enquire at that stage into the plaintiffs' case; but that is not the case here.

As a rule, a shipowner cannot himself know anything about the navigation of his ship at a given time. If, of course, he is his own sailing-master he will have the information; but generally in the case of a loss at sea, the owner is not likely to know, of his own knowledge, anything about the mode in which the ship was being handled at the time of the loss. Before the Judicature Acts, the Court of Chancery would, as a rule, in a case where an act was done by an agent of the party whose acts were the subject of enquiry, require that person to get the information which it was held the interrogator had a right to receive.

If the interrogatory was objectionable on any grounds, such as those specified in rule 5 of Order XXXI., then it was disallowed. With regard to the cases to which reference has been made, I would say that the case of *The Earl of Glengall* v. *Fraser* (8) was a case on discovery; but there it was held that the defendants must shew that they had endeavoured to acquire information from agents.

The Attorney-General v. *Rees* (9) resembles the case now before the Court, for in that case the owners of the mine had not themselves seen the shaft and workings of the mine, and yet it was decided that they could obtain information from their workmen, and that they could without difficulty have got the information required from their workmen or agents.

There is, of course, a possible exception, and that is that if the agent be a solicitor the information sought for may be privileged; but if he does not stand

in a fiduciary position, then the person interrogated must get the required information from his agent, and so give the discovery required.

On these principles I think the plaintiffs have in this case a right to a further answer. The old practice at common law, which was under consideration in *Bechervaise* v. *The Great Western Railway Company* (3), and the other cases which have been cited, has been altered by the Judicature Acts, and as in this case there was no application to disallow the interrogatory, I think the order of Williams, J., should be restored, and that this appeal should be allowed.

BRETT, L.J.—I do not wish to detract from what I am reported to have said in *Parker* v. *Wells* (5). I think that the practice in this matter of interrogatories is not governed exclusively by the practice as it existed at Chancery or at common law; but that it is governed by the provisions of and the construction to be put on the Rules. It was urged by the counsel for the defendants that a different rule exists in this respect at the present time between what may be called a common law action and a Chancery suit; but there is no such recognised distinction, for all actions are now actions in the High Court. The question, then, is whether this answer is sufficient. The contention on behalf of the defendants is in substance this —that they are in this case not bound to give any further answer, because, in order to do so, they would have to make enquiries of their agents or servants; and it is urged that they are not obliged to make any such enquiries, and that it is sufficient for them to say that they cannot make a better answer because they themselves were not personally present. That is, in my opinion, no sufficient excuse for not answering the interrogatory. I am of opinion that a party to an action who is interrogated is not excused from answering questions with regard to certain acts by saying that he was not present when the acts were done, and that his agents were present. If the acts done were such as he must know would, in the ordinary course of business, be done by and known to his servants or agents, then I think he is bound to answer fully, and give satisfactory information as to those acts. If, indeed, those acts are not more known to his servants or agents than to other persons, then he may not be bound to answer. Also I think that he makes a sufficient answer if he says that, although the acts about which enquiry is made were, if done at all, known to his servants or agents, yet he does not himself know whether they were done or not, and the servants or agents who did them, if they were done, are no longer in his employ or under his control, or are in such a position that it would not be reasonable to force him to enter into communication with them.

That, however, is not the position taken here by these defendants, and the contention raised on their behalf fails when tried by the test contained in the principles I have enunciated, so that this answer is not sufficient, and a further answer ought to be given.

Then it was urged that a party could not be interrogated as to the contents of his brief; but the answer is, that he can be interrogated as to facts which may be put into a brief, although he cannot be asked as to the evidence of those facts.

I am further of opinion that, if it were shewn in the answer that it would be wholly unreasonable to ask the party interrogated to make enquiries, that it would be too expensive or too cumbersome, or that unreasonable details were sought for, then it might well be that the answer would be sufficient even though the question was not answered in every detail. But if the answer to the 14th interrogatory is read, it appears that it is obviously consistent with that answer that the defendants know who the officers were who were on watch at the time specified, that those officers are still in their employment, that they might even have been in their office at the time when the defendants answered this interrogatory, and that the defendants purposely abstained from asking them for the information, maintaining that they have a right so to abstain. That is beyond the freedom given to them. The defendants must obtain the information from their servants, and this appeal must be allowed. It is not necessary to decide the point, but

I doubt whether these questions could not have been put equally at common law and in Chancery before the Judicature Acts came into force.

LINDLEY, L.J.—The question upon the facts of this case is, whether a person who is interrogated as to what was done by his servants or agents can answer that he does not know and that he will not enquire. I think that he cannot. Where a party is interrogated as to matters done or omitted to be done by his servants or agents, it is not open to him to make such an answer. Most of the authorities apply to discovery of documents; but the principle is the same, and the case of *The Attorney-General* v. *Rees* (9) applies that principle to interrogatories. The knowledge of the servant is in such a case the knowledge of the employer, and the employer is bound to make reasonable efforts to obtain the information required. It seems to me that the Divisional Court thought too much of the distinction which it has been suggested exists between discovery of documents and discovery by interrogatories; and the judgment must be reversed with costs.

Appeal allowed.

Solicitors—Pritchard & Sons, agents for Turnbull & Tilly, West Hartlepool, for plaintiffs; Parker, Garrett & Parker, for defendants.

[IN THE COURT OF APPEAL.]

1882. Nov. 21, 24. } KAY *v.* FIELD AND COMPANY.*

Ship and Shipping—Charter-party—Construction of—Demurrage—Detention by Frost.

It was agreed by charter-party between the plaintiff and the defendants that the plaintiff's ship should proceed to Cardiff East Bute Dock, and there load from the agents of the freighters a full and complete cargo of about 1,700 *tons of rail iron: detention by frost, floods, riots and strikes of workmen, accidents to machinery or quarantine, not to be reckoned as lay days. There are two docks at Cardiff—the East and West Bute Docks—which are connected by a short canal, and also by a railway which runs along the quays round both of the docks. The West, but not the East, Bute Dock was connected by a junction canal with another canal—the G. Canal. There are five or six manufacturers of rail iron at Cardiff, all of whom, with the exception of C. & Co., have wharves either in the East or West Bute Docks; and who were accustomed to load vessels in the East Bute Dock either from the quays or from lighters alongside the vessels. C. & Co., the agents of the freighters, had their wharf for the deposit of iron on the G. Canal, and, in order to load a vessel in the East Bute Dock, were accustomed to bring their iron in lighters from their wharf on the G. Canal, along the junction canal into the West Bute Dock, thence along the short canal into the East Bute Dock, where the vessel to be loaded was berthed. The whole cargo of iron was deposited at C. & Co.'s wharf in anticipation of the arrival of the plaintiff's ship. On her arrival the ship was berthed in the East Bute Dock, but the loading by means of lighters was interrupted for fifteen days by a frost, which covered with ice the junction canal leading from C. & Co.'s wharf to the West Bute Dock. In an action for demurrage,—* Held, *that the exception as to detention by frost applied only when the iron had arrived at the place named in the charter-party where the ship was to be loaded—namely, the East Bute Dock; and the defendants, therefore, would not be protected from liability to pay demurrage where the detention was occasioned by frost which rendered impassable the junction canal leading from C. & Co.'s wharf into the West Bute Dock; for the conveyance of the iron in lighters through the canal was not part of the act of loading.*

Hudson *v.* Ede (37 Law J. Rep. Q.B. 166) *distinguished.*

Appeal from a judgment of Pollock, B., on further consideration.

The action was brought by the shipowner against the freighters to recover

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

fifteen days' demurrage, at 30*l.* a day, under a charter-party.

At the trial at the Swansea Summer Assizes, 1881, Pollock, B., referred all the matters of fact in the cause to a special referee to make a report thereon.

The following facts, so far as material, are taken partly from the judgment of Brett, L.J., and partly from the referee's report:—

By a charter-party made the 18th of December, 1880, it was agreed (*inter alia*) between the plaintiff and the defendants that the steamer *Cid* should proceed to Cardiff East Bute Dock, and there load in the customary manner from the agents of the freighters a full and complete cargo of rail iron, say about 1,700 tons. "The cargo to be loaded as fast as steamer can take on board and stow within the customary working hours of the port (Sundays and holidays excepted), commencing when steamer is in berth and ready to load. . . . Detention by frost, floods, riots and strikes of workmen, accidents to machinery or quarantine, not to be reckoned as lay days. The cargo to be laden at not less than two hatchways at the same time, and when so required by charterers, steamer to load at night."

At Cardiff there are two docks, the East Bute Dock and the West Bute Dock, which are connected by a canal, and a railway also runs along the quays round both docks. The West Bute Dock is also connected with the Glamorganshire Canal by means of a junction canal. Iron rails shipped at Cardiff are almost entirely manufactured by some five or six makers who have their works at some distance from Cardiff—Crawshay & Co., who were the agents of the freighters, the defendants, being one of such makers. All of the makers, with the exception of Crawshay & Co., rent wharves for their own exclusive use, some in the East Bute Dock and some in the West Bute Dock. Crawshay & Co., whose manufacturing works are about twenty-four miles from Cardiff, were the only manufacturers of iron rails who had no special wharf accommodation in either the East Bute Dock or the West Bute Dock, but they had a wharf on the Glamorganshire Canal, nearly opposite the junction canal, leading from the Glamorganshire Canal to the West Bute Dock, which wharf had been used by them for some thirty years for storing and forwarding iron by lighters alongside vessels in the East Bute Dock. Vessels were loaded either from the dock quays, or from lighters brought alongside them when moored for that purpose in tiers in the dock basins. Large steamers cannot go into the West Bute Dock, and the shippers who have wharves there send their iron by lighters into the East Bute Dock, to load vessels that may be in that dock.

The plaintiff when he entered into the charter-party was not aware that the iron rails would be supplied by Crawshay & Co. as agents of the freighters, the defendants; nor did he know of the custom of the port of Cardiff, or of the way in which Crawshay & Co. conducted their business.

The whole of the iron intended to be shipped on the *Cid* was deposited at Crawshay & Co.'s wharf in anticipation of the steamer's arrival.

The vessel, which arrived at Cardiff on the 11th of January, 1881, was berthed in the East Bute Dock, and commenced loading on the following day. From the 16th of January (up to which time about 900 tons had been shipped on board) the passage of lighters along the canal from Crawshay & Co.'s wharf to the West Bute Dock was prevented by frost, and continued so until the 31st of January, when iron was again sent through, and the loading of the ship was completed on the 2nd of February. Demurrage was claimed under the charter-party in respect of the period from the 16th of January to the 31st of January. The docks themselves were not frozen during this time. Steamers and lighters could move about, and vessels could have gone out to sea; but no reasonable means could have been adopted to convey the iron from the wharf to the East Bute Dock, neither could any marketable railway iron have been obtained from any other source.

The referee reported also that had it not been for the frost the vessel would have been loaded according to the custom of the port within a reasonable time.

Pollock, B., on further consideration, held that the defendants were protected by the exception as to detention by frost, inasmuch as the shipping of iron by means

of lighters from Crawshay & Co.'s wharf was part of the act of loading, and was also one of the customary modes of loading in the port.

The plaintiff appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *McIntyre, Q.C.* (with them *Brynmor Jones*), for the plaintiff.—By the charter-party the steamer was to load at a particular part of Cardiff Dock—namely, in the East Bute Dock—and it would be as much a breach of the charter-party to load at any other dock in the port of Cardiff as to go to another port altogether, so that a frost which stopped work at the West Bute Dock is not a detention by frost within the meaning of this charter-party. The shipowner did not take the risk of a frost which might affect any individual owner with whom the charterer might choose to load, but he took the risk only as it might affect the port named; for all the provisions of the charter-party apply only to the port named. *Hudson* v. *Ede* (1) is a decision in favour of the plaintiff, because in that case there were no storehouses at the port itself, and the river which was frozen was the only means of communication between the storehouses and the port of loading. It is urged by the defendants that the words "load in the customary manner from the agents of the freighters" relieve them from liability, but those words apply only to the actual mode of loading, and not to the place in the port at which the loading is done, or to the time—*Lawson* v. *Burness* (2), *Tapscott* v. *Balfour* (3) and *Kearon* v. *Pearson* (4).

Butt, Q.C., and *Channell* (with them *Dillwyn*), for the defendants.—It is a fallacy to say that the cargo must, under this charter-party, be within the range of the East Bute Dock, or in lighters in that dock, and that the charterer breaks his contract if there is the least delay in bringing the iron into that dock. It has been found by the referee that one of the customary modes of loading is to convey iron which is in wharves in the West Bute Dock in lighters through the canals to the East Bute Dock, and, provided that the cargo is at any one of the usual storing places at Cardiff, the exception as to frost would apply.

Hudson v. *Ede* (1) is distinguishable from this case. The words of the exception there were "detention by ice and quarantine not to be reckoned as laying days," and these might refer, and refer only, to something happening within the port or place of loading named in the charter-party. But the exception in the charter-party under consideration requires a wider interpretation, as it contains words relating to matters outside the East Bute Dock. *Hudson* v. *Ede* (1) does not decide that if there had been a storehouse for grain lower down the Danube than Galatz the exception would not have applied; it is merely suggested, in the judgment of Blackburn, J., that if there had been a railway or any other practicable mode of bringing cargo by land to Sulina, or if the lower part of the Danube below Galatz had been left free so that cargo might have been brought from some places on the Danube, though the ice blocked up the river below the place where the cargo was lying, there the Court might have come to a different conclusion. *Tapscott* v. *Balfour* (3) is not an authority against the defendants, for it has been found by the referee that the customary mode of loading in the East Bute Dock is by means of lighters from the West Bute Dock through the canal.

The Solicitor-General, in reply.—The whole fallacy of the argument on behalf of the defendants consists in confounding the mode of bringing cargo to the place of loading with the mode of loading the cargo when at that place. *Hudson* v. *Ede* (1) was decided on the ground that the act of bringing the cargo from Galatz to Sulina was part of the loading, and is in favour of the plaintiff, so far as it fixes the limits of the place named in the charter.

BAGGALLAY, L.J.—The defendants claim the benefit of the exception as to frost on the ground that the delay in loading was occasioned by a frost which happened after

(1) 36 Law J. Rep. Q.B. 273; 37 Law J. Rep. Q.B. (Ex. Ch.) 166; Law Rep. 2 Q.B. 566; Law Rep. 3 Q.B. 412.

(2) 1 Hurl. & C. 396.

(3) 42 Law J. Rep. C.P. 16; Law Rep. 8 C.P. 46.

(4) 7 Hurl. & N. 386; 31 Law J. Rep. Exch. 1.

the loading had been commenced. The Solicitor-General, on behalf of the plaintiff, contended that the detention to which the charter-party has reference is a detention by frost which prevents the vessel being actually loaded within the East Bute Dock. On the other side it was contended that so narrow a limit ought not to be placed upon the exception, but that both the East and West Bute Docks must, for the purposes of this question, be considered as one dock, and that the wharf belonging to Crawshay & Co., as well as the wharves in the West Bute Dock, are to be treated as being places of loading at the East Bute Dock. I am unable to take that view.

The place of loading may be very much enlarged, as in *Hudson* v. *Ede* (1), where, under exceptional circumstances, it was held that the loading commenced from the time when the grain left the storehouses at Galatz. But the facts stated here are not sufficient to bring the case within *Hudson* v. *Ede* (2). The true construction of this charter-party is that the detention by frost must happen after the lighter which brings the cargo has got within the natural limits of the dock—that is, within the limits of the East Bute Dock. The appeal must, therefore, be allowed.

BRETT, L.J.—The charter-party in this case is made not with Crawshay & Co., nor by one of the five or six manufacturers of iron rail, but it is made by an ordinary charterer. Under the terms of that charter the ship is to proceed not to Cardiff, but to Cardiff East Bute Dock, and there to load, in the customary manner, a full and complete cargo of iron, of about 1,700 tons. It seems to be an admitted fact that the proper rate of loading, unless prevented by weather, would be about 200 tons a day, and the time the loading would take would be some six days. The charter is peculiar, because no lay days are specifically mentioned, so that the only way of arriving at the lay days is by calculation, which shews that they would be about six days. If the ship is detained longer than six days then the merchants are to pay to the shipowner 30*l.* per day demurrage. Now, what is the state of circumstances as between the shipowner and the charterer. The shipowner here has no means of knowing from which of these many manufacturers the railway iron will come; he cannot tell whether it is deposited in the East Bute Dock, or in the West Bute Dock, or at the wharf belonging to Crawshay & Co. The circumstances, therefore, depend upon what the shipowner is afterwards told by the charterer. The duty of the shipowner, under this charter-party, is to take his ship to Cardiff East Bute Dock, and when he has done that, and put her in a berth ready to be loaded, his duty is over. It then becomes the duty of the charterer, immediately the ship is in her berth ready to load, to begin to load her with cargo, or else to pay demurrage for the delay.

The first question in this case is whether this charter-party ought to be construed with relation to the circumstances as if the East Bute Dock were the only harbour at Cardiff. It is clear from the charter-party itself that it relates to the loading of cargo in the East Bute Dock only, and that it ought not to be construed with regard to anything which may have happened in the West Bute Dock or in the town of Cardiff. When may that loading be said to commence? Unless there is something peculiar, all the stipulations in the charter-party with regard to the loading apply to the place where such loading is to be done. The conveyance of the goods to the place of loading is no part of the loading; but the loading begins in and at the place named in the charter-party, and is not confined to the actual lifting of the goods on board the ship. That was decided in *Hudson* v. *Ede* (1), where it was held that *prima facie* the interpretation of such a charter-party as this is that the loading commences at the place where it is said that the loading is to be done, which here is the East Bute Dock. The stipulation of excuse for not loading is confined to the same place as that to which the stipulation for loading applies. The exception is limited in the same way as the obligation, and the detention here is a detention of the ship by reason of the charterer being prevented from loading by frost. The obligation is to load in the East Bute Dock, and therefore the prevention from loading must *prima facie* be a prevention by frost from loading in that dock.

Kay v. *Field, App.*

It was said that this matter would be altered, even without the circumstances to which we must hereafter refer, by the words "and there load in the customary manner"; but those words refer to the customary manner of loading in the East Bute Dock, which is the dock named in the charter-party; so that everything must happen in the East Bute Dock.

It was further said that under the circumstances of this case the loading commenced before the arrival of the iron at the East Bute Dock—namely, when the iron was conveyed from the wharf belonging to Crawshay & Co., which was half a mile from the East Bute Dock. The question arises, under what circumstances can one go beyond the limits of the port or dock if named. There are circumstances under which the loading can be said to have commenced beyond the limits of the port which is named. That was decided in the case of *Hudson* v. *Ede* (1), the circumstances in which, it is admitted, were exceptional. There the obligation on the part of the shipowner was to take his ship to the port of Sulina and load a cargo of grain. *Prima facie* the loading was to be done in the port of Sulina, and it was declared that unless there were peculiar circumstances the loading would commence in the port of Sulina, as, by way of example, by taking goods from the shore out to the ship. It was, however, proved, not that some but that all of the shippers who shipped grain at Sulina brought it down in lighters from Galatz, a port about a hundred miles up the river Danube, and, taking it alongside the ship, there loaded the grain. The Court also relied on the fact that every shipper shipped grain in this way at the port of Sulina; and consequently, when an exception is found in the charter-party which relieves the shipper in the case of frost, it must be taken to have been known by the parties that the grain would come from Galatz; that there was only one way of loading the ship; and that the exception applied to the whole of the distance from Galatz, although that place was not in the port of Sulina. It is obvious from the observations made in that case by Mr. Justice Blackburn, together with the addition made by Chief Baron Kelly at the instigation of Mr. Justice Willes, that the foundation of the judgment is that every shipper must be taken to have shipped grain in the manner stated. The present case comes within the general rules applicable to the interpretation of an ordinary charter-party, but it does not come within the exception in *Hudson* v. *Ede* (1), the authority on which Baron Pollock partly decided the present case. If it is to be taken that this case was decided on the words "and there load in customary manner," I am also unable to agree with the decision, for that stipulation has no application here. I am of opinion the judgment of Baron Pollock ought to be reversed.

LINDLEY, L.J.—I also am of opinion that the judgment of Baron Pollock was erroneous. The case turns upon the true construction of the charter-party, which may be divided into two portions. The first portion of the charter-party relates to what the ship is to do: she is to go with all possible despatch to the East Bute Dock and there load a full and complete cargo of iron. This part of the charter-party does not profess to define the duties of the shipper, and has no application as to the mode in which the goods are to be shipped. The portion of the charter-party which contains the stipulations relating to the shipper presupposes that the ship is at the East Bute Dock. The clause as to detention by frost was introduced for the purpose of exonerating the shipper from payment of demurrage in the case of delay caused by one of the things there mentioned.

As a general rule, and upon the true construction of this charter-party, the shipper is to bring the cargo to the place of loading, and is not liable for a detention there arising. We are asked to apply the authorities, and to say that the stipulation here applies to a frost which prevents the shipper from bringing his cargo to the place of loading. The only case cited on this point was *Hudson* v. *Ede* (1), which ought not to be applied here; for the only mode of loading there was by lighters; and the act of loading in a case of that description must be treated as having begun at a further place than it otherwise would have begun. The *ratio decidendi* of *Hudson* v.

Eds (1) appears from the passage in the judgment of Chief Baron Kelly, in which he says, "my brother Willes has observed, and we agree with him in opinion, that whenever there was no access to the ship by reason of ice from any one of the storing places from which merchandise was conveyed direct to the ship, the exception in the charter-party would apply." That being so, the present case is not within that decision, and the judgment of Baron Pollock must be reversed.

Appeal allowed.

Solicitors—Ingledew & Ince, agents for Ingledew, Ince & Vachell, Cardiff, for plaintiff; Nicol, Son & Jones, for defendants.

1882. June 17. } BELL AND ANOTHER *v.* BASSETT.

Church Rate—31 *&* 32 *Vict. c.* 109. *ss.* 1 *and* 5—*Rate levied on a Contract for Good Consideration—Parish of St. Paul, Covent Garden*—51 *Geo.* 3. *c.* cl.

By an Act of 12 *Car.* 2, *reciting that the Earl of Bedford had erected the church and rectory house of St. Paul's, Covent Garden, and charged his property with the perpetual payment of* 100*l. a year to the rector, it was enacted that St. Paul's be a parish, and that the yearly sum of* 250*l. be charged upon the houses of the inhabitants of the parish* (*except Bedford House*) *for the support and benefit of the rector, curate, clerk and sextons of the parish, and that the said sum be collected by a rate made by the churchwardens.*

By the Act 51 *Geo.* 3. *c.* cl. *reciting that it was expedient, from the very great advance in the price of articles of necessary consumption, that the said sum of* 250*l. should be increased, it was enacted that the yearly sum of* 520*l., in lieu of* 250*l., be charged upon all the houses in the parish* (*not excepting Bedford House*), *and the rent-charge upon the Duke of Bedford's property be increased to* 180*l. a year.*

On action brought to recover the amount of a rate made under the above statutes against an inhabitant of the parish,—

Held, *by* DAY, J., *that the rate was recoverable. Although being made partly for ecclesiastical purposes, it was a church rate within section* 1 *of* 31 *&* 32 *Vict. c.* 109 (*the Compulsory Church Rate Abolition Act*, 1868), *yet it was enforceable by virtue of section* 5 *of the same Act as being on a contract made for good consideration between the Duke of Bedford and the parishioners of St. Paul.*

This was an action to recover instalments of a rate called the rector's rate, brought by the plaintiffs, the churchwardens of St. Paul, Covent Garden, against the defendant, an inhabitant of the parish.

The statement of claim alleged that in pursuance of the provisions of 12 Car. 2, entitled an Act for making the precincts of Covent Garden parochial, and of 51 Geo. 3. c. cl. an Act to amend the former statute, the plaintiffs made two rates in 1880 and 1881 respectively, and the rates were duly confirmed and allowed by law, and the defendant was, as such inhabitant, liable to pay the said rates, but had not paid the same.

The statement of defence alleged that the rate was made for "ecclesiastical purposes," and was bad within 31 & 32 Vict. c. 109. s. 1; that the rates were not duly made or confirmed, and that the plaintiffs had a sufficient balance in hand from former rates.

The reply alleged that the defendant had not appealed to the Justices in Quarter Sessions against the rates, pursuant to 51 Geo. 3. c. cl.

The action was tried before Day, J., without a jury, when the following arguments were urged upon the admitted facts.

A. Wills, Q.C., and *R. A. McCall*, for the plaintiffs.—It is admitted that the rate was within 31 & 32 Vict. c. 109, and as it included the salary of the parish clerk and sextons it was partly for ecclesiastical purposes, but section 5 of the Act prevents the operation of section 1 (1). The

(1) 31 & 32 Vict. c. 109. s. 5: "This Act shall not affect any enactment in any private or local Act of Parliament, under the authority of

parish had been liable to tithes. By the division of the old parish of St. Martin-in-the-Fields, the tithes in the new parish of St. Paul were extinguished and a new provision made for the clergy. There was a contract made for valuable consideration given, as shewn in the Act of Geo. 3 (2). The sum raised by the rate directed to be made by the Act of Car. 2 was to be divided amongst the rector, curate, clerk and sextons. The statute of George increased the salaries and the amount of the rate. The Duke of Bedford charged an additional 80*l.* per annum on his estate, and consented to Bedford House being no longer exempt from the rate (3). The parishioners on their part consented to an increase of their liability in respect of the amount of rate to be levied. This was a contract which the Legislature sanctioned.

Then the defendant might have appealed to the Quarter Sessions, and did not; he cannot therefore raise any objection in the action which might have been taken on appeal—*The Queen* v. *The Justices of Kingston* (4) and *The Churchwardens of Birmingham* v. *Shaw* (5). The rate is perfectly good on the face of it.

A. Charles, Q.C., and *R. S. Wright*, for the defendant.—The rate is not protected by section 5 of 31 & 32 Vict. c. 109. There is no statement in the Act of Car. 2 that the parishioners were relieved from tithes by that Act, and certainly the Act of Geo. 3 did not impose the additional burden in consideration of any abolition of tithes. This rate, however, depends on the later of the two Acts, and liability to it cannot be maintained as a church rate levied in consideration of the abolition of tithes in the place. This case is undistinguishable from *Watson* v. *All Saints', Poplar* (6).

Section 19 of the Act of Geo. 3 only gives effect to the voluntary benevolence

which church rates may be made or levied in lieu of or in consideration of the extinguishment, or of the appropriation to any other purpose, of any tithes, customary payments, or other property or charge upon property, which tithes, payments, property or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes, as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not been passed."

(2) 51 Geo. 3. c. cl. s. 1: "Whereas by an Act, 12 Car. 2, it was enacted that the yearly sum of 250*l.* should from thenceforth be, and the same was thereby charged upon the houses of the inhabitants of the parish of St. Paul, Covent Garden (except the house then commonly called Bedford House), for the support and benefit of the rector, curate, clerk and sextons for the time being of the said parish; and whereas from the very great advance in price of the articles of necessary consumption, it is expedient that the said sum of 250*l.* should be increased:"

Section 2: "Be it enacted that in lieu of the said sum of 250*l.*, the yearly sum of 520*l.* shall be, and the same hereby is charged upon all houses within the said parish of St. Paul, Covent Garden, and shall be assessed and rated by the churchwardens after a pound-rate."

(3) 51 Geo. 3. c. cl. s. 19: "And whereas by the said Act of his late Majesty King Charles the Second, a perpetual yearly payment to the rector of the said parish and his successors of the sum of 100*l.* was charged on certain houses in Covent Garden in the said parish; and whereas the said houses are now the estate of the most noble John Duke of Bedford, and he is desirous that the same and certain other houses of him the said Duke situate in Covent Garden aforesaid, and which, together with the houses so charged by the said Act, form the Piazza in Covent Garden aforesaid, which extends from Russell Street to King Street, may be charged with the payment of a further yearly sum of 80*l.* to the said rector and his successors for the time being, for the better support and maintenance of the said rector and his successors: Be it therefore further enacted, that the said rector and his successors shall for ever hereafter have and be entitled to an additional yearly sum of 80*l.*, to be issuing out of and charged upon all and singular the houses charged by the said recited Act with the payment of the said yearly sum of 100*l.*, and also out of and upon all other the houses in Covent Garden aforesaid now forming the Piazza there, which extends from Russell Street aforesaid to King Street aforesaid, to be paid and payable to the said rector and his successors quarterly, on the several days of payment whereon the said sum of 100*l.* is by the said Act made payable; and that the first quarterly payment thereof shall be made on the 24th of June, 1811, and that the said rector and his successors shall have all such powers and remedies for the recovery of the said additional yearly sum of 80*l.* as by the said recited Act are given and provided for the recovery of the said thereinmentioned yearly sum of 100*l.*"

(4) E. B. & E. 256; 27 Law J. Rep. M.C. 199.
(5) 10 Q.B. Rep. 868; 18 Law J. Rep. M.C. 89.
(6) 46 Law Times, 201.

of the Duke of Bedford, to which no reference is made in the preamble. There is no contract and no consideration moving to the parishioners to bind them, and the Court cannot look outside the Act for evidence of any.

McCall, in reply.—The distinction between this and *Watson* v. *All Saints', Poplar* (6) is that here there was a mutual increase of the burdens borne by the parishioners and the duke, and that the agreement as to how they should be borne was sanctioned by the Legislature. He referred to *Ex parte Stafford* (7).

DAY, J.—In this case I give judgment for the plaintiffs, and I do so without the least hesitation, because I am happy to think that this is one of those cases in which an erroneous judgment will certainly not be allowed to remain unchallenged. If I am deciding wrongly, which is very possible, although I have a very strong opinion on the subject, my error will very soon be set right, and the parties will not be prejudiced. As I said before, I have a very strong opinion about this case, and I think the plaintiffs are clearly entitled to recover.

If the matter had stood on the statute of Car. 2 alone, I should have said that they had a double protection under the 5th section of 31 & 32 Vict., because I should have been of opinion that this rate was made and levied "in lieu of, or in consideration of the abolition of tithes" in the precincts of Covent Garden, which was constituted a parish by the Act of Car. 2. But I am impressed by the argument of Mr. Charles, and I am inclined to think that this rate can now only be supported under the Act of Geo. 3, and that under the Act of Geo. 3 there was no abolition of tithes by way of consideration for the imposition of the additional burden on the parishioners, and that therefore that portion of the 5th section of the statute 31 & 32 Vict. which maintains liability to church rates, where they are "in consideration of the abolition of tithes in any place," does not protect the rate which has been made in this parish under the Act of Geo. 3. I think that the rate is a good and valid rate, because I think that it is a rate made upon "a contract made, or for good or valuable consideration given"—the last words of protection found in the 5th section of the 31 & 32 Vict. c. 109.

Now it is quite true that there is a recital in the preamble of the Act of Geo. 3 to the effect that it is desirable to increase the allowance made to the rector, the curate, the clerk and the sextons, by reason of the increased price of provisions. That is the general motive which appears to me to influence what I will term the contracting parties. I look upon this statute as evidencing a contract to which certainly the Duke of Bedford was a party on the one hand, and the parishioners on the other, and I am of opinion that the whole statute must be taken together. Looking at it as a whole, it seems to me that the arrangement, which appears to be in the nature of a contract, was a reasonable and natural arrangement. The parishioners and the Duke of Bedford had a common interest in the adequate maintenance of the rector, curate and officials, and they were desirous that they should be supported in a manner suitable to their position. Owing to the increased price of provisions the allowance previously made was inadequate; and accordingly the Duke of Bedford, on the one hand, said that he would increase the rent-charge which he had previously paid, that he would abandon the exemption of a large portion of the parish represented by Bedford House, and make that liable with the other houses in the parish to rates, thereby reducing the pound-rate, and that he would also extend the area of property upon which his rent-charge is to be raised. The parishioners, on the other hand, submitted to the payment of a larger rate, perhaps larger in proportion than the benefit they derived from the submission, if I may say so, of Bedford House to the general rateability; but still, having regard to the interest and to the due administration of public worship, the Duke of Bedford making these large concessions on his part, they agreed to submit to an increased annual rate being levied on them.

Now it seems to me that there is abundant reason to suppose and to infer, if it were necessary to infer it, that this

(7) Prideaux's Church Guide, p. 93.

was an arrangement made between these parties by reason of the rector and the church officials seeking to have an increase of their allowance; and the duke expressed his readiness to do this on the parishioners also coming forward and submitting to an increased sum being imposed on them by way of an annual rate.

It seems to me that that was the true nature of the transaction, and that there was therefore consideration for the submission of the parishioners to the increased rate. They were willing that a rate producing 520*l.* a year should henceforth be imposed on them; the Duke of Bedford agreeing also to contribute a much larger sum than he had hitherto done. This was done by virtue of a common arrangement. It is true that one does not find a recital in the form in which an agreement would have been drawn by a conveyancer; but one must look at the Act as a whole. Although it is true that a submission to the rate by the parishioners is not in terms to be found in section 2, and the agreement by the Duke of Bedford to provide an increased sum by way of rent-charge is to be found in section 19, still I do not see that that makes any real or substantial difference when one is trying to find out what the gist of the transaction is.

Then, on the other hand, it is said the Duke of Bedford purported to do this out of benevolence. It is very likely he did it out of benevolence; but one cannot help seeing that whilst he was submitting to an increased rent-charge out of his benevolence, he might as well have said that the parishioners agreed to pay an increased rent-charge out of their benevolence, because it seems to me they agreed to do it for the benefit of their minister and officials of the church, and to secure the better and more adequate services of the church. I must say that I think that this was in the nature of a contract, and that there was abundant consideration for the rate to which the parishioners submitted themselves, as they appear to me to have done, by this statute of Geo. 3, which was passed practically to confirm an arrangement made between these parties.

Under these circumstances I am of opinion that the plaintiffs are entitled to judgment in respect to both rates, and I give judgment accordingly, with costs.

Solicitors—J. C. Button & Co., for plaintiffs; Harding & Co., for defendant.

1882. Nov. 14. MCGIFFEN *v.* PALMER'S SHIP BUILDING AND IRON COMPANY (LIMITED).

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1. *sub-s.* 1—"*Defect in the Condition of Ways, Works, Machinery, or Plant*"—*Temporary Obstruction of Road used by Workman.*

By the Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1. *sub-s.* 1, *a right of compensation against an employer is given in the case of any personal injury caused to a workman* "*by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer.*"

A workman, who was employed to convey molten iron in a hand-truck along a way constructed for the purpose from one part of his employer's works to another, was injured by the upsetting of the loaded truck over some "*tap*" *negligently placed a few hours previously upon, and so as to obstruct, the way which ought to have been kept clear:*—

Held, *that the* "*tap*," *forming a temporary obstruction of the way, but not altering the powers of the road nor its fitness for the purpose for which it was generally used, and not being incorporated with the road, did not constitute a* "*defect in the condition of the way*" *within the meaning of the above sub-section.*

This was a Special Case stated on appeal from the decision of the County Court Judge of Durham, at South Shields, of which the following are the material paragraphs in reference to the judgment of the Queen's Bench Division:

1. This is an action under the Employers' Liability Act, 1880, and the particulars of demand are as follows: "The

plaintiff is the father and legal personal representative of Thomas McGiffen, who was employed by the defendants as an underhand puddler at their rolling mills at Jarrow. On the night of September 29, 1881, whilst the said Thomas McGiffen was conveying a ball of red-hot iron on a bogie from the furnace, the wheels of the said bogie struck against an obstruction on the iron-plates forming the regular way for the conveyance of metals from the furnace to the steam-hammer in the defendants' mills, whereby the said bogie was overturned, and the said ball of iron fell upon and caused personal injury to, and which resulted in the death of, McGiffen on December 12, 1881. The said injury was caused by reason of a defect in the condition of the said way, and such defect was not remedied owing to the negligence of the defendants or their foreman puddler, Joseph Hickman . . . And the plaintiff claims 50*l.* damages in respect of the pecuniary loss sustained by him in consequence of the death of the said Thomas McGiffen."

2. The action was heard before the Judge of the above County Court on March 2 and 9, 1882. At the trial the Judge amended the particulars of demand by adding the name of Paul Croft as a person entrusted with superintendence, by reason of whose negligence the defect referred to was not remedied. The following facts were proved:

3. The deceased worked at the defendants' iron rolling mills as an under-hand puddler. Part of deceased's duty was to convey the puddled iron while still at a white heat to a steam hammer at a distance of about thirty yards from the furnace; the said iron was so conveyed in portions called balls upon a bogie or two-wheeled car, drawn by hand by means of a handle, along a roadway of iron plates, part of which roadway was called the race. Part of the said roadway was occupied on one side thereof by boxes containing coals for the use of workmen at other furnaces than that at which the deceased was engaged, and on the other side of the said race were deposited quantities of pig iron for replenishing the furnaces, and a substance called "tap," the tap being used by the puddlers for lining the furnaces at which they respectively worked. The said race when clear was sufficiently wide for the passage of the bogies with the balls of iron if the coals or pig iron or tap did not project upon the said race.

4. Between 8 and 9 p.m. on the 29th of September, a labourer named Conway, in the employment of defendants but having no superintendence, in the course of his ordinary labour placed several pieces of tap on a part of the roadway between the furnace at which deceased worked and the steam hammer, and one of the pieces of tap was negligently deposited in front of the pig iron, and projected at least eight inches on to the said race. On the other side of the roadway, opposite to the said tap, a quantity of loose coals was lying beyond the line of the coal-box and upon the said race. Between the said coal-box and the projecting piece of tap there was room for the bogie, if drawn by deceased through the said coals, to pass clear of the said tap with three inches to spare. It was usual and proper to run with the bogies. There was a furnace near the said coal-box, and when the shield or stopper of the said furnace was closed, it was impossible to see the projecting piece of tap or loose coals; but when the stopper was down, and thus opened, there was a light by which the tap and coals could be seen.

5. After the tap had been placed as aforesaid, and before eleven o'clock the same night, the deceased went past the aforesaid projecting piece of tap with his bogie on which was a ball of iron which he took to the hammer, and returned with the bogie to the furnace, and he did not then come in contact with the tap, the bogie-wheel going through the aforesaid loose coal lying on the roadway. When the deceased so passed and returned, the stopper of furnace No. 49 was down, and a light therefrom was thrown on the said coals and place where the projecting tap was. The hot iron ball also threw a light. About eleven o'clock, the stopper then being down, and there being a light, the deceased was running with his loaded bogie along the race from his furnace to the hammer, dragging the bogie by the handle, and being by the side in front of the right-hand wheel, when the right-hand

wheel or axle of the bogie caught the aforesaid projecting piece of tap, which was in the same position as when the deceased last passed it, and checked the speed of the bogie. The deceased fell, and the ball rolled on to him, inflicting such injuries that he afterwards died therefrom. The projecting tap might easily have been removed by one person in a few seconds if it was found to be an obstruction.

6. The defendants' foreman puddler, who had the superintendence of the labourers engaged in carrying tap and in keeping the race clear, was Joseph Hickman, but he was not on duty after five o'clock that night. The under-foreman was Paul Croft, whose duty it was to keep the said race clear, and who passed the place where the said tap was deposited and after it was deposited several times before the accident on the said night, but there was no evidence as to whether the stopper of furnace No. 49 was opened or closed when he so passed. He said he did not notice the tap before the accident.

7. It was contended on behalf of the defendants that the projecting piece of tap was not a defect in the condition of the ways used in the business of the defendants within the meaning of section 1, sub-section 1, of the Employers' Liability Act, 1880, but was an obstruction placed there by the negligence of a fellow-workman of the deceased. Also that there was no evidence of any negligence on the part of the defendants, or of any person in their service entrusted with the duty of seeing that the said ways were in proper condition, by reason of which negligence any defect within the meaning of the said section was not discovered or remedied. Also that there was such contributory negligence on the part of the deceased that the verdict ought to be entered for the defendants.

8. His Honour found that there was negligence on the part of the foreman Croft in not keeping the way clear, and that the deceased did not know of the obstruction, and that there was no contributory negligence on the part of deceased. The learned Judge did not decide the question as to whether the obstruction was a defect in the condition of the way within the meaning of the Act.

Judgment was therefore given for the plaintiff.

The questions for the opinion of the Court are:

1. Was the aforesaid obstruction a defect in the condition of the ways used in the business of the defendants within the meaning of section 1, sub-section 1, of the Employers' Liability Act, 1880?

2. Was there any evidence of negligence on the part of defendants, or of any person in their service who had any superintendence entrusted to him, within section 1, sub-section 2, of the said Act?

3. Was there contributory negligence on the part of deceased?

J. Strachan (*The Solicitor-General, Sir F. Herschell*, with him), for the defendants, appellants.—The first point is that the placing and leaving of the tap upon the way cannot be a defect within the Act. Something superadded cannot be a defect. It must mean something inherently defective in the thing itself or in the condition of it. Surely if some person had maliciously placed an obstruction to upset the truck, that could not be held to be a defect; and there is no difference between what is put negligently and what is put maliciously. Whether or no the defendants are liable for negligence is another question arising under sub-section 2 of section 1, but under section 1 sub-section 1, and section 2 sub-section 1, it is essential to the cause of action that a defect be made out. The Act does not make employers insurers of the safety of their workmen, and general negligence will not make them liable except when connected with the accident in the mode specified in the Act. As shewn in *The Metropolitan Railway Company* v. *Jackson* (1) a defect is not to be inferred because of negligence.

On the next point the claim and particulars are framed under sub-section 1 of section 2, and so depend also upon the question of defect or no defect.

[STEPHEN, J.—It seems as if the judgment were upon sub-section 2 of section 1, and negligence in the person alleged to have superintendence is found as a fact.]

That ought not to be so, for the defen-

(1) 47 Law J. Rep. C.P. 376; Law Rep. 3 App. Cas. 193.

dants would have been entitled to call evidence to prove that Croft was a person not within the definition of a person having superintendence in section 8, and they were precluded from doing so.

[The Court intimated that they would send the case back to the Judge upon this point in order that he might find any facts, with or without hearing further evidence, as to whether Croft was a person within the meaning of sub-section 2 of section 1, and section 8.]

A. Wills, Q.C., and *J. Edge*, on the first point.—A defect in the condition of the ways means something more than an inherent defect in the way itself. The expression is used expressly to meet cases where the machinery, plant, &c., though properly constructed are improperly maintained. For instance, an engine of approved construction is defective in condition for want of oil. A railway becomes defective in condition when covered with ice. The thing itself is altered and affected as to its use and working, and "defect" is a word that may rightly be applied to it.

[STEPHEN, J.—Do you say that any obstacle on the surface of the way however occasioned necessarily amounts to a defect? Take the case of a drunken man.]

Any obstruction which is of a sufficiently permanent character to cause the way to be incapable of being used safely and as it was intended to be used is a defect in its condition. The first section by itself makes the employer an insurer of the safety of the thing used by the workman. The second section limits the liability to cases where there has been negligence in some person whose duty it was to see that it was safe.

[STEPHEN, J.—Does not the word "condition" have a somewhat different operation applied to the different words? I do not see much distinction between "a defect in the way" and "a defect in the condition of the way," but there is a considerable difference when applied to machinery.]

Way is here coupled with machinery and plant, and it must mean the place to go upon as used in the business.

[FIELD, J.—Surely it cannot mean the right of way, it must mean the actual material thing.]

The use of the word "con lition" was intended to extend the other words used; a temporary obstruction might not be a defect in the way itself, but I see no difficulty in its being a defect in the condition of the way.

[STEPHEN, J.—I read the word as meaning anything which for the time becomes part of the condition of the thing—anything which for a considerable period of time would affect the road so that it was not in its natural state; but I should say that it is carrying language too far to say that the mere presence of some accidental obstruction for a time affected the condition of the road.]

I can only submit that the language was carefully chosen to extend the application of defect to something beyond the material of the way itself.

FIELD, J. (after stating that the case should go back for the Judge to find explicitly whether Croft was a person who had superintendence, and to make any amendments necessary to raise the question of liability under section 1, sub-section 2, proceeded to give judgment on the question argued under section 1, sub-section 1).—In this case the plaintiff brings an action against the employers of his son to recover damages under the Employers' Liability Act in respect of his death, which seems to have been occasioned without any fault in the lad himself. It is said on the part of the plaintiff that the accident was caused by a defect in the condition of the way used in the business of the defendants; and the facts found are that the deceased was engaged as an under-puddler, and that in the course of his duty he had to carry a ball of molten metal from one part of the works to another, and for this purpose there was provided a way, part of which was called a race, being a hard road of some kind, a space set apart and constructed to bear the bogie containing the molten metal running up and down it. The race ought to have been kept clear, and there was negligence in any person having superintendence in not keeping it clear at the time the accident happened. If therefore Croft really had superintendence of keeping the way clear, there is an end of the defendants' case. But the question for us is whether the circumstances shew that there was a defect in the condition of

the way so as to bring the case within the 1st sub-section of section 1 of the Act, and for this purpose we must look at the language of all the sub-sections; for if Mr. Wills' contention were correct, it would be quite unnecessary for the Act to go on further and say anything about the negligence of the persons employed in sub-section 2 of section 1.

Now sub-section 1 speaks of a defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; and this means, I think, a defect in something, the property of the employer, which it was the duty of the man to use, or which he does use in the business. The defect is alleged here to have been in the way. Now "ways" mean all kinds of material things which may be used in or in connection with the business of the employer, and it must be conceded here that there was no defect in the construction of the way itself leading to the accident, the cause of which was the projection of the tap over and upon the way.

But it is said that there is a difference between the way and the condition of the way, and this was a defect in the condition of the way for which the defendants are liable. Illustrations were given of machinery good in itself being in defective condition for want of oil, and of a way made dangerous by rain and mud, or slippery by ice. Now I cannot help thinking that the latter would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered; but as to the machinery I doubt whether the absence of oil does affect the permanent condition of the thing itself. However that may be I think that the present is not a case where there was a defect either in the way or in the condition of the way. There was no defect in my opinion, but some one had carelessly put something on the way; it was an obstruction, and would be so described in an action by a grantee of the right of way. The defendants may be liable for the negligence of their superintendent in not having it removed; but this part of the Act points to something in the permanent or quasi-permanent condition of the way being defective, and I do not think this case falls within the section.

STEPHEN, J.—I am of the same opinion, and I will add one word as to the difference between the way itself and the condition of the way. A defect in the way means a hole in the road, or that the stones or metal forming it stick up, shewing that the actual thing, the way itself, is not suited for the purpose for which it was intended. This would apply equally to machinery and plant—the absence of some part of the machinery or a crack or fracture. The words are quite plain.

A defect in the condition of the way or machinery is rather wider, and means such a state of things as that the powers and quality of the thing are for the time being altered in such a manner as to interfere with their use. For instance, if the way were made slippery by ice or muddy by water, in either such case the way itself would not be defective, but the condition of the way by reason of the water which is incorporated with it would be.

But here we are asked to go further, and say that any obstruction, though it did not alter the condition of the way in the sense in which I have described it, yet amounts to a defect in the condition of the ways. Suppose a drunken man staggering along the road—does that make a defect in the road or the condition of the road? Suppose he is dead drunk lying helplessly in the roadway, does that any more constitute a defect in the condition of the road? and if that was not a defect in the condition of the road, why should a piece of tap be? So I think the words in the Act do not include obstacles lying on the road, which do not alter the powers of the road nor its fitness for the purpose for which it is generally employed, and are not in any sense incorporated with the road.

Solicitors—Gregory & Co., agents for C. W. Newland, South Shields, for appellants; John Scaife, agent for Duncan & Duncan, South Shields, for respondent.

1881.
April 22, 29.
May 6, 13.
July 31.

STOCK *v.* INGLIS.

Ship and Shipping—Marine Insurance—Policy on Goods—Contract of Sale—Loss of Ship—Non-appropriation of Goods at Time of Loss—Vesting of Property—Insurable Interest—"Profits"—Terms of Policy.

The plaintiff claimed to recover from the defendant, an underwriter at Lloyds', under a "floating" marine policy on "goods," in respect of certain sugar lost on the 4th of February, 1881, *on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff and B. & Co., as hereinafter mentioned:*

By the first contract, dated the 7th of January, 1881, *D. & Co. agreed to sell to B. & Co.* 200 *tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at* 21*s.* 9*d. per cwt. net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the* 12*th of January,* 1881, *D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the* 7*th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of* 200 *tons of sugar at an advanced price; neither was the plaintiff aware that D. & Co. were the shippers of the* 200 *tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price, which left the plaintiff a clear profit of* 10$\frac{1}{8}$*d. per cwt. D. & Co. advised their Hamburg forwarding agents that they had sold* 400 *tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co's. forwarding agents at Hamburg shipped* 3,900 *bags only, and advised D. & Co. of this short shipment, proposing to send the* 100 *bags short shipped by the next steamer. The* 3,900 *bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co's. agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole* 3,900 *bags were shipped in one undistinguished mass, consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the* 3*rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co., in due course, took up the bills of lading, and then proceeded to apportion the* 3,900 *bags, appropriating* 2,000 *of such bags to B. & Co., and the remaining* 1,900 *to the plaintiff, and making out the invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co.; but prior to that time both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the* 200 *tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these* 200 *tons. Upon receipt of the invoices, the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the* 2,000 *bags so invoiced. The plaintiff then also declared*

upon his floating policy for this further loss:—

Held, *upon the above facts, that the plaintiff had no property or insurable interest in the sugar at the time of the loss, but that he had an insurable interest in "profits," the loss of which, however, could not be recovered under a policy on "goods."*

This case came before Field, J., upon further consideration. The facts sufficiently appear from the judgment.

Charles Russell, Q.C., Myburgh, Q.C., and *Danckwerts,* for the plaintiff.

Butt, Q.C., Cohen, Q.C., and *Barnes,* for the defendant.

Cur. adv. vult.

FIELD, J. (on July 31).—The plaintiff in this action (a Bristol merchant) seeks to recover from the defendant (an underwriter at Lloyds'), under a "floating" marine policy on "goods," a proportionate part of the value (with ten per cent. profit) of 3,900 bags of sugar, lost with the *City of Dublin,* on the 4th of February, 1881, on a voyage from Hamburg to Bristol. The sugar had been shipped at Hamburg by or on behalf of Messrs. J. V. Drake & Co. (London merchants), and had been bought by them of German manufacturers.

In the process of manufacture of sugar, although the parcels manufactured at each "make" are in general respects similar, the parcels turned out at any one make will differ slightly from any other in the number of degrees of saccharine matter which it contains, and the bags of each particular make bear a distinctive mark and number—say D 200, D 201, &c.—and the whole lot contains the same number of degrees of saccharine matter, and is otherwise identical in quality and description. The sugar contained in each lot is separately analysed in Germany, and a certificate of the analysis, referring to the mark and number of the bags in which it is packed is forwarded to Drake & Co. in London, so that the quantity of net saccharine in the lot is communicated to them. The sugar is then invoiced to Drake & Co. in bags, the invoice referring in like manner to the marks and numbers. By comparison, therefore, of the marks invoiced with the certificates of analysis Messrs. Drake & Co. know the quantity of saccharine matter contained in each parcel invoiced. The sugar is then forwarded by the manufacturers to an agent of Drake & Co. at Magdeburg (Paul Peckstein), and the amount of the invoice is paid in cash on behalf of Drake & Co. by their German bankers (the Credit Anstatt of Leipsic) to the manufacturers upon delivery by them to the railway company. In order to secure the repayment to the Credit Anstatt of this advance there is an arrangement between them and Drake & Co., by which certain forwarding agents at Hamburg (in the present instance Herrmann & Thielnehmer) ship and consign the sugars on their arrival at Hamburg according to Drake & Co.'s orders. The forwarding agent, however, does not ship them in Drake's but in his own name, and he takes the bills of lading, deliverable to "order" in London or Bristol, as the case may be, and then forwards the bills indorsed in blank to the London correspondent of the Credit Anstatt, who is instructed by the latter to deliver them to Drake & Co. against cash payment by them of the amount of the invoice. The forwarding agent, of course, keeps Drake & Co. advised of the marks and numbers in course of delivery and arrival at Hamburg, and asks for and obtains shipping orders from them; and, as the certificates of analysis then already in the possession of Drake & Co. enable them to know the precise net saccharine contents of each lot of 500 or 600 bags so advised, they can allot each bag or lot of bags to such one of their buyers with whom they are under contracts, so as to correspond in respect of the specific quantities of net sugar with the degree contracted for. The contracts for delivery in England made by Drake & Co. are uniform, or nearly so, in terms—they are for delivery f. o. b. Hamburg, and the quantities are expressed in "tons" weight. But the price is not calculated according to the weight per ton of the gross, but at so much per degree of net saccharine matter contained in the sugar as represented by the analysis. A standard degree is specified in the contract (say 88), with a payment or allowance of 6*d.*

for every degree above or below the average analysis of the whole contract; but anything above a given per centage (say 92) is not paid for, and if the average analysis of the whole contract exceed (say 90), such excess is not paid for. When, therefore, Messrs. Drake & Co. are desirous of appropriating at Hamburg the number of bags required for the execution of one or more contracts for sugar destined for any one port (say Bristol), it is obvious that the assortment must be so made before shipment that there shall be delivered such a gross number of bags as the port requires, and the bags so shipped must be made up of such particular bags as shall contain enough sugar of certain degrees, so that on arrival of the bills of lading in London Messrs. Drake & Co. can make up each particular contract in such manner that no part of the sugar to be supplied under that contract shall exceed 92, and that the average of the whole shall not be more than 90; for all net above, although paid for by Drake's in Germany, would, under the terms of the contract, go for nothing in England, and so be a loss to them. Messrs. Drake & Co. having thus ascertained which of the bags advised can be best averaged to any particular port, the gross quantity destined to that port is shipped without any subdivision, leaving the operation of apportioning the gross shipped to the port amongst the different contracts at the port till after the receipt by Messrs. Drake & Co. in London of the bills of lading. Indeed in some cases it is impossible for them to make this further apportionment before, and it is their usual course of business not to make it until after they have obtained the bills of lading by payment to the agent of the Credit Anstatt of the amount of the invoice. After having thus obtained the bills of lading, Drake & Co., on comparison of the bills of lading with the certificates of analysis, apportion the bags and the bills of lading representing them between their different buyers at the port for which they are shipped, and invoice the sugar to them accordingly. Messrs. Drake & Co.'s transactions of this character are very extensive, and have been so as well with the plaintiff as others, and the general course of business between them and their buyers has been for the buyer to bear the cost of the insurance against sea risks from the time of delivery. The buyers have usually themselves effected the insurance, or declared the risk under floating policies; but in some cases Messrs. Drake & Co. have effected the insurance as agents of the buyer.

The sugars which were lost had been shipped on the *City of Dublin* in intended performance of two contracts made for sale and purchase entered into by Drake & Co. with two Bristol buyers, and at the time of the loss on the 4th of February the position of things with regard to these contracts was as follows:—

By the earliest of these two contracts (the 7th of January), Drake's agreed to sell to a Bristol firm, W. Beloe & Co., 200 tons of sugar, price 21*s.* 9*d.* per cwt. net, f. o. b. Hamburg, for 88 degrees net saccharine contents. Sugar to analyse between 85 and 92 net—6*d.* per cwt. to be paid or allowed for each degree above or below 88, but anything above 92 not to be paid for; and should the average analysis of whole contract exceed 90, such excess not to be paid for. For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading.

By the second contract, of the 12th of January, Drake's agreed to sell to the plaintiff a similar quantity at a like price upon identical terms.

After the loss it became for the first time known to Drake & Co. and to the plaintiff that Beloe & Co. had entered into the contract of the 7th of January with Drake's for the purpose of enabling them to execute a contract previously made by them on the same day with the plaintiff for 200 tons at an advanced price.

Although not, I think, material, it is as well to observe that in this contract the condition contained in Drake's contract with Beloe, as to the excess over 92 not being paid for, was omitted, and it contained an additional term, also in my view immaterial, that the price f. o. b. was on "a steamship to Bristol."

At the time of shipment and loss, therefore, all that Drake's knew was that they had engaged to sell 400 tons destined for Bristol—that is, 200 to Beloe and 200 to the

plaintiff; and although the plaintiff knew that he had 400 tons coming from Hamburg —that is, 200 tons to be shipped by Drake's, and 200 to be shipped by some unknown shipper under Beloe—he did not know that Drake's were the shippers of the latter 200; nor did Drake's know that Beloe was under any contract to deliver, or the plaintiff under any contract to take, the 200 tons contracted for by Beloe.

It is also of importance to note that, although in the case of the contract between Drake's and Beloe of the 7th of January, and of that between Drake's and the plaintiff of the 12th, the provisions of the Statute of Frauds were complied with by all the parties to them, such was not the case with the contract of the 7th of January between Beloe and the plaintiff —for that contract, although signed by Beloe as if he had been acting as broker, was not, nor was any note of it, signed by the plaintiff (Beloe being a principal, and so not his agent for that purpose). The consequence, of course, was that although Beloe, if he had been the party sought to be charged in any action upon this contract, could not have availed himself of the provisions of the Statute of Frauds, the plaintiff was never until after the loss in a position to be charged in any action with any liability under it.

The ultimate destination of the whole 400 tons thus being Bristol, and the whole being deliverable by Drake's f. o. b. at Hamburg during the month of January, it became necessary that provision should be made for shipment. The ordinary course of business, and which course was known to the plaintiff, was for Drake's forwarding agents at Hamburg to ship by that boat of the Hamburg and Bristol line of steamers next due to sail after the time fixed for delivery, and the *City of Dublin* was the one in turn for the departure at the end of the last half of January. The agents for this line are, at Hamburg Niessle & Günther, and at Bristol Edward Stock & Son, and the latter make it their business to keep themselves informed of all contracts for sugar made for shipment from Hamburg to Bristol, and to keep Niessle & Günther advised of all such sales.

The plaintiff had, immediately after making each contract, of the 7th of January with Beloe, and the 12th of January with Drake & Co., entered into binding contracts for sale to the Bristol Sugar Refinery Company of identical quantities upon identical terms, except that the sale was at an advanced price of 22*s.* 7½*d.*, leaving him, therefore, the difference between that and 21*s.* 9*d.* as profit. The plaintiff was therefore anxious for the regular delivery by Messrs. Drake & Co. of the sugar he had thus contracted for, and he immediately informed Edward Stock & Son of the purchase he had made of Beloe, and requested them to reserve space by the last departure for the month; but as he did not know from what shippers Beloe would supply his contract, all the advice he could give was the fact of the sale. In like manner on the 12th of January the plaintiff asked Edward Stock & Son to reserve space for that parcel. It also appears that Beloe had requested Edward Stock & Son to reserve space for the same 200 tons, the identity, however, not being at that time known to the agents. The plaintiff also, on the 31st of January, in writing to Drake's expressed his hope that the 200 tons of the 12th were on the steamer then due to leave Hamburg, and in reply he received a letter from Drake's that this sugar was not only at Hamburg, but that there would probably be extra expense chargeable to him owing to delay in steamer's arrival and consequent delay in departure. About the same time Drake & Co. also advised Herrmann & Thielnehmer, their Hamburg forwarding agents, that they had sold 400 tons for Bristol, and gave them the necessary orders as to which bags were to be shipped for that port, begging them to engage room by the *City of Dublin*, and send the bills of lading to London as soon as possible.

Although, however, sugar in sufficient quantity and with suitable analysis had arrived at Hamburg, so that Drake & Co. could have shipped either the 200 tons contracted for by the contract of the 12th of January with the plaintiff, or, alternatively, the 200 tons of the contract of the 7th of January with Beloe, the whole of the sugar which Drake's had appropriated to satisfy the two contracts to-

gether had not arrived at Hamburg at the time of the departure of the steamer, and, in consequence, Herrmann & Thielnehmer were not able to ship by the *City of Dublin* more than 3,900 bags, and they advised Drake & Co. of this short shipment, proposing to send the 100 short shipped by the next steamer, due to sail on the 15th of February. They did, however, ship 3,900 bags, and took several bills of lading by which they were made deliverable to "Order, Bristol"; but as Drake & Co. had not made any apportionment of the 3,900 bags as between the two contracts (7th, Beloe's, and 12th, plaintiff's), no appropriation was or could be made by them of any specific bags—that is to say, as to which of the bags were to be Beloe's and which of them the plaintiff's—but the whole 3,900 were shipped in one undistinguished mass, and all were consigned simply "Order, Bristol." With this sugar thus on board the *City of Dublin* left Hamburg on the 3rd of February, and on the morning of the 4th went down in the Elbe with her cargo.

By the post of the 2nd of February Herrmann & Thielnehmer had, in the usual course, forwarded the bills of lading of the sugar indorsed in blank to the London correspondent of the Credit Anstatt of Leipsic; and by post of the 3rd they advised Drake's of their having so done, in order that the latter might take them up together with those of other bags (2,900) shipped to London by another steamer in the same manner.

On the 4th of February, and before any intelligence of the loss had reached Drake & Co., they, in due course, took up the bills of lading by payment of the amount of the invoices to the agents of the Credit Anstatt, and then proceeded to apportion the 3,900 bags between Beloe and the plaintiff, appropriating such of them as would make up the proper average for the plaintiff's contract to him, and such as would make up Beloe's contract to him, according to the averages contracted for in each contract. At this time they had no knowledge that the sugar invoiced by them to Beloe would, in fact, be appropriated by him to the plaintiff under the sub-contract of the 7th of January, and they therefore made out two separate invoices in ordinary course to them as two separate purchasers—as, in fact, they were. In doing this they had of course, as before explained, so to allot the bags to each particular contract as would best suit their own commercial convenience and advantage, and having made the selection of and appropriated 2,000 of the bags out of the mass to Beloe and 1,900 others to the plaintiff, they made out the invoices accordingly, and of course the result was a short supply of the plaintiff's contract by 100 bags. Each invoice, however, was so made up as to comply with the terms of each contract—that to Beloe shewing an average per centage on the whole of 89·5875, and that of the plaintiff of 89·35—both averages, therefore, being kept under 90. Certainly, however, before these invoices were posted by Drake & Co. (whether before or after the appropriation does not appear), news arrived by telegram to them of the loss of the sugar. News of the loss also arrived the same day in Bristol, and the plaintiff, anticipating that he might have the 200 tons on board coming to him under his contract of the 12th, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy now under suit for any loss in respect of those 200 tons.

In the letter to the plaintiff of the 4th of February, in which Drake's enclosed the invoice to the plaintiff for the 1,900 bags, they proposed that the contract should be cancelled as to the 100 short shipment, and to this the plaintiff assented; but this, of course, was done after both parties knew of the loss. The invoice to the plaintiff was headed "Contract 12th January." It set out the marks and numbers of the bags and statement of the degrees of net saccharine matter. With the invoice Drake's also forwarded a cash order for payment of the amount (4,162*l.* 16*s.* 1*d.*) in Bristol to the order of Williams, Deacon & Co. in London, in exchange for the bills of lading; and on the morning of the 5th the plaintiff paid the amount in exchange accordingly, and obtained the bills of lading of the sugar thus invoiced to him under his contract of the 12th. A like course of forwarding invoice and bill of lading was undergone in Beloe's case between Drake's and him,

the invoice being headed "Contract 7th January."

The next step in the transaction was that, Beloe being, as before stated, under contract to sell 200 tons to the plaintiff, but at an increased price, made out his invoice to the plaintiff, making him debtor to himself, and forwarded it to him with an intimation that the bills of lading were at the bankers', and requesting him to forward to him (Beloe) a cheque for the amount; and this having been done, the plaintiff received the bills of lading for the 2,000 bags thus invoiced, and then also declared upon the present policy for this further loss, making his total claim against the underwriters—including the usual ten per cent. added for profit—9,530*l.* 19*s.* 8*d.*, and it was the defendant's proportion of this sum that the plaintiff sought to recover. In consequence of the loss of the ship, the plaintiff was of course unable to perform his two sub-contracts with the Bristol Sugar Refining Company, and therefore failed to realise the profit he had contracted for.

Upon these facts the plaintiff's right to recover was denied by the defendants, on the ground that no property in the sugar had passed to him before the loss; and, secondly, that at the time of the loss he had no insurable interest in the sugar itself, and that even if he had an insurable interest in "profits" he was not entitled to declare the loss in respect of that interest upon a policy on "Goods."

The first question, therefore, is whether at the time of the loss the property in the 3,900 bags, or any of them, had passed to and was vested in the plaintiff.

Now none of the three contracts which we have to take into consideration in the present case are for the sale of any specific goods, they are all executory, and no general rule can be more clearly established than that in the case of a contract like that to deliver goods to answer a specific description, and where it is for the seller to ascertain which of his goods he will deliver in execution of his contract, the property which he has in those goods does not pass out of him or vest in the buyer until he has made an appropriation of those specific goods to the latter.

The question at what period of the transaction in such cases the property passes is often one not free from difficulty. The rule is that it is a question of the intention of the parties, to be collected from the language of the contract coupled with the ordinary and usual course of business; and so collected in the present case it seems to me that the intention of the parties was that the seller should in each case select and ship at Hamburg the specific number of bags contracted for on board a ship selected by the buyer, the seller taking for them a clean bill of lading to be afterwards handed to the buyer against payment in London of the amount of the invoice. That this was the mode of delivery agreed upon appears from the terms as well of the two contracts of the 7th as of that of the 12th of January. By them the goods, which the seller should designate as the goods to answer the contract, are to be delivered at Hamburg at a price f. o. b., and of course before any such delivery could have been made the seller must have appropriated to each of his buyers the specific goods which he intended to deliver to him.

Messrs. Drake & Co. had no knowledge of Beloe's sub-contract with the plaintiff, nor had they any intention to make any appropriation or delivery at Hamburg to the plaintiff in respect of that contract; nor had the plaintiff any intention of taking delivery from Drake & Co. of that quantity, nor did he know that the 2,000 bags which he had thus contracted to buy of Beloe were on board; although, as the contract was to deliver on board a Bristol steamer by the end of January, he would probably expect that some Hamburg shipper would ship them by the last steamer of the month. But if Messrs. Drake had, as they had contracted with the plaintiff to do, shipped f. o. b. at Hamburg, and appropriated to him, under his contract of the 12th of January, 2,000 specific bags of sugar, there would have been a delivery to him of those bags in the agreed mode, and they would, I think, have become his property, and insurable by him as his goods; they would have become so by the appropriation to the plaintiff, and the delivery with the plaintiff's assent on board a ship

designated by him, and would of course have been at his risk. So if the like course had been adopted in reference to the 2,000 bags of sugar contracted for by Messrs. Beloe, the property in that sugar would, I think, have passed to Messrs. Beloe, and the sugar would have been at their risk on delivery. I do not, however, see that even in that event the plaintiff would have acquired any property in those 2,000 bags, there being no appropriation, or delivery to, or taking of delivery by him, either by or from Drake or Beloe.

But it is unnecessary to consider that question, because I have come to the conclusion that there never was before the loss any sufficient appropriation and delivery by Drake & Co. either to the plaintiff or to Messrs. Beloe. All that had been done by Messrs. Drake was to select from the large quantity of sugar which they had in Germany 4,000 bags, with the general intention of consigning them to Bristol, and with the further intention of subsequently selecting from them bags such as from their analysis would suit Messrs. Drake's commercial convenience and profit to appropriate to the plaintiff, and such others as would in like manner suit their contract with Beloe. That selection and appropriation they purposely deferred until after the arrival of the bills of lading in London, and at the time they actually made it the loss had occurred, and at the time that they communicated that appropriation to the plaintiff and he assented to it, he and they knew of the loss. At the time of the loss, therefore, the power of selecting which bags should go to the plaintiff and which to Beloe still rested with Messrs. Drake & Co., and no property in any specific bag passed to or vested in either Beloe or the plaintiff, nor could either of them have claimed to have any one bag rather than another.

It is unnecessary in this case to consider whether Messrs. Drake & Co. could have withdrawn any of the bags and substituted others, nor is it necessary to say what might have been the result if all the parties had known of the actual state of facts in reference to the three contracts, and had agreed and been willing that the whole 3,900 bags should, without any further selection, have passed to the plaintiff—for this was not the case. Shipping as they did, Messrs. Drake had only the general intention of putting on board goods in quantity and quality fit to answer both contracts, and leaving the specific appropriation of the particular bags to each, until they should have received the bill of lading. The plaintiff, as I have before observed, knew nothing about Drake's being the shippers of any goods which Beloe intended to appropriate to him, and had no intention of taking delivery of anything more than the 2,000 bags which he had requested Drake's to ship per the *City of Dublin*. Indeed, as Beloe's contract with the plaintiff was at an advanced price, it was absolutely necessary (nothing else having been agreed to by way of substitution) that Messrs. Drake should first appropriate and deliver to Beloe his 2,000 bags before the latter could appropriate and deliver to the plaintiff, and none of the parties contemplated that either the plaintiff or Beloe would each take delivery from Drake's of more than his 2,000 bags. Neither the plaintiff nor Beloe ever assented to any such general appropriation and shipment as was made by Messrs. Drake, and it did not appear that any such mode of carrying out any contracts in similar terms, under similar circumstances, had ever occurred before, so as to supply the want of actual assent, by any assent to be implied from the course of business. I am, of course, now speaking of what happened before the loss. After that event there was an assent by the plaintiff to what had been done, which, if given with a knowledge of all the circumstances, might have operated to pass the property in the whole to him from that time, and for some purposes by relation to the time of shipment. It was also, of course, competent to him to waive the default in delivery at the place agreed on, and, if he pleased, pay for the goods; but then, as this assent and waiver did not take place until after the loss, the case of *Anderson* v. *Morice* (1) is an authority to shew that it was not competent to him by any assent or election at that stage to enable himself to throw

(1) 44 Law J. Rep. C.P. 341; 46 ibid. C.P. 11; Law Rep. 10 C.P. 609; ibid. 1 App Cas. 713.

any liability upon the defendant which did not exist at the time of the loss.

This proposition was also asserted in *Stockdale* v. *Dunlop* (2). In that case there was no contract binding the seller within the Statute of Frauds, and the Court held, that although as between him and the buyer the contract ultimately became capable of being enforced by a subsequent part delivery and acceptance, that circumstance would not operate retrospectively so as to dispense with a memorandum within the statute, and thus by relation charge the insurer.

In the view, therefore, which I have taken of the case upon this point, it is unnecessary to consider the questions which were raised on the argument, whether either the Credit Anstatt or Messrs. Drake had (by taking the bills of lading making the goods deliverable to their order) so reserved the *jus disponendi* as to prevent the passing of the property to the plaintiff until after payment, or whether the short shipment of the 100 bags affected the case; and I express no opinion, therefore, upon either of those points.

But upon the assumption that the decision might be against the plaintiff upon the question whether the goods were his, it was next argued for the plaintiff that, although the property had not passed, he had yet an insurable interest in the sugar. But the same default which seems to me to have prevented the passing of the property seems to me also to have prevented his having had any insurable interest. It was, no doubt, truly said for him that by the terms of the contract and the known course of business any goods duly shipped in accordance with the contract would have been at his risk after shipment. But in that event he would, according to my view, have had not only an insurable interest but also property; and the present case is not like that of *Castle* v. *Playford* (3), in which, although the property had not passed, there was a specific agreement that the goods were to be at the buyer's risk. Neither does the case of *Sparks* v. *Marshall* (4) (which was strongly pressed upon me in the course of Mr. Myburgh's very able argument) assist the plaintiff, because in that case, although the seller had made default in delivering at Portsmouth according to the contract, the plaintiff had before the loss assented to what was an undoubted appropriation to him, and so the property had passed. But, although the plaintiff had not, in my judgment, either property or insurable interest in "goods," he had, I think, an insurable interest in "profits," for he had contracts, binding both Drake and Beloe, by which he was entitled to the delivery of 4,000 bags of sugar at Hamburg, and had sold at a profit, which he was clearly unable to realise for want of the goods. Whether this profit was lost by any of the perils insured against it is unnecessary for me to consider, for it is now well settled that such a loss cannot be recovered under a policy framed like the present merely on goods—*The Royal Exchange Assurance Company* v. *McSwiney* (5) and *Anderson* v. *Morice* (1).

I am unable, therefore, to give the plaintiff judgment.

At first sight this seems to operate harshly on the plaintiff, for he had made a contract to insure, and had paid premium, and may have reasonably believed that he was insured under his floating policy, and so have omitted to effect a fresh insurance. But it is impossible to blame the defendant for this. He has insured at the ordinary market premium such risk coming within his policy as the plaintiff may choose to declare upon it. If the loss is not covered by it the plaintiff will probably have the opportunity of declaring another which is; and suffering, as he no doubt has, the loss of this expected profit, he must consider it as due to Drake's breach of contract in not delivering to him at Hamburg as he had promised to do, and for this the defendant is in no way answerable; and I give judgment for him with costs.

Judgment for defendant.

Solicitors—Hollams, Son & Coward, for plaintiff; Walton, Bubb & Walton, for defendant.

(2) 6 Mee. & W. 224; 9 Law J. Rep. Exch. 83.
(3) 41 Law J. Rep. Exch. 44; Law Rep. 7 Exch. 98.
(4) 2 Bing. N.C. 761; 5 Law J. Rep. C.P. 286.
(5) 14 Q.B. Rep. 634; 19 Law J. Rep. Q.B. 222.

1882. Nov. 10, 11. } ALLOWAY *v.* LE STEERE.

Bankruptcy — Liquidation — Landlord and Tenant — Non-disclaimer by Trustee of Debtor's Tenancy—Set-off—Liability of Trustee for Rent due before Appointment.

W. was tenant from year to year to the defendant of a certain farm and land, in respect of which an offgoing tenant was, upon the expiration of the tenancy, entitled to receive from the landlord all reasonable allowances in respect of any tillages, sowing or cultivation, the benefit whereof should be given up to the defendant. On the 24th of September, 1879, *W. filed his petition for liquidation, and the plaintiff, who was appointed trustee, elected not to disclaim the tenancy, but to till and cultivate the farm. The plaintiff's tenancy expired in September,* 1880, *after notice to quit had been duly given by him, and he was then entitled to receive as offgoing tenant allowances amounting to* 785*l. odd:* —Held, *that the defendant was not entitled to set off against the above amount any sum which had accrued due for rent from the debtor prior to the appointment of the plaintiff as trustee.*

Special Case, stated in an action by the consent of the parties.

On and before the 24th of September, 1879, Thomas Webb was tenant from year to year to the defendant of a farm and land situate in Newdigate, in the county of Surrey. The terms of the said tenancy were not expressly agreed upon or mentioned; but the custom of the county required that the said Thomas Webb should, during the tenancy, till and cultivate the farm and land in a husbandlike manner, according to the custom of the county where the same were situate; and that the defendant, or other the landlord for the time being, should, at the expiration of the tenancy, pay to the tenant for the time being all such reasonable allowances as he, as offgoing tenant, should, according to the said custom, be entitled to receive in respect of any tillages, sowing or cultivation by the tenant, according to the said custom, the benefit whereof should be given up to the defendant, or other the landlord for the time being.

On the 24th of September, 1879, Thomas Webb instituted proceedings under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement or composition, and the plaintiff was duly appointed receiver of the property, of which he took immediate possession.

On the 14th of October, 1879, it was resolved that the affairs of Thomas Webb should be liquidated by arrangement, and the plaintiff was appointed trustee; and thereby the said tenancy became vested in the plaintiff, subject to the right to disclaim, under the provisions of the Bankruptcy Act, 1869.

The plaintiff, with the consent of the committee of inspection, elected not to disclaim the said tenancy, but to remain tenant to the defendant, and to till and cultivate the farm and land.

The plaintiff's tenancy duly expired on the 29th of September, 1880, after notice to quit duly given by him.

During the tenancy the plaintiff bestowed his work and labour in tilling, sowing and cultivating the farm and land in a husbandlike manner, according to the said custom; and at the expiration of the tenancy the benefit thereof was given up by the plaintiff to the defendant, and the plaintiff, as offgoing tenant, was then entitled to have the allowances hereinbefore mentioned. The whole of the work, labour and other farming expenses in respect of which the above allowances were payable, have been provided and paid for by the plaintiff, as such trustee as aforesaid, out of moneys received by him from the estate of Thomas Webb, except 115*l.* 11*s.* 6*d.*, which sum consists of 74*l.* 5*s.* in respect of allowances for tillages and cultivation bestowed by Thomas Webb, and 41*l.* 6*s.* 6*d.* in respect of the growth of underwoods during the tenancy of the said Thomas Webb.

The sum which the plaintiff was entitled to receive, in pursuance of the custom above-mentioned, amounted to 785*l.* 1*s.* 2*d.*, which included the value of certain fixtures and other things then being upon the said farm, which formerly belonged to the said Thomas Webb, and had become vested in the plaintiff as aforesaid.

On and between the 28th of January, 1880, and the 27th of September, 1880,

the plaintiff paid money for the defendant at his request, and the defendant became indebted to the plaintiff for the sum of 10*l.* 13*s.* 9*d.*

The plaintiff, by his statement of claim, claimed the said sums of 785*l.* 1*s.* 2*d.*, and 10*l.* 13*s.* 9*d.* The defendant admitted the debt of 10*l.* 13*s.* 9*d.*, and that the said valuation was binding on him, but paid into Court the sum of 348*l.* 4*s.* 11*d.*, and said that that sum was sufficient to satisfy the plaintiff's claim when reduced by the set-off or counter-claim hereinafter appearing.

The said Thomas Webb, at the time of his liquidation, was indebted to the defendant in the sum of 300*l.* for two years' rent in arrear of the said farm and land, which accrued due as to one year's rent on the 27th of September, 1878, and as to the other year's rent on the 29th of September, 1879.

Rent to the amount of 150*l.*, being one year's rent (which accrued due on the 29th of September, 1880) in respect of the plaintiff's tenancy of the said farm and land, has accrued due since the liquidation, and the plaintiff has always been willing to set off such sum against his claim.

The plaintiff has in his hands, after certain payments made by him, the sum of 1,020*l.* (including the sum of 348*l.* 4*s.* 11*d.*) as against which he is liable to his solicitor for the costs of the liquidation and of this action; and he is entitled to certain charges and remuneration as receiver and as trustee; and he may, in the event of being unsuccessful in the further prosecution of this action, be liable for the defendant's costs. So far as can be judged, the said sum of 1,020*l.* is sufficient to indemnify him against all liabilities undertaken by him in respect of the said tenancy, and otherwise in respect of the estate of the debtor, or his expenses as trustee thereof. Apart from the matters hereinbefore mentioned, the plaintiff has no interest in this action other than his present liability to pay costs therein.

The question was, whether the defendant was, under above circumstances, entitled to set off against the claim of the plaintiff the said rent, amounting to 450*l.*, or any and what part thereof (1).

R. Vaughan Williams, for the defendant.—The question here is as to the right of set-off, and if it were not for the fact that the contract was a contract of lease, there could really be no doubt on the subject, for since the passing of the Bankruptcy Act, 1869, which has so enlarged the right of proof, all provable debts can be set off (see 32 & 33 Vict. c. 71. s. 31). The sole question here is as to rent accrued due before the trustee succeeded, as to which it is contended on behalf of the defendant that the right to set off exists. The rent due before and after the trustee took to the farm arose under one contract of tenancy, and both are claimable under the liquidation. Supposing the trustee had no estate at all of his own, and he did not pay the rent which accrued due after the bankruptcy, would there be a right of proof by the landlord in respect of such a debt?—*Ex parte Davis; in re Sneezum* (2) shews that there would. These are "mutual dealings" within the meaning of section 39 of the Bankruptcy Act, 1869. If the trustee had elected to disclaim, the tenancy would have been determined as from the date of the adjudication, and the landlord would have been entitled to set off against the sum claimed for allowances any arrears of rent then due. The trustee has no beneficial interest in the action; he is entitled in a twofold character—first, as assignee of the estate, and secondly, by virtue of the contract. In dealing with the question of set-off the Court will always regard an equitable set-off, and such set-off is not allowed or disallowed on the bare egal appearance of the matter.

He cited *Agra & Masterman's Bank* v. *Leighton* (3) and *Baily* v. *Johnson* (4).

Grantham, Q.C. (*Muir* with him), for the plaintiff.—The cases that have been cited have no bearing. In *Titterton* v.

(1) It was admitted during the argument that the only question was as to the sum of 150*l.*, the defendant having, as he was entitled to do, distrained for one year's rent, and the plaintiff admitting his liability for rent to the amount of 150*l.*, being the year's rent which accrued due on the 29th of September, 1880.

(2) 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 463.

(3) 36 Law J. Rep. Exch. 33; Law Rep. 2 Exch. 56.

(4) 40 Law J. Rep. Exch. 189; Law Rep. 6 Exch. 277; on app. 41 Law J. Rep. Exch. 211; Law Rep. 7 Exch. 263.

Cooper (5) the Court of Appeal recently decided that the liability attaching to a trustee, under circumstances such as these, is that of an ordinary assignee, and that he could not be made liable for any claim for which an ordinary assignee would not be liable. A trustee, therefore, cannot be made liable for the rent which has accrued due before his appointment. *Sneezum's Case* (2) was not an action upon the covenants of a lease, but upon an executory mercantile contract, and is expressly distinguished on that ground by Brett, L.J., in *Titterton* v. *Cooper* (5).

They also cited *The Sankey Brook Coal Company* v. *Marsh* (6) and *Ex parte Morier* (7).

Williams replied.

DENMAN, J.—In this case I am of opinion, notwithstanding the ingenious argument of Mr. Williams, that the defendant has failed to make out any case. The Special Case states that in 1879 Webb was tenant from year to year of a certain farm and land, and as such tenant was required by the custom of the county to till and cultivate the farm in a husbandlike manner, the landlord, upon the expiration of the tenancy, paying all such reasonable allowances as an offgoing tenant was entitled to receive for tillages, sowing or cultivation by him, the benefit whereof should be given up to the landlord. On the 24th of September, 1879, Webb instituted liquidation proceedings under the Bankruptcy Act, 1869, and the plaintiff was shortly afterwards appointed a trustee, the tenancy having thereby become vested in him. The plaintiff elected not to disclaim the tenancy in question, but continued as tenant to the defendant up till the 29th of September, 1880, when he was entitled as offgoing tenant to receive from the landlord a sum of 785*l.* odd in respect of the matters to which I have already alluded. The defendant claims, however, the right to deduct from that amount, by way of set-off or counter-claim, the sum of 450*l.* for rent, part of which, namely 300*l.*, accrued due prior to the liquidation, while the remaining 150*l.* has accrued due since the liquidation. No question is raised before us with reference to the 150*l.* which the plaintiff has always been willing to set off against his claim; the only question is as to whether the rent due before the liquidation can be set off against the trustee's claim, either under the provisions of any statute or by reason of any equitable principle applicable to such a case as the present. Now so far as I am able to discover there is certainly no statute which supports the defendant's claim; but Mr. Williams has vigorously contended that according to the decision in *Ex parte Sneezum* (2) there ought to be such a set-off, though I fail altogether to see the analogy between that case and the present. The question raised in *Sneezum's Case* (2) was as to the right to prove, which is altogether different to a set-off. The landlord may, for aught I know, be perfectly entitled to prove against the debtor's estate for rent due; but that fact alone does not entitle him to support a right to set off under such circumstances as these; nor has any authority been cited to support such a proposition. There is no privity of estate, and the sum sought to be set off against the trustee's claim was due for rent before he entered upon the farm. There is no such one contract or mutuality as to make one at all correlative with the other. It was for Mr. Williams to make out an affirmative case, which he has wholly failed to do. I ought to add that had the question before us at all depended on whether the trustee was really acting for the benefit of the estate or his own benefit I should be with Mr. Williams, since it is clear from what is stated that the plaintiff has no interest in the present action.

MANISTY, J.—I have arrived at the same conclusion, and when you look at the facts found in the Special Case, and consider the relative position of the parties I think there is no doubt at all about the matter. The facts are shortly as follows:—Webb was a yearly tenant at the rent of 150*l.*, and was under covenants to cultivate the farm according to the custom of the county. Webb became bankrupt on

(5) 51 Law J. Rep. Q.B. 472; Law Rep. 9 Q.B. D. 473.

(6) 40 Law J. Rep. Exch. 125; Law Rep. 6 Exch. 185.

(7) 49 Law J. Rep. Bankr. 9; Law Rep. 12 Ch. D. 491.

the 24th of September, 1879, and the plaintiff was appointed his trustee. The first question to be considered is, what were the position, rights and liabilities of the plaintiff as soon as he was appointed a trustee? The bankruptcy put an end to the tenancy between the landlord and Webb, and two courses were then open to the trustee: he had the option either to disclaim or not, and in the latter case the estate vested in him by virtue of the Bankruptcy Act, 1869. At that time the tenancy was not determined, save so far as it was determined by Webb, and there was a breach of one of the conditions as to payment of rent, for which breach the landlord must either prove against the estate or exercise the rights of distress. He did distrain, and for aught I know may also have exercised the right of proof against the estate. But what was the relative position of the trustee and the landlord—for when this is determined all difficulty vanishes? Mr. Williams candidly admitted that if the trustee was personally liable for the performance of covenants after his appointment, there was a formidable difficulty in his way; and I quite agree with him. That such a liability does exist has been decided very recently in the case of *Titterton* v. *Cooper* (5); the whole matter was there gone into very fully, and the conclusion arrived at by the Court of Appeal was that a trustee who does not disclaim is in the position of an ordinary assignee. I cannot do better than read a few lines from the judgment of Lord Justice Cotton, which accords with the opinion of the other Judges. "The trustee is liable," says the Lord Justice, "not by reason of any express provision in the Bankruptcy Act, 1869, but because the statute makes him an assignee, and the same liability attaches to him as to an ordinary assignee. In my opinion he cannot be liable for any claim for which an ordinary assignee would not be liable." That is settled law, as laid down by the Court of Appeal. Now supposing that in this case instead of bankruptcy there had been an assignment, the assignee would be liable for breaches, and would be entitled to profits due in his time just as an ordinary assignee would. If there had been such an assignment, on what principle could it be contended that the landlord had an equitable right of set-off for breaches of covenant committed prior to such assignment? Such a right would be contrary to authority—and what principle can be alleged for its existence? *Sneezum's Case* (2) has really no bearing upon the present question; that case was noted in the judgment delivered in *Titterton* v. *Cooper* (5), and Lord Justice Brett said with reference to it—"It was not an action upon the covenants of a lease, but it related to an executory mercantile contract. The trustees performed it for some time, but they afterwards ceased to fulfil it. The question then arose whether they could be personally liable upon the contract; and that depended on the further question whether they had personally taken and adopted it. I understand that case to have gone upon the principle that the trustees took the contract as assignees, and that they could not be sued by Messrs. Davis, with whom the insolvent debtor originally contracted, for there was no privity of contract between them; whereas the assignee of a lease is personally liable to the lessor, there being privity of estate between them; and by force of the Bankruptcy Act, 1869, the trustee is assignee of the lease belonging to the bankrupt." That being so there seems to be no difficulty in answering the question put to us in the negative.

Judgment for plaintiff.

Solicitors—Morrisons, agents for G. C. Morrison, Reigate, for plaintiff; Duncan, Warren & Gardner, agents for Hart, Hart & Marten, Dorking, for defendant.

[IN THE COURT OF APPEAL.]

1882. July 4. } EATON *v.* WESTERN.*

Master and Servant—Outdoor Apprentice—Change of Firm—"Successors in Business"—Change of Locality of Business—Unreasonable Command.

A. was bound apprentice to a firm of engineers and their successors in business, and his father covenanted to provide him

* *Coram* Jessel, M.R.; Sir J. Hannen, and Lindley, L.J.

Eaton v. *Western*, *App.*

with board, lodging and other necessaries. At the date of the articles the firm carried on their business in London, where A.'s father also resided. The articles contained no stipulation as to where the business should be carried on. Before the expiration of the apprenticeship term the firm was dissolved and split into two firms, one carrying on business in London and the other at Derby. The partners at Derby, where the manufacturing part of the old business was being carried on, required A. to remove to Derby:—Held, *that the direction to A. to go to Derby was an unreasonable command, which he was not bound to obey.* Held, *also, that as the business of the old firm was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm, or entitled to the services of the apprentice.*

Semble,—*In the absence of an express stipulation in articles of apprenticeship as to the place where the apprentice is to attend for the purpose of being taught his trade, there is an implied stipulation that the contract is to be performed at the place where the master is carrying on the business at the date of the articles, or within a reasonable distance therefrom.*

Royce *v.* Charlton (Law Rep. 8 Q.B.D. 1) *overruled.*

This was an appeal from the decision of a Divisional Court on a Special Case stated for the opinion of the Court under these circumstances.

By articles of apprenticeship dated the 12th of January, 1877, and made between W. Eaton (the father), of Lambeth, and W. Eaton (the son), of the one part, and C. R. Western, J. E. Carfrae, and M. R. Western, of Victoria Works, Belvedere Road, Lambeth, mechanical engineers, copartners, of the other part, W. Eaton (the son), with the consent of his father, was bound apprentice to the firm, "and to the successor or successors of them, or to such other person or persons as might from time to time carry on the business then carried on by them, either in copartnership with or in succession to them or any of them," to learn the business of an engineer, for six years, from the 8th of August, 1876. The deed contained usual covenants—by the apprentice, to serve his masters faithfully and obey their lawful commands, and not to absent himself from their service unlawfully; by the father, to provide his son during the term with suitable board, lodging, washing and clothes, and all other necessaries; and by the masters, to teach the apprentice the business in such manner as was usual in such cases.

There was no stipulation in the deed as to carrying on the business at any particular place.

By deed dated the 30th of June, 1879, it was agreed that the partnership between C. R. Western, J. E. Carfrae, and M. R. Western should be dissolved, and that two firms should be formed, namely, one at Derby, to consist of C. R. Western and F. J. Odling; and the other in London, to consist of J. E. Carfrae and M. R. Western; and it was also agreed that the goodwill of the old firm should belong equally to the Derby firm and the London firm.

On the 18th of October, 1879, the members of the old firm gave notice to their apprentices that on and after the 24th of October the factory would be removed to the new works at Derby, and all apprentices were to present themselves at the works at Derby on that day. Every apprentice was to be allowed a free railway ticket and a certain sum for expenses of removal, and 2*s.* per week extra wages during the remainder of his apprenticeship. Any apprentice who did not wish to remove to Derby might have his indentures cancelled, in which case the firm would give him four weeks' wages as a present.

W. Eaton (the son) refused to go to Derby, and thereupon the firm refused to continue him as their apprentice.

The father and son then brought this action in the Southwark County Court, claiming 50*l.* damages for breach of the covenants in the deed of apprenticeship.

At the trial in the County Court it was proved that the manufacturing part of the business of the old firm was carried on by the Derby firm, and that the business carried on by the London firm was one of repairs and of agency for the Derby firm, and judgment was given for the plaintiffs, with 50*l.* damages.

On the 29th of March, 1882, the case

came before Mathew, J., and Cave, J., sitting as a Divisional Court, by way of appeal from the County Court, when their lordships, considering themselves bound by the decision in *Royce* v. *Charlton* (1), reversed the decision of the County Court Judge, but gave leave to appeal.

Ribton, for the appellants.—First, in the absence of an express stipulation as to the place at which the apprentice is to attend for the purpose of being taught his trade, it is an unreasonable command to require him to attend more than a hundred miles from his father's home. It might be different if the apprentice was boarded and lodged in his master's house—*Brook* v. *Dawson* (2). This Court is not bound by the decision in *Royce* v. *Charlton* (1), which, it is submitted, is not sound law. Secondly, the plaintiffs are no longer bound by their covenants—*Bailey* v. *De Crespigny* (3) and *Newby* v. *Sharpe* (4); because the Derby firm are not the successors of the original firm, nor is the business now carried on at Derby the same as the original business, and an apprentice has a right to be taught the business in its entirety.

Verney (*Charles, Q.C.*, with him), for the respondents.—On the first point *Royce* v. *Charlton* (1) is conclusive, and *Coventry* v. *Windal* (5) also supports the same view. As to the second point, the apprentice was bound to serve not only the original firm, but their successors, and the terms of the deed are sufficient to cover the change that has taken place in the firm. The business is not really divided, for all the manufacturing part, which, practically, is what the apprentice has to be taught, is carried on at Derby, and it is reasonable that he should be required to attend wherever the factory is.

JESSEL, M.R.—In form this is an appeal from the judgment of a Divisional Court, but in fact, from the decision in *Royce* v. *Charlton* (1). The Judges in the Court below felt themselves bound by the decision in that case, but gave leave for this appeal in order that the decision in that case might be reviewed. I must say I think the case of *Royce* v. *Charlton* (1) was not rightly decided; and we decide this appeal, on the first point, in favour of the appellants with the understanding that our decision overrules that case. In the present case the masters carried on their business at Lambeth. The apprentice and his father also lived at Lambeth, and the father covenanted that he would at all times during the term of the apprenticeship provide his son with suitable board, lodging, washing and clothes, and all other necessaries. In my opinion the reasonable construction of that covenant is that the father shall keep and maintain his son within a reasonable distance of Lambeth, where he lives. Then the masters remove to Derby. Is it reasonable to expect that the father should find his son lodging and board at Derby? I think not. Therefore, in my opinion, it was not a reasonable command of the masters that the apprentice should follow them to Derby.

But then there is another point in the case. The apprentice is to serve "the firm," which, by the deed of apprenticeship, was defined to be the defendants, and the successor or successors of them, and such other persons as might from time to time carry on the business then carried on by them either in co-partnership with or in succession to them or any of them. Afterwards the original firm was dissolved and split into two firms, one carrying on business at Derby and the other in London—the manufacturing part of the business being carried on by the Derby firm and the repairing and agency part of the business by the London firm. Neither firm, therefore, can be said to carry on the original business which was carried on at Lambeth at the date of the apprenticeship deed. I think, therefore, that this point also must be determined in favour of the appellants.

SIR J. HANNEN.—I am of the same opinion. The question is whether it was a reasonable command that the apprentice should go to Derby. The answer depends entirely on the circumstances of the case, and in this case I think it was not a

(1) Law Rep. 8 Q.B. D. 1.
(2) 20 Law Times, 611.
(3) 38 Law J. Rep. Q.B. 98; Law Rep. 4 Q.B. 180.
(4) 47 Law J. Rep. Chanc. 617; Law Rep. 8 Ch. D. 39.
(5) 1 Brownl. 67.

reasonable command. There is a broad distinction between this case and that of an apprentice boarded and lodged in his master's house. In the latter case the master would probably be entitled to take the apprentice with him if he removed to another place, and the apprentice would have no right to refuse to go. But here the apprentice was not in his master's house, but was provided with board and lodging by his father. I think it was unreasonable to call upon him to go and live in a distant part of England under entirely different circumstances. I also agree that the business of the firm who gave him the order was not the same business as that to which he had been apprenticed. He was to be taught the business in its entirety, and was entitled to be educated in the business of buying and selling as well as that of manufacturing. But the firm has now been split into two, neither of which carries on the same business as the original firm. It appears to me, therefore, that neither of the new firms represents the original firm or is entitled to require the services of the apprentice.

LINDLEY, L.J.—I am of the same opinion. Neither of the two firms into which the original firm has been split is, properly speaking, the successor of the original firm. But the more important point is whether the defendants have the right to order the apprentice to go to Derby. The apprentice here is not boarded and lodged by his master, as in *Coventry* v. *Windal* (5), but lives with his father. I cannot say that it was a reasonable and lawful command that he should live more than a hundred miles from his father's place of residence. I do not say that a removal of the business to a small distance would be material, but when the removal necessitates a change in the place of residence of the apprentice, I think that is contrary to the original intention of the parties, and cannot be enforced against the apprentice.

Solicitors—Bordman & Co., for appellants; Western & Son, for respondents.

[IN THE COURT OF APPEAL.]

1882. June 19. } QUILTER *v.* MAPLESON.*

Landlord and Tenant—Breach of Covenant to Insure—Relief against Forfeiture—The Conveyancing and Law of Property Act, 1881, *ss.* 14 *and* 71—*Order LVIII. rules* 2 *and* 5—*Jurisdiction of Court of Appeal.*

The 14*th section of the Conveyancing and Law of Property Act*, 1881, *is retrospective in its operation both as to the rights of parties under existing leases and as to breaches committed before the Act came into operation, and also applies to proceedings pending when the Act came into operation where the landlord has not re-entered.*

Under Order LVIII. rules 2 *and* 5, *the Court of Appeal, as a Court of rehearing, has jurisdiction to make such order as ought to be made according to the law as it stands at the hearing of the appeal, even although the judgment of the Court below was correct according to the law as it then stood.*

This was an appeal from a decision of Lord Coleridge, C.J., in an action by a landlord against a tenant to recover possession of the demised premises, on the ground of the breach of the tenant's covenants to keep the premises insured at all times from loss by fire for 14,000*l.* in the names of the persons mentioned in the covenant.

The policies had lapsed on the 25th of March, 1880, while the tenant was abroad, but immediately on his return new policies for the full amount were effected on the 14th of May, 1880. In the meantime the plaintiff had commenced this action to recover possession under the proviso for re-entry under the lease.

The tenant, by his statement of defence, claimed relief under 22 & 23 Vict. c. 35. s. 4, alleging that the breach of the covenant to insure had been committed without fraud or gross negligence.

On the 4th of July, 1881, the action was tried before Lord Coleridge, C.J., who gave judgment for the plaintiff, on the ground of negligence, but stayed execution,

* *Coram* Jessel, M.R.; Lindley, L.J., and Bowen, L.J.

pending an appeal, so that the plaintiff never obtained possession.

The notice of appeal was given on the 4th of August, 1881; and the Conveyancing and Law of Property Act, 1881, came into operation on the 1st of January, 1882.

The Solicitor-General (*Sir F. Herschell*), *W. G. Harrison*, *Q.C.*, and *Harmsworth*, for the appellant.—The defendant has not been guilty of negligence within the Act 22 & 23 Vict. c. 35. But even if he has, he is now entitled to relief under the Act of 1881, as the landlord has not re-entered.

Webster, *Q.C.*, and *H. D. Greene*, for the respondent.—Although the Act of 1881 is retrospective for some purposes it does not apply to breaches before the Act. Section 71 expressly saves pending proceedings from the operation of the Act. Further, the Act of 1881 had not come into operation when the judgment of the Court below was pronounced, and the Court of Appeal can only make such an order as ought to have been made by the Court below.

No reply was called for.

JESSEL, M.R.—I am of opinion that the Act of 1881 applies. The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively unless it is clear that such was the intention of the Legislature. Now what was the object of this enactment? It was to give a lessee a right to relief against forfeiture which he did not previously possess. The 9th sub-section of section 14 expressly provides that the section shall apply to existing leases, so that the 1st sub-section clearly deprives a landlord of a right which he would have had to claim a forfeiture of an existing lease under the terms of a proviso contained in it. The section, therefore, is manifestly retrospective to some extent, as it alters the rights of the parties under an existing contract. That being so, does it apply to a pending action? Now, in the first place, does the section apply to breaches committed before it came into operation? I am of opinion that it does. It would be strange if the contract were altered as to future breaches only and not as to past breaches, and if we look at the 71st section of the Act the intention of the Legislature is reasonably clear. Then, does the 14th section apply to pending proceedings? I think that it does. But it is important to observe that the 2nd sub-section only applies where the landlord has not re-entered. On an ejectment under the Common Law Procedure Act, 1852, s. 210, a tenant could obtain relief against forfeiture for non-payment of rent at any time within six months after execution (1). No such period is allowed by the Act of 1881, and the tenant must proceed under section 14, sub-section 2, of that Act before the landlord has re-entered. But it was urged that this sub-section cannot apply to pending proceedings, because it refers to the conduct of the parties under the previous provisions, which can only relate to matters occurring after the Act came into operation. I think, however, that that sub-section must be read as referring to the conduct of the parties under the previous provisions when and so far as those provisions are applicable. I am of opinion, therefore, that the 2nd sub-section applies to pending proceedings, and that we have jurisdiction under it. But it is said that the fact of this being an appeal prevents our having jurisdiction. Now Order LVIII. rule 2, provides that "All appeals to the Court of Appeal shall be by way of rehearing." On an appeal, strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance. Then the 5th rule says, "The Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." I am of opinion, therefore, that this Court has jurisdiction to make such an order as ought to be made according to the present state of the law, and that the defendant is entitled to the relief he claims.

LINDLEY, L.J.—I am also of opinion

(1) See sections 211 and 212, and the Common Law Procedure Act, 1860, s. 1.

that the Act of 1881 applies. The action was brought by the landlord on the ground of breaches committed before the Act, and he obtained judgment before the Act came into operation, but execution was stayed, so that he has not obtained possession. The original action, then, is not at an end; and when we look at the 14th section we find that, so far as language goes, the 2nd sub-section applies to the case: because so long as the tenant has not been turned out of possession he is within the terms of the enactment, for the lessor is "proceeding to enforce" his right of re-entry. The enactment, then, being in terms retrospective must be construed according to its terms. It has been urged that though the 14th section applies to leases made before the Act, it does not apply to breaches committed before the Act. No doubt there is no express declaration that it shall apply to them, but on the fair construction of the enactment it appears to me that it applies to breaches before the Act and to pending proceedings. I am of opinion, therefore, that, putting the provisions of the Act together, they justify the conclusion that on the true construction the 14th section of the Act is retrospective, and applies to breaches whenever committed, so long as the landlord has not obtained possession.

BOWEN, L.J.—I am of the same opinion. The first question is, Whether the defendant's application for relief is too late. Under section 14 (sub-section 2) of the Act of 1881 the tenant may apply for relief until the landlord has re-entered. Now, as long as execution is stayed, re-entry is suspended. It was urged that this sub-section does not apply to an action pending when the Act came into operation. No doubt, as a general rule, a statute does not affect pending proceedings; but that rule is only a guide where the intention of the Legislature is obscure, it does not modify the clear words of the statute. Many clauses of this Act are clearly retrospective, which lessens the presumption against any particular clause not being retrospective. I think that sub-section 2 of section 14 has a retrospective force by virtue of sub-section 9, and applies to pending proceedings. Why should it not be so applicable? It is expressly made applicable to leases executed before the Act, and therefore affects rights existing when the Act came into operation: why, then, should it be restricted to breaches committed after the Act came into operation?

In my opinion the wider construction is more consistent with the principle of the statute, and I hold that it applies to proceedings pending when the Act came into operation. The only other question is, Whether this Court can give relief where a judgment has been obtained by the landlord before the Act came into operation. I think we should be misreading the Judicature Rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of Appeal to do complete justice. If the law is altered pending an appeal, it seems to me to be pressing the rules of procedure too far to say that the Court of Appeal cannot decide according to the law existing at the time when the appeal is heard.

Relief was accordingly granted against the forfeiture on the terms of the defendant effecting an insurance in accordance with the covenant, and paying the plaintiff the amount he had paid for premiums, with interest, and the costs of the action and appeal.

Solicitors—Last & Sons, for plaintiff; J. & R. Gole, for defendant.

1882. Nov. 23.

LAMB *v.* MUNSTER.

Practice—Interrogatories—Libel—Objection to Answer—"Might" tend to criminate.

In an action for libel the defendant denied publication. To interrogatories asking whether he did not publish the alleged libel, the defendant answered: "I decline to answer all the said interrogatories, upon the ground that my answer to

Lamb v. *Munster.*

them might tend to criminate me." Upon a summons for a further and better answer, —Held, *that the answer was sufficient, and that the defendant was not bound to say that he believed that his answer would criminate him.*

This was an appeal from an order of Williams, J., reversing an order of a Master for a further and better answer to certain interrogatories.

The action was brought for a libel alleged to have been published by the defendant. The statement of defence denied publication, and justified. The plaintiff administered interrogatories to the defendant, asking him whether he did not publish the alleged libel. The defendant answered: "I decline to answer all the said interrogatories, upon the ground that my answer to them might tend to criminate me."

Gore, for the plaintiff.—It is not enough for the defendant to say that the answer might tend to criminate him. He must say that he believes that it will do so. *Scott* v. *Miller* (1) is a distinct authority for that proposition. An answer to any interrogatory might tend to criminate the person interrogated; the question is whether he is prepared to pledge his belief that it will. He cited *Fisher* v. *Owen* (2).

[FIELD, J.—In *Allhusen* v. *Labouchere* (3) Lord Justice Brett says, in speaking of *Fisher* v. *Owen* (2), "I take that decision to be that, where interrogatories are relevant, although the answer to them might criminate the person answering—that is to say, might make him liable to a criminal indictment—they must, nevertheless, be allowed, and he must himself elect whether he will answer them or not."]

Woollett, for the defendant.—The contention on the other side would do away with the privilege altogether. To swear that an answer will criminate is equivalent to giving the answer.

He was stopped by the Court.

(1) 28 Law J. Rep. Chanc. 584.
(2) 47 Law J. Rep. Chanc. 681; Law Rep. 8 Ch. D. 645.
(3) 47 Law J. Rep. Chanc. 819; Law Rep. 3 Q.B. D. 654.

FIELD, J.—We have come to the conclusion that my brother Williams's decision is right, and that this answer is sufficient. It is a principle of the law of this country that no man shall be bound to criminate himself—that is, to bring himself into peril of a criminal charge. Take the case of a witness in the box, who says, "I decline to answer that question, as the answer may tend to criminate me." Mr. Gore says that that will not do. I think that, in such a case, it becomes the duty of the Judge to look at all the circumstances and to see whether there is a reasonable probability of any such peril arising. I do not think that it matters whether the witness says It may, or It might, or It would, or I believe that it would. I think that the circumstances are to be looked to. I should not like to do anything that might have a tendency to infringe the rule of law that no man is bound to criminate himself.

Now, what are the circumstances of the present case? It seems to me to be about as clear a case of a man being asked to criminate himself as could well be imagined. If a vindictive man got affirmative answers to such questions as these he might go before a grand jury and indict the person who had answered them. These interrogatories, if answered, have a direct tendency to criminate the defendant by eliciting from him an admission of the publication of what is alleged to be a libel.

But it is said, although that may be so in fact, this answer is not sufficient in form; in order to claim the privilege the defendant must say, not that the answers might, but that they would, tend to criminate him. I do not find that any of the authorities lay down a rule which supports that contention.

The leading case on this subject now is *Fisher* v. *Owen* (2), which decided that such an interrogatory could be put. There are many persons, Lord Justice Brett amongst the number—*Allhusen* v. *Labouchere* (3)—who doubt whether such interrogatories should be allowed, and who think that there is great danger in introducing into litigation arising from the daily occurrences of life the equity principle on these matters. We all know that the fact of the answer being declined is

held out as an admission when the matter comes before a jury. That, however, as Lord Justice Brett says, is past controversy; but that is all that *Fisher* v. *Owen* (2) decides. Nor do I know of any other case that supports the plaintiff's contention. I think that in the judgments in *Fisher* v. *Owen* (2) each of the Judges, in suggesting that the defendant has the option of declining to answer, uses a different form of words to describe the grounds upon which she might decline to answer, while the head-note to the report (4) does not follow the exact form of words used by any of the Judges, but uses the very words of the answer that is objected to in this case, "on the ground that his answer might tend to criminate him."

STEPHEN, J.—I am of the same opinion, and I agree with every word of the judgment of my brother Field. It seems to me that in every case of this kind the existence of the alleged peril is the main question to be considered, and that it would be a great pity to lay down a particular form of words for declining to answer interrogatories having a tendency to criminate. I think the privilege of the witness or party interrogated extends to all answers that might have a tendency to subject him to criminal proceedings. The rule is laid down as follows in my *Digest of the Law of Evidence* (p. 117):—"No one is bound to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the witness to any criminal charge, or to any penalty or forfeiture which the Judge regards as reasonably likely to be preferred or sued for."

That is what I understand by a person not being bound to criminate himself. It is not that a man must have been guilty of an offence to claim this protection, and so must practically say "I am guilty of this offence, but I am not going to give evidence against myself." The rule is not so narrow as that. The extent of the privilege seems to me to be that the interrogated person is entitled to say, "If you are going to bring a criminal charge against me, or are seeking for evidence upon which you might bring a criminal charge, then I will not help you; you must do what you can." All that the Judge has to be satisfied of is that that is the objection, and that it is made *bona fide*. In the case of *The Queen* v. *Boyes* (5), one of the persons charged in an information for bribery to have been bribed by the defendant was called as a witness at the trial, and, on his declining to answer any questions with respect to the alleged bribery, the counsel for the Crown handed him a pardon under the Great Seal. It was there held that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, did not justify the witness in still declining to answer, and that the Judge would have to consider, from the circumstances of the case and the nature of the evidence which the witness was called to give, whether there was reasonable ground to apprehend real danger to the witness from his being compelled to answer. Cockburn, C.J., says:—"We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice."

In the present case the defendant says that to answer this interrogatory might have a tendency to endanger him; and it seems to me to be a very possible danger. I certainly cannot say that it is wholly imaginary. A vindictive person might, on these questions being answered in the affirmative, take criminal proceedings. I think that the defendant might well have said that the answers to these interrogatories would tend to criminate him. I think, however, that the answer is sufficient as it stands, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors—Palmer & Bull, for plaintiff, agents for Lamb & Evett, Brighton; Brewer, for defendant.

(4) In the Law Reports.

(5) 1 B. & S. 311.

1882. Dec. 5. BELL AND ANOTHER *v.* STOCKER.

Husband and Wife—Debt of Wife contracted before Marriage—Action against Husband after Death of Wife—Persons married between the 30th of July, 1874, and the 1st of January, 1883—Married Women's Property Act (1870) *Amendment Act*, 1874 (37 & 38 *Vict. c.* 50), *ss.* 1 *and* 2.

A man married between the passing of the Married Women's Property Act (1870) *Amendment Act*, 1874 (30*th of July*, 1874), *and the coming into operation of the Married Women's Property Act*, 1882 (1*st of January*, 1883), *was sued after the death of his wife, merely as her husband, for a debt contracted by her before marriage*:—Held (*on demurrer*), *that the Act of* 1874 *did not make the action maintainable, although the defendant did not plead under section* 2 *that he had not received any property with his wife.*

The defendant demurred to the first four paragraphs of the plaintiff's statement of claim, and the claim founded thereon, the statement of claim being, so far as material, as follows:

1. The plaintiffs are drapers.

2. The defendant is the husband (1) of the late Sarah Maria Stocker, to whom he was married on the 30th of June, 1879.

3. Previously to the said marriage the plaintiffs sold and delivered goods to the said Sarah Maria Stocker, and at her request did work and provided materials to the amount of 35*l.* 11*s.* 11*d.*

4. Full particulars of the said goods . . . have been delivered.

7. Payment of the said sum has been demanded of the defendant.

9. No part of the said sum has been paid.

The plaintiffs claim that sum.

(1) The statement of claim originally said also "and executor *de son tort*"; but the defendant, on the ground that by the writ he was not sued in any representative capacity, obtained an order that the statement of claim should be amended by striking out those words.

Murphy, Q.C. (*Graham* with him), for the defendant.—The defendant is not liable, his wife being dead, for debts contracted by her before marriage. In repealing, as to marriages thereafter, so much of the Married Women's Property Act (1870) (2), as enacted that a husband should not be liable for the debts of his wife contracted before marriage, the Married Women's Property Act (1870) Amendment Act, 1874 (3), enacts only that a husband and wife thereafter married may be "jointly" sued for any such debt.

T. W. Chitty, for the plaintiffs.—The Act of 1874 (3) creates a joint liability of the husband and wife, which survives against the husband. The word "jointly"

(2) 33 & 34 Vict. c. 93. s. 12: "A husband shall not, by reason of any marriage which shall take place" hereafter, "be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and" her separate property "shall be liable to satisfy such debts as if she had continued unmarried."

(3) 37 & 38 Vict. c. 50 (passed 30th of July, 1874), after reciting "It is not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment," enacted:

Section 1: "So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this Act, and a husband and wife married after the passing of this Act may be jointly sued for any such debt."

Section 2: "The husband shall in such action, and in any action brought for damages sustained by reason of any tort committed by . . . or . . . breach of any contract made by the wife before marriage, be liable for the debt or damages respectively, to the extent only of the assets hereinafter specified, and in addition to any other . . . pleas may plead that he is not liable . . . in respect of any such assets, . . . or, confessing his liability to some amount, that he is not liable beyond what he so confesses, and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned."

45 & 46 Vict. c. 75 (the Married Women's Property Act, 1882), commencing, by section 25, the 1st of January, 1883, repeals, by section 22, the Acts of 1870 and 1874, subject to a saving of any right or liability accrued to or against any husband or wife before the commencement of the Act to sue or be sued under the repealed Acts.

in section 1 was introduced merely by way of distinguishing the new liability from the several liability of the wife, which already existed under the Act of 1870 (2), and was enforced in the recent case of *Williams* v. *Mercier* (4); and if any difficulty is occasioned by that word it is removed by section 2, which has no such word, and contains a substantive enactment sufficient for the maintenance of this action. No doubt, the old law, apart from statute, as laid down in *Heard* v. *Stamford* (5), did not, either at law or in equity, charge a husband with the debts of his wife after her death; but the reason was, as pointed out in that case, that during the life of the wife the husband was liable to all her debts, even if he did not get a shilling with her. And the force of the old reason is destroyed by the Act of 1874 (3), which, while repealing the provision of the Married Women's Property Act, 1870, giving an unjust immunity to the husband, makes the husband, even during the life of his wife, liable for her debts only to the extent of assets received from the wife, and specified in the Act. The fact of there being such assets need not be alleged in the statement of claim; it is, according to the express provision of the Act of 1874, section 2 (3), applied in *Matthews* v. *Whittle* (6), for the husband to plead the contrary. If there is anything at all in the objection that the husband is sued alone, the objection is mere matter of form, and cannot be allowed to defeat the action.

Murphy, Q.C., was not called on to reply.

FIELD, J.—The case has been ingeniously argued on the part of the plaintiffs, but my judgment must be for the defendant.

By the law as it stood apart from recent statutes, a husband was liable for the debts of his wife, but the liability cast upon the husband ceased on the death of his wife; as far back as the year 1735 (for that is the date of the decision cited from 3rd Peere Williams (5), a decisive failure was met with in an attempt made to have a husband declared liable for his wife's debts after her death. The Married Women's Property Act, 1870, by section 12 (2), abolished the husband's liability for his wife's debts in the case of any marriage taking place after the passing of that Act, so rectifying the injustice done by the old law in holding the husband liable for his wife's debts where he had not received any property with her, but being itself unjust in the opposite direction. The Act of 1874 (3), reciting the injustice of the enactment of 1870, by section 1 repeals the unjust provision, and enacts that a husband and wife married after the passing of the Act may be jointly sued for a debt of the wife contracted before marriage. Mr. Chitty contends that that means the husband may be sued alone. I am unable to yield to that contention. Mr. Chitty relies also upon section 2; but the language of section 2, speaking of "such" action, carries you back to section 1. I am therefore clearly of opinion that the demurrer must be allowed.

Judgment for the defendant.

Solicitors—Torr, Janeways, Gribble & Oddie, agents for Wells & Hind, Nottingham, for plaintiffs; Adrian Young, agent for A. D. Bartlett, Loughborough, for defendant.

(4) 51 Law J. Rep. Q.B. 594; Law Rep. 9 Q.B. D. 337.

(5) 3 P. Wms. 409; Ca. t. Talb. 173.

(6) 49 Law J. Rep. Chanc. 359; Law Rep. 13 Ch. D. 811.

[IN THE COURT OF APPEAL.]

1882. May 8, 11. } BABBAGE *v.* COULBOURN.*

Practice—Action sent to County Court for Trial—Appeal from Judgment of Divisional Court—19 & 20 *Vict. c.* 108. *s.* 26—*Judicature Act*, 1873, *s.* 45—*Landlord and Tenant—Agreement to Pay for Damage done to Furnished House—Amount Payable to be Settled in Case of Dispute by Two Valuers—Right to Sue for Damage before Amount Settled—Arbitration—Condition Precedent.*

An action brought in the High Court, but sent for trial before a County Court

* *Coram* Brett, L.J., and Cotton, L.J.

under section 26 *of* 19 *&* 20 *Vict. c.* 108, *does not thereby become a cause in the County Court, but remains in the High Court; so that an appeal will lie from the judgment of a Divisional Court on a motion in the cause, without special leave being obtained under section* 45 *of the Judicature Act,* 1873.

Balmforth *v.* Pledge (35 Law J. Rep. Q.B. 169; Law Rep. 1 Q.B. 427) *approved.*

A tenant of a furnished house agreed in writing to deliver up possession of the same, together with the furniture, at the expiration of the tenancy, in good order; and in the event of any loss, damage or breakage, to make good or pay for the same; the amount to be paid in case of dispute to be settled by two valuers:—

Held (*per* BRETT, L.J.; COTTON, L.J., *dissentiente*), *that the settlement by two valuers of the amount to be paid by the tenant was a condition precedent to the lessor's right to bring an action for damage or loss done.*

Judgment of Divisional Court affirmed.

Appeal from a decision of a Divisional Court (reported 51 Law J. Rep. Q.B. 638) discharging a rule for a new trial.

By an agreement in writing, the plaintiff agreed to let, and the defendant to take, a furnished house, with a garden, at a certain rent; the defendant agreeing, amongst other things, "to keep, and at the expiration of his tenancy to quit and deliver up quiet and peaceable possession of, the residence, gardens and grounds, with the furniture and effects, in accordance with the inventory, in as good order, state and condition as the same are on his taking possession (reasonable use and wear, and accidental damage by fire, storm or tempest only excepted), and in the event of any loss, damage or breakage otherwise than herein provided for, the same to be made good or paid for by the tenant, the amount of such payment, if in dispute, to be referred to and settled by two valuers, one to be appointed by the landlord and the other by the tenant, or their umpire, in the usual way."

After the expiration of the tenancy, the plaintiff brought an action for the sum of 13*l.* 15*s.*, being the amount of dilapidations assessed by a surveyor appointed by himself, and also for the expenses of the surveyor and the balance of rent remaining due. The defendant brought into Court the balance of rent due, and pleaded that the assessment of the amount by two valuers, according to the provisions of the agreement, was a condition precedent to the plaintiff's right to sue for the amount. The issue was sent down for trial in the Westminster County Court, under the provisions of 19 & 20 Vict. c. 108. s. 26 (1), and the County Court Judge decided that the contention of the defendant was right. The plaintiff obtained a rule *nisi* for a new trial on the ground of misdirection; but the Divisional Court (Field, J., and Huddleston, B.) discharged the rule. No leave to appeal was obtained.

The plaintiff appealed.

Swinfen Eady, for the defendant, took the preliminary objection that no appeal would lie. This is an appeal from a decision of the County Court Judge at the trial; consequently, no appeal will lie, without special leave, from the decision of the Divisional Court to the Court of Appeal. The case is within the words of section 45 of the Judicature Act, 1873, which provides that the determination by the Divisional Court of all appeals from a County Court is to be final unless special leave be given to appeal to the Court of Appeal. Although the action here was commenced in the Superior Court, yet the trial was had in the County Court. It may be that there is an appeal without

(1) 19 & 20 Vict. c. 108. s. 26:—"Where in any action of contract brought in a Superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into Court payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a Judge of a Superior Court, on the application of either party after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name; and thereupon the plaintiff shall lodge with the Registrar of such Court such order and the issue, and the Judge of such Court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the Registrar to both parties or their attorneys; and after such hearing the Registrar shall certify the result to the Master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court."

Babbage v. *Coulbourn, App.*

leave in any proceedings other than those for a new trial, but that is not so where, as in this case, the appeal is really from the decision of the County Court Judge at the trial. *Bowles* v. *Drake* (2) shews that there is no appeal to the Court of Appeal from the judgment of a Divisional Court without special leave, where the action has been sent to the County Court for trial under 30 & 31 Vict. c. 142. There is no difference where the action is sent for trial to the County Court under section 26 of 19 & 20 Vict. c. 108.

W. H. Clay, for the plaintiff.—The action was sent to the County Court under section 26 of 19 & 20 Vict. c. 108, and not under section 7 of 30 & 31 Vict. c. 142. Section 26 is not affected by the provisions of section 45 of the Judicature Act, 1873. The action was sent down for trial only; but for other purposes it remains in the Superior Court—*Wheatcroft* v. *Foster* (3), *Balmforth* v. *Pledge* (4) and *Wilson's Judicature Acts* (5). The County Court Judge has no jurisdiction over the cause except to try the issue; the motion for a new trial must be made to the Superior Court, and not under the County Court rules; judgment also must be signed, and the costs taxed in the Superior Court. An appeal, therefore, will lie from the decision of the Divisional Court without leave. *Bowles* v. *Drake* (2) is not precisely in point, for that decision turned on the wording of 30 & 31 Vict. c. 142, and not of 19 & 20 Vict. c. 108 (1). *Osborne* v. *Homburg* (6) and *Foster* v. *Usherwood* (7) were also referred to.

Swinfen Eady replied.

BRETT, L.J.—The question to be considered is—What is the rule upon which the Court is to act where the summons to send the action for trial to the County Court is under section 26 of 19 & 20 Vict. c. 108 (1), and where it is under section 7 of 30 & 31 Vict. c. 142? It is obvious that the conditions upon which the Court is to act are the same under the two sections except as to the time within which, and the person by whom, the summons is to be issued. In both cases the matter may be dealt with where the action is one of contract, and where the original claim either does not exceed 50*l.* or has been reduced by payment to a sum not exceeding 50*l.*

The only distinction between the two sections seems to me to be that the application under section 7 of 30 & 31 Vict. c. 142 must be made by the defendant within eight days from the date of the service of the writ upon him; but under section 26 of 19 & 20 Vict. c. 108 (1) the application may be made by either party after issue joined, and therefore after the expiration of the eight days.

Section 7 of 30 & 31 Vict. c. 142 is therefore not inconsistent with section 26 of 19 & 20 Vict. c. 108 (1), and both those sections can be read together; it therefore follows that section 26 (1) of the earlier Act is not impliedly repealed by the later Act. 30 & 31 Vict. c. 142 deals with three separate classes of cases which may be sent for trial to a County Court—namely, actions of contract, suits or proceedings in Chancery, and certain actions of *tort*.

Bowles v. *Drake* (2) was an action of *tort* which was sent to the County Court under section 10 of 30 & 31 Vict. c. 142. The Divisional Court having made a rule absolute for a new trial, an appeal was brought to the Court of Appeal, which came to the conclusion that no appeal would lie, upon the ground of the introduction into the latter part of section 10 of the terms "and the County Court so named shall have all the same powers and jurisdiction with respect to the cause as if both parties had agreed, by a memorandum signed by them, that the said County Court should have power to try the said action, and the same had been commenced by plaint in the said County Court." The Court, moreover, relied in their judgment upon those terms. I think that the decision in *Bowles* v. *Drake* (2) goes to this extent, that there is no appeal without special leave in all cases within sections 7,

(2) 51 Law J. Rep. Q.B. 66; Law Rep. 8 Q.B. D. 325.
(3) E. B. & E. 737; 27 Law J. Rep. Q.B. 277.
(4) 35 Law J. Rep. Q.B. 169; Law Rep. 1 Q.B. 427.
(5) 3rd edit., p. 71.
(6) 45 Law J. Rep. Exch. 65; Law Rep. 1 Ex. D. 48.
(7) 47 Law J. Rep. Exch. 30; Law Rep. 3 Ex. D. 1.

8 and 10 of 30 & 31 Vict. c. 142, which are to be treated, when once they have been sent to the County Court, as if the actions had been originally commenced there. But section 26 of 19 & 20 Vict. c. 108 (1) has not been repealed by those sections; and the case now before us has not been dealt with under the later statute. No such words as those which are contained in the latter part of section 10, and to which I have referred, are to be found in section 26 (1) of the former statute. It seems to me that under section 26 (1) the County Court Judge can only try the case; he cannot give judgment, for the Registrar is to certify the result to the Master's office of the Superior Court, and then judgment is to be signed in the Superior Court in accordance with the certificate. The jurisdiction to grant a new trial, as was pointed out by the Court in *Balmforth* v. *Pledge* (4), remains vested in the Superior Court where an action is sent for trial under section 26 (1) to the County Court. Mr. Justice Lush there said:—"Section 26 only says that the cause is to be sent for trial to the County Court. The Judge of the County Court is only to try the cause, and when he has done that he is *functus officio*, and the Registrar is to certify the result. The Judge of the County Court is precisely in the same position as the under-sheriff, or as a Judge when acting as a commissioner of assize: they try the cause, but beyond the trial all jurisdiction as to new trials, &c., remains vested in that Court out of which the writ issued. Under section 26 the County Court Judge is simply substituted for the under-sheriff or commissioner of assize; and therefore the general jurisdiction over the cause remains exactly as it was before the section passed." That being so, this case is reduced to the ordinary case of a trial at Nisi Prius, and of an application to the Divisional Court for a rule for a new trial. An appeal, therefore, will lie to the Court of Appeal, and section 26 does not contain any provisions which render it necessary that special leave to appeal should be obtained under section 45 of the Judicature Act, 1873. The objection must therefore be overruled.

COTTON, L.J.—An objection was taken here on behalf of the defendant that this was an appeal from a County Court, and consequently that special leave to appeal under section 45 of the Judicature Act, 1873, ought to have been obtained. *Bowles* v. *Drake* (2) was relied on in support of that contention; but it is conceded that in the present case the order sending the action for trial to the County Court was made under section 26 of 19 & 20 Vict. c. 108. That section, however, was not the section or Act of Parliament upon which the question arose in *Bowles* v. *Drake* (2). The order which is here appealed from was made by the Divisional Court sitting in the ordinary course to hear arguments upon rules for new trials. Sections 7, 8 and 10 of 30 & 31 Vict. c. 142 were considered in *Bowles* v. *Drake* (2), and each of those sections contained an enactment that after the transfer had been made, the proceedings were to be continued as if they had been commenced in the County Court; and all the jurisdiction of the High Court was to be transferred to the County Court. The effect of that is to make the action a County Court action, and any appeal to the Divisional Court from the decision of the County Court Judge would necessarily be an appeal under 30 & 31 Vict. c. 142, and special leave to appeal from the Divisional Court to the Court of Appeal would be necessary under section 45 of the Judicature Act, 1873. But section 26 of 19 & 20 Vict. c. 108 does not contain any such provisions as those contained in the later Act; the County Court Judge has jurisdiction simply to try the issues, and a certificate of the finding of the issues has to be sent to the Master's office of the Superior Court, and the judgment which is signed is the judgment of the Superior Court. An action sent for trial under section 26 of 19 & 20 Vict. c. 108 is different therefore from one sent for trial under sections 7, 8 and 10 of 30 & 31 Vict. c. 142; and the application for a new trial can only be made to the Divisional Court. An appeal can therefore be brought to this Court without special leave being necessary. The objection must be overruled.

The Court then heard the appeal.

W. H. Clay, for the plaintiff.—The case

is governed by *Dawson* v. *Fitzgerald* (8), where it was held, the terms of the lease as to arbitration being almost the same as here, that the clause did not make arbitration a condition precedent to the plaintiff's right to maintain an action, but was a distinct and independent covenant. The agreement here is clearly an agreement to pay, and if the plaintiff sues upon it, the defendant can apply under section 11 of the Common Law Procedure Act, 1854, for the action to be stayed until the amount has been ascertained by arbitration. The only cases where a clause of this kind has been held to be a condition precedent to the right to bring an action are those where the only proviso is that no action shall be brought until the amount has been ascertained. Here there are two independent and collateral covenants.

Swinfen Eady, for the defendant.—The case of *Dawson* v. *Fitzgerald* (8) merely decides that where there is an absolute covenant not to do a certain thing damages can be recovered for a breach thereof, although there is a subsequent covenant that if the first covenant be broken compensation must be paid. *Dawson* v. *Fitzgerald* (8) is also distinguishable on the ground that here, if the payment is in dispute, the amount is to be settled by two valuers; no such clause is to be found in the agreement in the case cited. Another distinction is, that in *Dawson* v. *Fitzgerald* (8) the words "the tenant to pay a fair and reasonable compensation" were introduced, but such a stipulation is not to be found here. The agreement to pay for damage, and to refer the amount, if in dispute, to two valuers, must be read as one agreement.

Clay replied.

Cur. adv. vult.

The following judgments were delivered on May 11, 1882:—

COTTON, L.J.—In this case the County Court Judge decided, in favour of the defendant, that no action would lie against him until the amount payable by him for the damage done had been ascertained by two valuers or their umpire in the usual way. The Divisional Court upon appeal affirmed that decision, which is now also appealed from. The agreement in question, which was for the letting of a furnished house for a term, contained a proviso as to the manner in which the amount to be paid at the expiration of the tenancy by the tenant for damages done to the premises was to be ascertained. We have to consider what, according to the true construction of the written agreement, are the rights of the parties. It was said that the case came within the principle of the decision in *Scott* v. *Avery* (9), and that the plaintiff had no right of action until the amount payable had been ascertained by arbitration. Lord Cranworth (at p. 848) says, "If I covenant with A B that if I do or omit to do a certain act, then I will pay to him such a sum as J S shall award as the amount of damage sustained by him, then, until J S has made his award and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen"—that is to say, that where the agreement upon which the action is brought is only to pay such a sum as another person shall determine, then, until the amount has been ascertained, there is nothing that the defendant can pay. On the other hand, if the agreement is to pay a certain specified sum for damage done, there the plaintiff has a right of action. The limitation of the plaintiff's right to bring an action for such a sum as another person shall fix may be imposed in various ways. In *Scott* v. *Avery* (9) the House of Lords came to the conclusion that the only agreement was to pay such a sum as should be fixed by an award, and that until the sum was so fixed no action could be brought. We have to consider whether or not this case comes within that rule. It is sometimes said that there are two independent covenants in the agreement. Here there was an agreement, in my opinion, to pay for the damage done, and for which an action can be brought, even though the amount has not been ascertained. The agreement is, that the tenant shall give up the premises in good condition at the end of the tenancy, "reasonable use and wear, and accidental damage by fire, storm or tempest only excepted, and in the event of any loss,

(8) 45 Law J. Rep. Exch. 893; Law Rep. 1 Ex. D. 257.

(9) 5 H.L. Cas. 811, 848; 25 Law J. Rep. Exch. 308.

damage or breakage, otherwise than hereinbefore provided for, the same to be made good or paid for by the tenant;" and if the agreement had stopped there, could it be disputed that the landlord could maintain an action? It was said, however, that there was no positive agreement to pay, because of the words "the same to be made good or paid for by the tenant"; but the case must be dealt with upon the hypothesis that this is a covenant that the damage was to be paid for by the tenant. It is true that the amount, if in dispute, is to be referred to two valuers; but according to the ordinary meaning of the English language, the agreement is to pay for damage done, and that agreement comes before and is independent of the provision that the amount is to be referred for settlement to two valuers. I think that the decision of the County Court Judge was wrong, and that the judgment of the Divisional Court ought to be reversed.

BRETT, L.J.—I am sorry, although with great hesitation and doubt, that I am unable to bring my mind to the same conclusion as that at which Lord Justice Cotton has arrived. The result of the cases before, and also of the decision in *Scott* v. *Avery* (9), is that where there are two covenants, each one is independent of and does not govern the other. The question here is, whether this agreement contains two covenants or one only. I have no doubt what the parties intended. It is well known that in the case of such a tenancy as this, there will be a quantity of breakages, and I have no doubt that the parties intended absolutely to save themselves from a trial in Court, by providing that the tenant should pay such an amount as should be found to be due. If, however, the parties have not expressed themselves so as to give this effect to their intention, I should be bound to hold that an action would lie. It was said by the plaintiff that by the terms of the agreement there are two contracts, the one independent of the other. It is admitted that, if the words had been "in the event of dispute the tenant to pay the amount which shall be settled by two valuers," the case would be that of *Scott* v. *Avery* (9); but it is said the words of the agreement bring the case within those decisions which were before that in *Scott* v. *Avery* (9). I think that the true construction is that the agreement must be taken to be the same as if the parties had said "the tenant to pay the amount settled by two valuers." I am unable to concur with Lord Justice Cotton; but I am inclined to think that the judgment of the Divisional Court is right; I certainly am not satisfied that it is wrong. It is unfortunate when a Court consisting of two Judges differ in opinion; but the result is that the judgment of the Court below will be affirmed.

Judgment affirmed.

Solicitors—Freeman & Bothamley, for plaintiff; C. F. Emmott, for defendant.

1882. Nov. 22. } JEFFRYES *v.* REYNOLDS.

*Practice—Attachment—Charging Order—Shares standing in Name of Judgment Debtor—Application by Person having Beneficial Interest—Power to Discharge Order Absolute—*1 *&* 2 *Vict. c.* 110. *ss.* 14 *and* 15.

An application, under 1 *&* 2 *Vict. c.* 110. *s.* 15, *that a charging order, made under sections* 14 *and* 15, *should be discharged cannot be entertained after the order has been made absolute.*

By 1 *&* 2 *Vict. c.* 110. *s.* 14, *a charging order can be made, upon the application of a judgment creditor, on shares belonging to and standing in the name of or held in trust for a judgment debtor. By section* 15 *the order is to be an order nisi in the first instance; and "unless the judgment debtor shall, within a time to be mentioned in such order, shew to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute. Provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full*

power to discharge or vary such order, and to award such costs upon such application as he may think fit."

A charging order having been made upon shares standing in the name of a judgment debtor, the father of the debtor applied, after the order had been made absolute, that it might be discharged on the ground that the shares were in fact his:—

Held, *that there was no power to entertain the application, "such order" meaning the order nisi and not the order absolute.*

This was an application, under 1 & 2 Vict. c. 110. s. 15, to rescind a charging order upon certain shares, made under sections 14 and 15 of that Act. The application had been referred to the Court by Williams, J., sitting at chambers (1).

The following was the affidavit upon which the application was founded:—

The affidavit of W. H. Reynolds, sworn the 26th day of October, 1882, states—

"1. That I am informed and believe that the above-named plaintiff has obtained an order absolute, charging eighteen shares in the 'Vorsmanns Moss Litter Company (Limited),' standing in the books of the said company in the name of the above-named defendant.

"2. The said shares so charged are not the property of the said defendant, nor have they ever been, but belong to me absolutely.

"4. On the formation of the said company I authorised certain persons to subscribe on my behalf for twenty shares of 50*l.* each. Eighteen of these stand in the name of my son, the above-named defendant, one in the name of Thomas Doublet, and one in the name of Gerald Clarence Hopper, and I paid for them the sums following, and on the dates mentioned:

1882	February 20	.	18	0	0
„	March 21	.	250	0	0
„	„ 23	.	232	0	0
„	April 29	.	500	0	0
			£1,000	0	0

"4. Being anxious, however, to exercise some control over the affairs of the said company I obtained the nomination of my son, the above-named defendant, as a director, in order to watch over my interests therein.

"5. Neither the above-named defendant, Thomas Doublet, nor Gerald Clarence Hopper, has any interest whatever in the said shares, but merely hold them as trustee for me.

"6. The reason why I did not claim the said shares before the charging order was made absolute is on account of my having been out of England for some time, and I only returned on the 13th day of October instant, and, hearing of these proceedings taken against the said defendant, I immediately instructed my solicitors to take the necessary steps to establish my claim to the said shares."

R. Vaughan Williams, in support of the application, argued that the proviso at the end of section 15 of 1 & 2 Vict. c. 110 enabled any person interested to apply at any time to set aside a charging order upon shares made under section 14 (2).

(1) The application was originally made to the Court; but the Court directed that it should be made at chambers.

(2) By 1 & 2 Vict. c. 110. s. 14, it is enacted:—"That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster shall have any government stock, funds or annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor: provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

"And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorised to be charged for the benefit of the judgment creditor under an order of a Judge:

"It is further enacted,

"Section 15: That every order of a Judge, charging any government stock, funds or annuities, or any stock or shares in any public

He cited—*In re The Blakely Ordnance Company (Limited)*, *Frederick Coates's Case* (3), *Baker* v. *Tynte* (4), *Brown* v. *Bamford* (5), *Rogers* v. *Holloway* (6), *Cragg* v. *Taylor* (7) and *Gill* v. *The Continental Gas Union Company* (8)

Winch, for the judgment creditor, was not called upon.

FIELD, J.—I think that this motion must be dismissed with costs. The plaintiff has got judgment against the defendant; and he has taken proceedings, under 1 & 2 Vict. c. 110. s. 14, to obtain a charging order upon certain shares standing in the defendant's name. These charging orders may at one time have assumed a form which they were not entitled to do. But in the present case the order adopts almost the very words of the Act, charging the debtor's interest, and the debtor's interest only. The Act has said what it meant—namely, that such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor. The plaintiff having obtained an order *nisi* under that section, it was subsequently made absolute. Then the father of the defendant comes forward and says, "Although these shares are standing in the books of the company in the name of the defendant, and, as far as appears, in his own right, they are really my shares, and the charging order which has been made absolute must be rescinded." I am of opinion that this cannot be done after the order has been made absolute. If I had had any doubt on the construction of the sections, I should have desired to hear Mr. Winch; but it seems to me that the statute is very clear. Let us examine what it says. By section 14, the order purports to be made *ex parte*; but with the proviso that the person entitled to have the benefit of the charge is not entitled to have it until after the expiration of six months from the date of the order. Then, by section 15, it appears that the order made under section 14 is to be an order to shew cause only; and we have a positive reason given in the introduction to the section why the order is to be made in the first instance *ex parte* and without any notice to the judgment debtor. Section 15 confers a benefit upon the companies, and also imposes a liability upon them. Directly the order *nisi* is made that creates a charge; neither the judgment debtor, in whose name the shares are standing, nor any other person can deal with them. Then the Judge is to look upon all the circumstances of each case, and say within what time cause is to be shewn; and, unless cause is shewn within that time, "the said order . . . . shall be

company, under this Act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorised agent of such corporation, and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that, unless the judgment debtor shall within a time to be mentioned in such order shew to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute. Provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

(3) 46 Law J. Rep. Chanc. 367.
(4) 29 Law J. Rep. Q.B. 233.
(5) 9 Mee. & W. 42; 11 Law J. Rep. Exch. 53.
(6) 5 Man. & G. 292; 12 Law J. Rep. C.P. 182.
(7) 35 Law J. Rep. Exch. 92; Law Rep. 1 Exch. 148.
(8) 41 Law J. Rep. Exch. 176; Law Rep. 7 Exch. 332.

made absolute: Provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order." Mr Williams says "such order" must mean the order absolute. I do not agree with him; I think that it means the same order as is spoken of just before—namely, the order *nisi*. Otherwise, a person might come forward and say, "I have just heard that all my shares were transferred five years ago; although they were standing in another person's name, they were mine, so they must be re-transferred." I think that the order absolute was intended to be a document of title, upon which all the world may rely. I think that is shewn by the fact of an interval of six months being provided during which the judgment creditor is to wait before taking any proceedings to have the benefit of his charging order.

STEPHEN, J.—I am of the same opinion, and for the same reasons.

Application refused.

Solicitors—Ashurst, Morris, Crisp & Co., for applicant; E. Johnson, for judgment creditor; T. Durant, for defendant.

[IN THE COURT OF APPEAL.]

1882. Nov. 10. } MARSHALL AND OTHERS *v.* SCHOFIELD AND COMPANY.*

Landlord and Tenant—Agreement for Use of Room and Power—Demise of Tenement—Destruction of Tenement by Fire—Liability of Tenant for Rent becoming due subsequently.

The plaintiffs, by an agreement in writing, let to the defendants "all the room and power" in a certain mill, together with the warehouse room in connection therewith, in consideration of which the defendants agreed to pay 500l., subsequently increased by parol agreement to 700l., per annum, by quarterly instalments after the first year:—Held, *that the agreement amounted to a demise of a tenement; that the consideration to be paid by the defendants was rent issuing out of the land; and that the defendants were liable in respect of three quarters' rent, which had become due after the mill had been destroyed by fire.*

Selby v. *Greaves* (37 Law J. Rep. C.P. 251) *followed.*

Appeal by the defendants from a judgment of Chitty, J.

The action was brought to recover three quarters' rent due under an agreement dated the 17th of July, 1879.

By the agreement in question the plaintiffs agreed to let and the defendants to take all the room and power in Clough Mill, Hightown, together with the warehouse room in connection therewith and closely adjoining, except one room; in consideration of which the defendants agreed to pay and the plaintiffs to accept 500*l.* per annum, in quarterly instalments after the first year. The agreement also contained provisions as to the amount of steam-power to be found by the plaintiffs and as to the amount of machinery to be provided by the defendants; and the rent was to commence in proportion to the amount there specified of machinery running.

The defendants entered into occupation in July, 1879; and by a verbal agreement, made about April, 1880, the defendants took certain other rooms in the mills at an additional rent of 200*l.*, the whole rent then amounting to 700*l.* a year.

On the 5th of October, 1880, the mill was burnt down, and the plaintiffs now sued for three quarters' rent, due from the 1st of October, 1880, to about the 3rd of July, 1881.

The action came before Chitty, J., and a special jury at the Liverpool Winter Assizes, 1882, when the jury were discharged, and the case was reserved for further consideration. At the hearing, Chitty, J., held, on the authority of *Selby* v. *Greaves* (1), that the agreement amounted to a demise of certain rooms in the mill, together with a right on the part of the

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

(1) 37 Law J. Rep. C.P. 251; Law Rep. 3 C.P. 594

defendants to have steam-power supplied to them; and consequently, that as the rent issued out of the demised premises and every part of it the defendants were liable for the rent, notwithstanding that the premises had been burnt down.

The defendants appealed.

Gully, *Q.C.*, and *D. French*, for the defendants.—The very essence of this agreement was that the plaintiffs should supply power for the use of the defendants. The plaintiffs failed to supply the power, and therefore the essential part of the agreement was not complied with. The steam-power is not ancillary to the agreement. The agreement here must regulate the rights of the parties, and is for two things—namely, the rooms and the steam-power; if the landlord fails to give one or the other, the tenant is not bound to pay the whole amount stipulated for. This would be matter for deduction, and not counter-claim. *Selby* v. *Greaves* (1) merely points out the appropriate remedy by which a landlord can recover the rent where it is due. But where the right to the rent has gone, there the right to distrain has gone also. The whole rent must be due. If the defendants have a right to deduct for non-supply of steam-power, that is a matter which goes to the whole root of the consideration. Here there was an absolute failure of consideration, because the supply of steam-power went to the root of the whole consideration; no action, therefore, will lie against the defendants. *Newman* v. *Anderton* (2), *Taylor* v. *Caldwell* (3), *Mechelen* v. *Wallace* (4), *Wilson* v. *Finch-Hatton* (5), *Robinson* v. *Learoyd* (6) and *Regnart* v. *Porter* (7) were also cited.

Addison, *Q.C.*, and *Aspland*, for the plaintiffs, were not called on.

BAGGALLAY, L.J.—The effect of the two agreements, which may be treated as one, was that the defendants were to have the occupation of portions of the mill, which in fact they did occupy; and also were to have steam-power supplied by the plaintiffs for the purpose of working their own machinery in that mill. A rental of 700*l.* was to be paid by the defendants for two things—namely, for the occupation of the rooms and for the supply of steam-power. The rent was to be paid quarterly after the first year. The mill was burnt down on the 5th of October, 1880, and consequently the continuance of the working of the defendants' machinery in the part of the mill occupied by them was rendered impossible. Nothing appears to have been done by the landlord to supply steam-power, or by the defendants to supply machinery, during the nine months after the occurrence of the fire, and the demand in this action is for the nine months' rent.

The argument addressed to the Court was one of hardship. It was said that the defendants paid a larger portion of the rent for the supply of steam-power than for the use of the rooms, but that the landlords had failed to supply the power, and consequently if the defendants were bound to pay the rent the landlord would escape from his liability to supply the power. The first point raised against the defendants is that it is recognised law that where in the case of a house a fire occurs, the tenant, unless there are special provisions in the lease to the contrary, must bear the loss and continue to pay the rent to the landlord in respect of the property of which he has been deprived.

It was suggested that here the rent must be regarded as consisting of two parts, and is to be treated as rent and a payment for the use of the machinery. This part of the case, however, is met by the decision in *Selby* v. *Greaves* (1). There a portion of a room in a factory was let to the plaintiff, with the use of steam-power to work certain machinery belonging to the plaintiff; the rent was to be paid quarterly, and a deduction therefrom was to be made if the defendant failed to supply steam-power for more than seven days in each quarter. An action having been brought for a wrongful and excessive distress by the defendant, it was held that the rent, although partly for the use of room for

(2) 2 N.R. 224.
(3) 3 B. & S. 826; 32 Law J. Rep. Q.B. 164.
(4) 7 A. & E. 54; 6 Law J. Rep. K.B. 217.
(5) 46 Law J. Rep. Exch. 489; Law Rep. 2 Ex. D. 336.
(6) 7 Mee. & W. 48; 10 Law J. Rep. Exch. 166.
(7) 7 Bing. 451; 9 Law J. Rep. (o.s.) C.P. 168.

the working of the plaintiff's machinery and partly for the use of the steam-power to be supplied, was one entire rent issuing out of the land, and could therefore be recovered by distress. That decision, it seems to me, is almost sufficient to govern this case. There is no doubt that a distinction has been drawn between those cases where the covenant is not a covenant for the use of a room to which steam-power has been supplied, but is a covenant for the use of a room for the purpose of putting machinery into it and then of supplying steam-power. That is the distinction which exists between *Hancock* v. *Austin* (8) and *Selby* v. *Greaves* (1). As to the question of hardship that the landlord has abstained from doing that which he has put himself under an obligation to do—the answer is, that if he fails to perform that obligation the tenant may have a remedy by action or by counter-claim; but as no such counter-claim has been raised in this case, I do not express any opinion whether or not there might be a right to recover damages from the landlord. The present case is covered by authority, and although Mr. Justice Chitty did not think it necessary to go through all the authorities, but relied upon *Selby* v. *Greaves* (1), I think that case justified the judgment which he gave. No doubt reference was made on behalf of the defendants to *Taylor* v. *Caldwell* (3), but that is a distinct case from the present one. There it was held that the agreement contained an implied condition precedent that the defendant should give to the plaintiff the occupation of the music-hall and gardens which was agreed for, but that inasmuch as such occupation, by reason of a fire which prevented him from so doing, was not given to the plaintiff by the defendant, the agreement was at an end. Having regard, however, to subsequent decisions, it is doubtful whether that case would now be followed. It is sufficient to say that it does not govern the present case. This appeal must therefore be dismissed.

BRETT, L.J.—I agree with the judgment of Mr. Justice Chitty. The present case is clearly within a recognised principle of English law. The agreement, being in writing, must be construed by the Court. Mr. Justice Chitty held that this written agreement, upon its true construction, is a lease of a tenement, and that the sum payable by the defendants is rent in the proper acceptation of the term. *Selby* v. *Greaves* (1) is a distinct authority that such an agreement as this is a demise of a tenement, and that the sum to be paid is rent. It is clear law that although part of the consideration for the sum to be paid is the supply of power, yet, inasmuch as it is rent for the demise of a tenement, it is rent which is said to arise out of the land, and the consideration is rent which is paid for the use of land. In such an agreement as this, therefore, considering this matter as rent, we cannot divide the rent, which is to be deemed to be issuing out of the land. The whole sum of 700*l.* was rent issuing out of the land. This is not the case of an agreement to allow a person to put his machinery into the rooms of another who reserves to himself the occupation, in which case the doctrine relating to a demise does not apply. But it is the case of a tenement and of rent issuing out of the land, and such rent becomes due after each quarter. It was argued that because a fire had occurred without the fault of either the landlord or the tenant, no rent was payable. There is no warranty by the landlord that a fire shall not occur, and I should think that no action would lie against the landlord because a fire had occurred. This has nothing to do with the wholly independent covenant under which the tenant has entered into occupation, and the rent is due because nothing has occurred to prevent the occupation of the tenant. The only colourable argument brought forward on behalf of the defendants was the case of double value—*Robinson* v. *Learoyd* (6). The Court there did not determine that the rent was indivisible, but that in the case of such a lease as the present one, if the tenant holds over, what is to be recovered is not rent but a penalty under a statute which does not say double "rent," but double "value" of the tenement. Moreover it was there decided that in order to

(8) 14 Com. B. Rep. N.S. 634; 32 Law J. Rep. C.P. 252.

ascertain the amount due under the statute the value of the land alone is to be estimated and not what has been paid for machinery which has been put into the tenement. In my opinion no counterclaim could have been supported by the defendants. It was argued that in order to prevent circuity of action such a counterclaim could have been maintained. That doctrine, however, only applies where the amount to be recovered in both cases is exactly the same. In this case the damages claimed in a cross action would be for non-supply of steam-power, and not for rent. The appeal must be dismissed.

LINDLEY, L.J.—I also think that the decision of Mr. Justice Chitty was right, and that the agreement, which we have to construe, is an agreement for the lease of a room and power. It is therefore an agreement for an interest in land, and so far the case is undistinguishable from that of *Selby* v. *Greaves* (1). The sum payable by the defendants is rent, in the proper sense of the word, and can be distrained for. If a fire occurs, the defendants must pay the rent; and therefore there is no answer as to that. With reference to the case of *Regnart* v. *Porter* (7), the *ratio decidendi* there was that the rent was uncertain, and therefore there could be no distress; and looking at the facts Chief Justice Tindal said, "the question is, whether there is evidence that Regnart held as a tenant to Porter at a rent certain; for, unless he was a tenant and at a rent certain, the avowant had no right to distrain. It is admitted that if there was any tenancy at all it was not under the agreement in evidence, for that contains no words of present demise; and it may also be conceded that if a party enters and pays, or promises to pay a rent certain, or settles it in account, a new agreement may be presumed under which the landlord may have a right to distrain." If that be so, there was no fixed rent, but the defendants here cannot say that the rent is uncertain.

As regards the question of counterclaim it seems to me that the view taken by Mr. Justice Chitty was right, and even if an action would lie against the plaintiffs for non-supply of steam-power the damages are *nil*. The appeal must be dismissed.

Appeal dismissed.

Solicitors—Williamson, Hill & Co., agents for H. Thompson, Liverpool, for plaintiffs; Bower & Cotton, agents for Jubb & Booth, Halifax, for defendants.

1882. Nov. 28. } TILLETT *v.* WARD.

Trespass—Escape of Cattle—Property adjoining Highway.

An ox belonging to the defendant, while being lawfully driven along a highway in a town, escaped, without any negligence on the part of the defendant or the drover, into a shop of the plaintiff adjoining the highway, and there did damage:—Held, *that the defendant was not liable.*

This was an appeal from the Stamford County Court by a Special Case, in which the facts appearing were as follows:—

An ox belonging to the defendant, while being lawfully driven through a street in the town of Stamford to market, escaped, without there being (as the Special Case was understood by the Court) any negligence on the part of the defendant or of the drover, into a shop of the plaintiff, an ironmonger, the doorway of which was open to the street, and there did damage. The County Court Judge held the defendant liable for the damage, and gave judgment in favour of the plaintiff for 1*l.*

The defendant appealed.

E. R. Moon, for the appellant.—No negligence being found, the appellant was not liable. The case is within *Goodwyn* v. *Cheveley* (1). There, cattle of the plaintiff having, while being driven along a road, strayed into a field of the defendant through a gap in his fence and

(1) 4 Hurl. & N. 631; 28 Law J. Rep. Exch. 298.

been impounded by the defendant, the Court held that the defendant was not justified, unless the plaintiff had had a reasonable time, under all the circumstances of the case, to remove his cattle; and Bramwell, B., who dissented, dissented only as to what was meant by a reasonable time, considering the defendant justified in impounding the cattle as soon as the plaintiff had had the time actually necessary for driving them out. In *Fletcher* v. *Rylands* (2) the judgment of the Exchequer Chamber, delivered by Blackburn, J., in distinguishing a class of cases within which the present falls, said (3): "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near to it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger. . . In" such "case, therefore," they cannot "recover without proof of want of care or skill. . . ."

He was stopped by the Court.

Sills, for the respondent.—Even in the absence of negligence the appellant was liable. The ordinary responsibility of an owner of cattle for their trespass applied. In *Com. Dig.* (4) it is said: "It is not justifiable to enter land with cattle, because it lies open to the highway," citing *Rolle's Abr.* (5), where it is said: "Si mon terre soit ouvert al haut chemin et les avers dun estranger enter sur le terre ceo nest justifiable," referring to a case in the *Year Books* (6). In *Cox* v. *Burbidge* (7), where a child on a highway was kicked by a horse, the ground of the decision that the owner of the horse was not liable was that kicking the child was not according to the ordinary nature of the animal; but the like cannot be said of the escape of a bull from its drover and its doing damage in a shop which it enters. In *Lee* v. *Riley* (8), where a horse of the defendant strayed from an occupation road into the plaintiff's field and did damage, the defendant was held liable. In a case in the *Year Books* (9), abstracted in *Fletcher* v. *Rylands* (2) in the judgment of the Exchequer Chamber (10), a plea to trespass with cattle that the defendant's land adjoined a place where the defendant had common, that the cattle strayed from the common, and defendant drove them back as soon as he could, was held bad. The principle of the decision in *Fletcher* v. *Rylands* (2) applies.

[LORD COLERIDGE, C.J.—Is not an ox which is being driven to market along a highway "naturally" there?]

Not according to the meaning with which the word "naturally" is used in that decision. In *Goodwyn* v. *Cheveley* (1) the straying of the cattle was occasioned by want of proper fences on the land upon which they strayed; and the law there laid down does not assist the appellant. The passage cited on behalf of the appellant from *Fletcher* v. *Rylands* (3) is a mere dictum, and, moreover, rightly read, does not apply to a case like the present; and it is the only authority which at all makes in his favour.

[LORD COLERIDGE, C.J.—The respondent appears to have left his shop-door open. The law laid down in *Goodwyn* v. *Cheveley* (1) seems to make against him. Bramwell, B., although dissenting from the conclusion of the majority of the Court, said: "The plaintiff has a right to take his cattle along the highway; and if they do go along the highway, and there are no fences in the adjoining land, it is certain that they will stray: therefore the plaintiff cannot prevent it; and, as that is a necessary consequence of the enjoyment of the right of using the highway, why it is a necessary evil, I suppose, which those whose lands border on the highway must sustain." And he afterwards said: the defendant's "right is

(2) 35 Law J. Rep. Exch. 154; 37 ibid. Exch. 161; Law Rep. 1 Exch. 265; ibid. 3 H.L. Cas. 330.

(3) 35 Law J. Rep. Exch. at p. 160; Law Rep. 1 Exch at p. 286.

(4) Trespass (D).

(5) 2 Rolle, 565, l. 47.

(6) 39 Ed. 3. 3.

(7) 13 Com. B. Rep. N.S. 830; 32 Law J. Rep. C.P. 89.

(8) 18 Com. B. Rep. N.S. 722; 34 Law J. Rep. C.P. 212.

(9) 20 Ed. 4. 11.

(10) 35 Law J. Rep. Exch. 157; Law Rep. 1 Exch. 280, 281.

to have his land trespassed on as little as possible—to no greater extent than is absolutely necessary."]

This is the case of a street in a town, and the respondent could not reasonably be required to keep his shop-door closed. He referred also to *May* v. *Burdett* (11), *Reed* v. *Edwards* (12) and *Ellis* v. *The Loftus Iron Company* (13).

Moon, in reply.—The circumstance that in *Goodwyn* v. *Cheveley* (1) the damage was done upon land adjoining a highway in the country, and that in this case it was done to property adjoining a highway in a town, does not distinguish this case from that. That case, and the passage in *Fletcher* v. *Rylands* (2) which recognises with regard to property adjoining a highway (3) an exception from the general rule of liability there laid down, apply to the present case, and distinguish the authorities cited on the part of the respondent.

He referred also to *Manzoni* v. *Douglas* (14), *Sharrod* v. *The London and North Western Railway Company* (15) and *Holmes* v. *Mather* (16).

LORD COLERIDGE, C.J.—The Special Case finds, I think, negatively that there was no evidence of negligence. The question remains whether the defendant was rightly held liable in the absence of negligence; and upon that many authorities have been cited to us.

It is clear enough, as a general rule, that an owner of cattle must keep them from trespassing; and that, if they do trespass, it is not necessary, in order that he should be held responsible, that he should be shewn to have been negligent. On the other hand, it seems clear that where an injury occurs in the course of the lawful use of a highway, the person complaining being upon the highway, negligence must be shewn in order to maintain an action. In the present case the plaintiff complains of a trespass by an ox belonging to the defendant, which, while being driven along the highway, entered the plaintiff's shop immediately adjoining the highway, and did damage there. Does that, in the absence of negligence, give a cause of action? It seems to me that an exception from the general rule of liability is clearly established where cattle, while being lawfully driven along a highway, trespass on premises immediately adjoining the highway. I find the law laid down to that effect in *Goodwyn* v. *Cheveley* (1). What was there said upon that subject was, as has been pointed out by Mr. Moon, not mere *obiter dictum*; for it would have been useless to discuss what constituted a reasonable time for the owner of the cattle to drive his cattle off the land upon which they had strayed, unless the law allowed him, in one sense or another, a reasonable time for doing it. The Court in that case consisted of Chief Baron Pollock, Baron Martin, Baron Bramwell (now Lord Bramwell) and Baron Channell. I find the law also laid down to that effect by Mr. Justice Blackburn (now Lord Blackburn) in *Fletcher* v. *Rylands* (2), in delivering the judgment of the Exchequer Chamber (3). I do not see how I could well dispute the law which those eminent authorities have thus laid down; but, further, the law which they have laid down seems to me to be reasonable law. As applied to this case, it says simply that persons who have shops in a street through which cattle are driven to market take the risk necessarily resulting from the driving of the cattle to market. I am therefore of opinion that the judgment of the learned County Court Judge must be reversed.

STEPHEN, J.—I am of the same opinion. Although, in general, a man who owns cattle must keep them in, and is responsible for damage they may do through his failing to keep them in, there is, I think, an established exception in the case of damage which cattle passing along a highway may do to property adjoining the highway. And a reason for such an exception is given in *Goodwyn* v. *Cheveley* (1),

(11) 9 Q.B. Rep. 112; 16 Law J. Rep. Q.B. 64.
(12) 17 Com. B. Rep. N.S. 245; 34 Law J. Rep. C.P. 31.
(13) 44 Law J. Rep. C.P. 24; Law Rep. 10 C.P. 10.
(14) 50 Law J. Rep. Q.B. 289; Law Rep. 6 Q.B. D. 145.
(15) 4 Exch. Rep. 580; 20 Law J. Rep. Exch. 185.
(16) 44 Law J. Rep. Exch. 176; Law Rep. 10 Exch. 261.

and in the judgment of the Exchequer Chamber in *Fletcher* v. *Rylands* (2), delivered by Mr. Justice Blackburn (3). It is, if I may paraphrase what is there said, a risk to which the owner of the property is necessarily exposed in the course of the conduct of the common affairs of life. The owner of a house, or other property, adjoining a highway must take the precautions necessary for guarding against risks like the present to which he is necessarily exposed by the lawful use of the highway. I see no difference between *Goodwyn* v. *Cheveley* (1) and this case in respect of the damage being, in that case, done in a field adjoining a highway in the country, and, in this, in a house adjoining a highway in a town.

Judgment reversed. Leave to appeal refused.

Solicitors—Whyte, Collisson & Prichard, agents for J. E. Atter, Stamford, for appellant; Wright & Law, agents for W. F. Law, Stamford, for respondent.

1882. Dec. 9, 21. } MILNES *v.* THE MAYOR, ETC., OF HUDDERSFIELD.

Water Company—Duty to Supply Pure Water—Water Poisoned in Consumer's Service Pipe—Waterworks Act, 1847, *s.* 35.

The corporation of H. were empowered under a private Act, with which were incorporated the Waterworks Acts, 1847 *and* 1863, *to supply water for domestic use from specified sources. M. had been supplied for some years from one of the corporation's mains, through a lead service pipe laid down by the corporation at the expense and upon the application of M. and his landlord. By section* 66 *of their Act the corporation were entitled to prescribe the material to be used for service pipes, and at the time when the service pipe to M.'s house was laid the material might either be lead or cast-iron. No objection was made by M. to his service pipe being made of lead. The service pipe when laid belonged to the consumer. M. having been attacked with a severe illness, which, it was admitted, arose from the water supplied to him by the corporation having become contaminated with lead absorbed from his service pipe, brought an action against the corporation to recover damages for the injuries he had sustained. It was admitted that the material used for M.'s service pipe was that ordinarily used and best adapted for the purpose, and that the water while in the main from which M.'s supply was taken was pure and wholesome. By section* 35 *of the Waterworks Act*, 1847, "*The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act, who shall be entitled to demand a supply and shall be willing to pay water-rate for the same*":— Held, *that M. had no cause of action against the corporation, as the responsibility of the corporation for the condition of the water supplied to M. terminated at their mains.*

This was an action tried at Leeds Summer Assizes, and reserved by Mathew, J., for further consideration.

It was argued before him on the 9th of December by—

A. Wills, Q.C. (with him *C. Dodd*), for the plaintiff;

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Forbes, Q.C.* (with them *Lockwood* and *Vaughan Williams*), for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Cur. adv. vult.

MATHEW, J. (on Dec. 21).—In this action, which was tried before me at the Leeds Summer Assizes, the plaintiff sought to recover damages for injuries which he had sustained from impure and unwholesome water alleged to have been supplied by the defendants. The material facts were not in dispute, and it was agreed that the jury should assess the damages, and that the question of the defendants' liability in the action should be reserved for

further consideration. The jury gave a verdict for 2,000*l.*

The plaintiff is a solicitor residing in Huddersfield, and the defendants, the Huddersfield Corporation, are empowered under the Huddersfield Waterworks Act of 1869 to supply water for domestic use within the limits and from the sources described in their Act. With the Act of 1869 the Waterworks Acts of 1847 and 1863, with certain excepted provisions, are incorporated.

The plaintiff for some years had been supplied from one of the defendants' mains, through a lead service pipe, which was about ninety feet in length, part of which had been laid down at the expense of the landlord of the plaintiff's house, and the rest at the plaintiff's expense. By section 66 of their Act, the defendants are entitled to prescribe the material to be used for service pipes by persons supplied with water, and, under the by-laws of 1873, which were in force when the service pipes to the plaintiff's house were laid, it would seem that the material might either be lead or cast-iron.

It was not disputed that the service pipes when laid belonged to the consumer and not to the defendants.

The material invariably used by the defendants for service pipes had been lead, and lead service pipes had been laid down to the plaintiff's house by the defendants, upon the application of the landlord and the plaintiff, without objection on the part of either to the material selected.

The plaintiff and the members of his family had used the water supplied by the defendants from 1875 down to 1881 without inconvenience of any kind.

In July of that year the plaintiff was attacked with an illness, the cause of which was not at first suspected. He soon recovered; but between September, 1881, and May, 1882, he suffered from a series of attacks of increasing severity, and was finally affected with grave symptoms, which were clearly referable to lead poisoning. Upon analysis of the water drawn from the service pipe to the plaintiff's house the presence of lead was detected, and it was not disputed at the trial that the plaintiff's condition was due to his use of the water, which had become contaminated with lead absorbed from the service pipe.

It appeared that between 70,000 and 80,000 people were supplied from the reservoir from which the water for the plaintiff's house was drawn. It was not contended that there had been any want of care or skill on the part of the defendants or their agents, and it was admitted that the water while in the main from which the plaintiff's supply was taken was pure and wholesome, and in its natural condition as it was drawn from the sources specified in the Act of 1869.

It was further admitted that the material used for the service pipes was best adapted for the purpose, and that it had been used with perfect safety for the supply of a great number of large towns.

No clear explanation of the cause of the contamination of the water supplied to the plaintiff was given by the scientific witnesses called on either side.

It was stated that soft water, like that supplied to Huddersfield, usually contained ingredients which served to form an insoluble coating to lead service pipes and prevented the absorption of lead.

It was not explained why this protective process had not taken place in this particular case. There was evidence to shew that some persons were peculiarly susceptible of the poisonous property of lead, and that so small a quantity as one-fortieth of a grain of lead per gallon of water might be injurious.

It was stated that the quantity of lead absorbed was not always the same, and varied, it was supposed, with changes of an obscure kind in the natural condition of the water. Scientific men of great eminence were called at the trial, who appeared to be unable to explain how the water supplied to the plaintiff has become contaminated to the extent ascertained upon analysis; or how the plaintiff alone, out of the large number of persons supplied from the same reservoir, had suffered the serious injuries which he was proved to have sustained.

The case came on for argument on further consideration on the 9th instant.

It was contended by counsel for the plaintiff that, under section 35 of the Act of 1847, the defendants were bound to

have in their mains for the supply of the plaintiff pure and wholesome water. It was treated as a fact clearly established at the trial that a lead service pipe was the best and safest mode of conveying water from the mains to the plaintiff's house, and it was argued that, though the water may have been pure in the mains, it was nevertheless not fit for domestic use, if, when drawn from the mains by the best known method, it became contaminated before it reached the plaintiff's house.

It was argued that the defendants were, under their Acts, in the position of a company of traders carrying on the business of supplying water to customers, and that it was reasonable that the Legislature should require them to warrant the quality of the article which they supplied. Their position was said to be analogous to that of a railway company empowered to make contracts with the public, and it was contended that in the statutory contract made with each customer the Legislature must have intended that there should be implied the warranty which would be contained in a mercantile contract of the same character, namely, that the water should be fit for the purpose for which it was supplied. As against this view attention was called by the counsel for the defendants to the terms of the 35th section of the General Act of 1847, which, so far as they are material, are as follows: "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act who shall be entitled to demand a supply and shall be willing to pay water rate for the same." It was pointed out that the private Act from which the defendants derived their powers enabled them to provide a supply of water from certain specified sources, and that, while the mains by which the water was drawn from those different sources belonged to the defendants, the service pipes were the property of the consumers, and that it was reasonable to suppose that, in accordance with the precise terms of section 35, the responsibility for the condition of the water was intended to terminate at the defendants' mains. That, as it was shewn that lead was the best material for service pipes, it would be unreasonable that the defendants should be made responsible for what no care or skill could have prevented, namely, contamination due to the natural action on the plaintiff's service pipe of pure and wholesome water, and that the supposed warranty would be imposing on the defendants an obligation which they would have no practicable means of fulfilling.

The contention of the defendants appears to me to be correct. There seems no reason for departing from the plain terms of section 35, by which the defendants are required to keep in their pipes pure and wholesome water for domestic use, and no ground for supposing that any further duty was intended to be imposed upon them.

The meaning of section 35 is made clear from the terms of the section in the same Act as to the pipes to be laid by consumers (sections 48 to 53). By section 48 the consumer might compel the defendants to supply him with water through a service pipe of material not selected or approved by the defendants. It could not have been meant that the defendants should be responsible for contamination due to the material of a pipe thus provided.

Again, it would seem unreasonable that the defendants should be exposed to claims for what might be due to the carelessness of the consumer after the supply had come under his control, and not to any impurity in the water in the defendants' mains.

Further, by section 61 of the Act of 1847, the defendants are entitled to recover penalties from persons by whom their water supply might be fouled, and this would seem to be the only remedy.

If the plaintiff's contention were right the defendants might be made responsible without default on their part for contamination due to the acts of others against whom they would have no right to an indemnity. I do not consider it necessary to express an opinion upon a further point made by the defendants, namely, that, under section 36 of the Act of 1847, they were liable, if at all, to a penalty and not

to an action. Nor do I consider it necessary to deal with the question whether, upon the assumption that the defendants could be treated as having entered into a contract with respect to the quality of the water, there was evidence of the breach of any warranty which it would be reasonable to imply.

I regret that the serious injuries sustained by the plaintiff must remain without the redress which the verdict of the jury was intended to give him. I am compelled to decide that he has no cause of action against the defendants, and my judgment must be entered for them, with costs.

Judgment for the defendants.

Solicitors — Conrad Fitch, agent for Edwin Sykes & Son, Huddersfield, for plaintiff; Van Sandau & Co., agents for Joseph Batley, Town Clerk of Huddersfield, for defendants.

[IN THE COURT OF APPEAL.]

1882. Nov. 16, 22. } THE ATTORNEY-GENERAL *v.* EMERSON AND ANOTHER.*

Practice — Information — Discovery — Production of Documents—Affidavit, Sufficiency of.

The Court will not order the production of documents which the defendant, in his sworn answer to an information (the procedure as to which, under Order LXII., is not affected by the Rules of the Supreme Court), has admitted relate to the matters in dispute and are in his possession and control, but which he objects to produce, on the ground that the same form or support his own title, and are intended to be or may be used by him in evidence accordingly, and do not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case. But where the Court can, notwithstanding those averments, see with reasonable certainty, from the information, the admissions in the answer and the description of the documents themselves contained in the answer, that the defendant has erroneously misrepresented or misconceived the nature of the documents, an order for the production of such documents will be made.

Per BRETT, L.J.—*The rule applicable to proceedings in the Court of Chancery before the Judicature Act as to the sufficiency of an affidavit in which a party claims protection from the production of documents is equally applicable to an affidavit in which the like protection is claimed under the Rules and Orders of the Judicature Act.*

Appeal of the defendant Emerson from an order of a Divisional Court for the production of certain documents.

By an information filed by the Attorney-General on behalf of the Crown it was prayed that it might be declared that the Crown was seised in fee of the foreshore of the sea opposite to the county of Essex, north and east of Havengore Creek; and that a commission might issue to ascertain the seaward boundaries of the manors of Great and Little Wakering.

The defendant Emerson, in his sworn answer to the information, alleged that the land in question belonged to him as lord of the manor; and also admitted that he was in possession of certain deeds, charters, court rolls, plans, books and other documents set forth in the schedule relating to the matters in question in the suit.

The documents set forth in the second part of the schedule consisted of all the entries made on the court rolls and minute books of the two manors within the last sixty years; but the defendant, in his answer, objected to produce them, "on the ground that the same relate exclusively to my own title to the foreshore claimed by me, and that none of such documents relates to or tends to support or to make evident the alleged title" of the Crown.

The documents which the defendant in particular objected to produce were described in the schedule as follows:—

"Two books containing court rolls of the manor of Great Wakering, commencing the 24th of May, 1815, and ending in 1880.

"Book containing court rolls of the manor of Little Wakering, commencing

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

the 3rd of November, 1848, and ending in 1880.

"Great Wakering book, containing minutes of proceedings at courts, commencing the 17th of June, 1835.

"Great Wakering minute book, commencing the 20th of May, 1869.

"Great Wakering index to court rolls.

"Little Wakering minute book, commencing the 27th of May, 1812; also presentments, commencing the 31st of May, 1820; also another minute book, commencing 1874.

"Four statements as to rentals of the manor of Great Wakering.

"Three statements as to rentals of the manor of Little Wakering."

The Master refused to make an order upon the defendant for the production of these documents. Denman, J., at chambers, reversed the order of the Master; and the Divisional Court (Field, J., and Stephen, J.) affirmed the decision of the learned Judge.

The defendant appealed.

Moulton (with him *A. J. Ashton*), for the defendant.—The inspection of these court rolls ought not to be ordered. The defendant has made an affidavit which is in the same terms as those which were held to be sufficient in *Bewicke* v. *Graham* (1).

[BRETT, L.J.—Perhaps the suggestion is that that case cannot apply when the question is one as to boundaries.]

The question at issue is whether the foreshore is within the manor of the defendant, and discovery and inspection will not be allowed the object of which is merely the discovery of the case and evidence of the other party—*Benbow* v. *Lowe* (2). The principle is that the discovery sought must be directed to that which will support the case of the party seeking it—*Owen* v. *Wynn* (3). It must be admitted that *Earp* v. *Lloyd* (4) extended the principle somewhat farther; but that case cannot be supported.

Smith v. *The Duke of Beaufort* (5) shews that inspection will not be ordered of documents which exclusively evidence the title of one party.

Jenkins v. *Bushby* (6) and *Burrell* v. *Nicholson* (7) were also cited.

Vaughan Hawkins (with him *The Attorney-General, Sir H. James, Q.C.*), for the Crown.—The broad issue is as to the boundaries between the two manors, and if it appears from the description or the names of the documents that they may be material to the case of the party seeking inspection, then they cannot be privileged from production. The entries in these court rolls contain evidence common to both parties. *Bewicke* v. *Graham* (1) was a decision on the question of how to get a description of documents which a party declined to produce; but in this case there is a sufficient description to shew that they relate to the case of the Crown; and the answer to the information also shews that the affidavit of the defendant is erroneous. In *Combe* v. *The Corporation of London* (8) the principle is laid down that a document is not protected if it may form part of the title of the other party; and the same view was expressed in *Ferrier* v. *Atwool* (9) by the Court of Appeal; and since the decision of Lord Cottenham in *Smith* v. *The Duke of Beaufort* (5), a party may have production of everything which will enable him to make out his case. The mere assertion by the other party that the documents will not assist the case of his adversary does not protect them from production—*Newton* v. *Berresford* (10). There is a difference between the jurisdiction exercised in equity as to granting discovery of documents, and the more limited jurisdiction given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). Section 50 of that Act, upon which the common law practice is founded, gave power to a Court of law to

(1) 50 Law J. Rep. Q.B. 396; Law Rep. 7 Q.B. D. 400.
(2) 50 Law J. Rep. Chanc. 35; Law Rep. 16 Ch. D. 93.
(3) Law Rep. 9 Ch. D. 29.
(4) 3 Kay & J. 549.
(5) 1 Ph. 209; 13 Law J. Rep. Chanc. 33.
(6) 35 Law J. Rep. Chanc. 400; Law Rep. 2 Eq. 547.
(7) 1 Myl. & K. 680.
(8) 1 You. & C.C.C. 631, 651.
(9) 12 Jur. N.S. 365.
(10) 1 Younge, 377.

require an affidavit to be made by the defendant of the documents in his possession or under his control relating to the matters in dispute, and the Court was empowered to make an order for their production; but the jurisdiction in equity was more extensive, and quite independent of the practice as to making an affidavit, which was introduced for instance in patent cases by 15 & 16 Vict. c. 83. s. 42. *Newall* v. *The Telegraph Construction Company* (11) is an authority to shew that even where the affidavit as to documents is for convenience made in the common form, it may still be necessary to go behind that form if it be insufficient—see also *Catt* v. *Tourle* (12). In *Felkin* v. *Lord Herbert* (13) it was held that the defendant must state, and it must appear by the schedule and the nature of the documents, that they do not relate or tend to support the title of the plaintiff. The circumstances under which production of documents has been ordered are to be found in *The Attorney-General* v. *Thompson* (14), *The Prince of Wales* v. *Lambe* (15), *Knight* v. *The Marquess of Waterford* (16) and *Gresley* v. *Mousley* (17). It is contended by the defendant that *Earp* v. *Lloyd* (4) cannot be supported; but the effect of that decision is that, on a question of boundary, if the parcels of the deeds can reasonably be said to describe the *locus in quo*, then production of the deeds will be ordered. On the question of boundary, *Mansell* v. *Feeney* (18), *Lind* v. *The Isle of Wight Ferry Company* (19) and *Harris* v. *Harris* (20) were cited. Where it can be seen from the answer and the description of the documents that the documents are material, there the Court can go behind the answer and order the production of the documents. *Benbow* v. *Lowe* (2) only shews that the plaintiff must not ask to see the details of the defendant's case; and in *Owen* v. *Wynn* (3) it plainly appeared from the nature of the issue and the description of the documents that the plaintiff could have no interest in seeing them.

Moulton, in reply.—It must be shewn from the answer that the documents in question are material in that they assist the other side to make out his case. The affidavit must, therefore, be looked at as a whole; and the Court must be satisfied, not that the documents will destroy the defendant's, but that they will support the plaintiff's, case—*Bolton* v. *The Corporation of Liverpool* (21). The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case; and does not extend to a discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case—*Wigram on Discovery* (22). He also referred to *Minet* v. *Morgan* (23) and *Daniell's Chancery Practice* (24).

BAGGALLAY, L.J.—Under Order LXII. of the Rules of Court, the orders appended to the Judicature Acts are not applicable either to Crown cases or to Revenue cases; and therefore they are not applicable to the particular jurisdiction which is sought to be enforced in this case. The old system of procedure—whatever it may have been—prevails, therefore, so far as regards the question now under consideration.

The defendant, in his answer, states that the deeds which are set forth in the schedule are deeds and documents which relate to the matters in dispute between the parties. That is an important admission on the part of the defendant, when the claim for protection from production is considered. The schedule is divided into four parts. The first part contains the documents which the defendant has in his possession and does not object to pro-

(11) 35 Law J. Rep. Chanc. 827, 829; Law Rep. 2 Eq. 756, 762.
(12) 18 W.R. 966.
(13) 9 W.R. 456.
(14) 8 Hare, 106.
(15) 11 Beav. 213, 219; 17 Law J. Rep. Chanc. 213.
(16) 2 You. & C. 22, 41.
(17) 2 Kay & J. 288, 291.
(18) 2 Jo. & H. 320.
(19) 8 W.R. 540.
(20) 4 Hare, 179, 184.
(21) 1 Myl. & K. 88; 1 Law J. Rep. Chanc. 166.
(22) 2nd ed. p. 261.
(23) 42 Law J. Rep. Chanc. 627; Law Rep. 8 Chanc. 361.
(24) Vol. 2, 2nd. ed. pp. 1690–1.

duce. The second part contains documents upon which the defendant raises a claim for protection, and which are the subject of the present application. The third part contains documents which the defendant objects to produce, on the ground that they are privileged communications between himself and his professional advisers; and the fourth part contains documents which once were, but which no longer are, in his possession.

The defendant here has given his answer in what is apparently the usual form. In *Combe* v. *The Corporation of London* (8) the claim for protection from production was in larger terms than those in which it is expressed here in the defendant's answer; but it has been agreed between the parties, in order that the opinion of the Court might be taken as applicable to the fullest amount of protection claimed, that all the words which would cover what was considered of importance by Vice-Chancellor Knight-Bruce in *Combe* v. *The Corporation of London* (8) should be treated as if they had been the grounds here for the non-production of the documents. That case was decided some forty years ago, and has been cited in *Daniell's Chancery Practice* and other text-books since that time as enunciating the rule applicable to the circumstances under which the production of documents alleged to be in the possession of the plaintiff or defendant should be refused. What Vice-Chancellor Knight-Bruce says is this (at p. 650): "To protect a defendant from the discovery or production of a document relating to the subject of dispute"—which the documents here are admitted to be—"it is not sufficient that it should be evidence of his title, or contain evidence that he intends and is entitled to use in support of his case"; and then he states the principle that is to be applied in each case as it arises—"if it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature." It is to be observed that there are four allegations which were deemed important by that learned Judge in order to maintain a claim for protection—namely, that the document supports the defendant's title; that it is intended to be or may be used by him in evidence accordingly; that it does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case. Then it is said that, if these four states of circumstances co-exist, the document is protected from production unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature. It has been suggested that there might be some doubt as to the precise meaning to be attached to the word "sees" in that passage. I should be disposed to say, if that sort of judicial view that a person would take of all the circumstances brought under his notice in connection with the particular case were taken by him, it might perhaps be said that the word "sees" is equivalent to "is reasonably satisfied," or, as it has been suggested, to "is reasonably certain"—that is, that amount of certainty which a reasonable man would act upon as a certainty. There does not, however, appear to me to be any substantial difference between these several views, and the application of any one of those interpretations of the word "sees" would, in the great majority of cases, lead to the same result. In *Combe* v. *The Corporation of London* (8) the matter is put by Vice-Chancellor Knight-Bruce as a positive rule with an exception to that rule. He says, "But where it is consistent with the answer that the document may form the plaintiff's title or part of it, may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected; nor I apprehend is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness." I do not think the Vice-Chancellor intended in that second proposition to affirm anything different from that which he had affirmed in the earlier

proposition, but that he merely intended to put, as it were, the converse case; for in the first proposition it is said that the rule shall apply unless the Judge sees something to the contrary, and in the second proposition that if it is consistent with the answer put in by the defendant that these other circumstances might not exist, then the document is not protected. It appears to be clear from the proposition stated by Vice-Chancellor Knight-Bruce, which I am prepared to adopt as a guide, that it is the duty of a Judge, if he finds a defendant's answer in such precise terms as those pointed out by Vice-Chancellor Knight-Bruce, and which we are to assume the answer in the present case amounted to, to ascertain whether, from a consideration of the whole case, he is satisfied that the defendant has erroneously represented or misconceived the nature of his case. In order to do that it is necessary to go into the whole of the answer; but I do not depart from adopting the view, which has been repeatedly acted upon, that where there is nothing but the clear and positive denial of the defendant, in some such terms as those enunciated in *Combe* v. *The Corporation of London* (8), there the oath of the defendant must be accepted and credit given to it. That may be so in cases where production is claimed and the only thing to be dealt with is an affidavit as to documents; but here there is an additional circumstance which cannot be omitted from consideration, namely, the admission by the defendant that the documents which he does, as well as those which he does not, seek to protect, relate to the subject-matter of the suit. Now that raises some doubt or suspicion—not at all sufficient to be acted upon by itself—whether the documents sought to be protected, since they relate to the subject-matter in dispute, have a bearing which would make one or other of the several allegations not strictly accurate. A mere inference of that kind would not of itself be sufficient; but where, as in this case, there is not only a statement as to the possession of the documents and the denials which are necessary for the claim of protection, but also the language of a continuous answer to various other interrogatories which have been put to him in connection with the subject-matter of the suit, there the question must be considered whether or not, taking all the admissions that are to be found in the other part of the answer, and the whole of the answer in connection with the subject-matter to which they relate, full and complete credit can be given to the affidavit made by the defendant. I do not by that mean to say that the defendant, when full and complete credit is not given to his statement, has wilfully stated that which is false; for the case might be a complicated one of title, and a man who is not a professional man might well come to the conclusion that particular documents, according to his view, would not in any way support the plaintiff's or impeach his own title. The opinion, therefore, whether unbounded credit is to be given to the representation made by the defendant must be formed when the other portions of the answer are looked at.

Without travelling through all the allegations and statements which are to be found in the answer, it seems, in my judgment, to be impossible to come to any other conclusion than that the defendant has made a mistake or misconceived the effect of the documents which he alleges have no relation to and do not support the plaintiff's case, or in any way impeach his own. A number of court rolls, down to about fifty or sixty years ago, have been set forth, but all the more recent ones are those in respect of which the defendant seeks protection; and it may be that there is a strong presumption, having regard to the very peculiar nature of copyhold property, and what is often found on copyhold rolls, that, if there has been for a long series of years entries of admissions from time to time to this and to that property, the continuance of those rolls from a period of forty or fifty years ago down to the present time would contain matters of importance to the several parcels of copyhold land, or have reference to certain acts, rights or privileges connected with ownership, such as the enforcement of various copyhold rights and other matters of that kind; or, in the absence of information with regard to particular parcels of the manor, which might be very important as indicating that certain land was not a parcel of the manor, although the earlier

court rolls had regularly and persistently dealt with it.

There are certain entries in the defendant's answer which make it almost impossible for me to come to the conclusion that the later court rolls do not contain matters of importance not only as affecting the matter in dispute, but as tending to shew the plaintiff's title, or possibly to impeach the title of the defendant. Applying the test suggested by Vice-Chancellor Knight-Bruce, I am "reasonably satisfied" or "reasonably certain" that the defendant has misrepresented or misconceived the nature of these documents when he says that they cannot have the effect which he says that they have not. I think the decision of the Court below was right. The appeal must therefore be dismissed.

BRETT, L.J.—The process into which we are enquiring consists of several steps which it is necessary to keep separate in order to come to a satisfactory conclusion, and we must therefore consider carefully which step of the process we are now enquiring into. The first step here consists of interrogatories put to the defendant as to the existence of documents. The defendant is bound to answer these interrogatories by describing what documents are in his possession or under his control which relate to the matters in dispute. The answer given by the defendant to those interrogatories may be in a more or less general form, and may contain a general description of the different documents; or, as in *Bewicke* v. *Graham* (1), it may contain a less general description of those documents—as, for instance, by stating that the defendant has in his possession or control certain documents tied up in bundles which are numbered. If the person who interrogates—the plaintiff here—is not satisfied with the particularity of the description of the documents, he has a remedy; for he can ask the leave of the Court, either that he may interrogate further, or that the defendant may be required in his answers to give a more accurate description of the documents. If the plaintiff does not object to the description of the documents at that stage, he is precluded in the next stage, which is the one now under consideration, from asking for any further description of the documents. The question must therefore be considered with regard to the description which has been given, and to which no objection has been made. After the interrogatories have been answered by the defendant a new stage of the process is commenced. The plaintiff has a right to ask for discovery of the documents which the defendant has stated in his answer are in his possession or control, and which he has described; and unless the defendant can shew a valid objection to the discovery or production of all or any of those documents, all must be produced. In answer to that application the defendant must produce the documents, unless he can shew some excuse for not producing some of them. If he desires to object to the production of any of the documents he must make an affidavit of a very strict kind, as it seems to me, with regard to those which he objects to produce. When that affidavit has been made, the question may arise as to whether it is sufficient or not; for the affidavit may not have been so strict in substance as to entitle the defendant even *prima facie* to object to the production of the documents. The affidavit, however, ever since the case of *Combe* v. *The Corporation of London* (8), and to the extent there described by Vice-Chancellor Knight-Bruce with great care, and ever since adopted, must, with distinctness and positiveness, state that the document which the defendant objects to produce forms or supports the defendant's title or case, and is intended to be or may be used by him to support it, and does not contain anything impeaching his defence or forming or supporting the plaintiff's case. The affidavit must go to that extent; it is not sufficient for it to state that it does not contain anything impeaching the defendant's title or case, but it must also state that it does not form or support in any way the plaintiff's title or case.

There are cases where the defendant has been obliged to produce documents which he has already stated refer to the matters in dispute, because the affidavit in answer to the application to produce was not sufficient within that rule. Here it is to be assumed, by agreement between the parties, that the affidavit with regard to the documents in dispute is *prima facie*

sufficient. Then comes another question, which has been a matter of considerable controversy, and, as it seems to me, of considerable variation in form—namely, assuming the defendant has made the affidavit in such a form as is *prima facie* sufficient to protect the documents from production, is the Court bound to accept it absolutely and to act upon it?

Since the case of *Combe* v. *The Corporation of London* (8) it has been held that the Court is not absolutely bound to accept the affidavit, although *prima facie* it is full in form. But a doubt has arisen as to the extent of circumstances which will entitle the Court or a Judge who has to determine the question, not absolutely to disregard, but to decline to act upon the affidavit of the defendant in that form. I think that the Judges, in stating what is the extent of circumstances which will entitle a Judge not to act upon the affidavit of the defendant in such a case, have differed in the form of expression of that rule. It is important that there should be an expression of the rule upon which every Judge, as far as possible, may act. The Judge who, I think, has stated the rule in the widest terms which will enable the affidavit of a defendant or party not to be acted upon was Vice-Chancellor Page Wood in *Newall* v. *The Telegraph Construction Company* (11); but, with great deference, I do not think that the rule was there laid down in any exact terms at all. I think that, subject to the explanation of one word, the rule laid down by Vice-Chancellor Knight-Bruce in *Combe* v. *The Corporation of London* (8) is the right one —"if it be with distinctness and positiveness stated in an answer that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case; that document is, I conceive, protected from production, unless the Court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature." I think the meaning of the expression "or misconceives its nature" must be taken to be that the document is one which forms or supports the defendant's title, but does not contain anything impeaching his defence, or forming or supporting the plaintiff's title or case. That is the nature in which the Judge must see there is an error. I think that the next part—"unless the Court sees"—is right, if we can come to an accurate conclusion as to what the word "sees" there means. The interpretation I put upon the words "unless the Court sees" is "unless the Court is satisfied," or "unless the Court is reasonably"—I do not say absolutely—"certain" from the answer itself that the defendant erroneously represents or misconceives the nature of the document in the particulars before mentioned. There must be that degree of certainty which a man of reasonable care would, in the ordinary course of things, act upon as a certainty. If there is that degree of certainty that the defendant has not erroneously represented or misconceived the documents when he says that they only can form part of his case and cannot form part of the plaintiff's case, there the affidavit must be acted upon. But if it can be seen that the defendant has in the sense described misconceived the nature of the documents, then the Judge is entitled not to act upon the affidavit. From what is this certainty to be got? Here it is said from the answer. Where the process is that of the old Court of Chancery, it would, I suppose, be got from the answer. But where the process is a new process, that is, only by interrogatories, summons and answers of the affidavits, it must be considered whether that certainty exists, judging from the description of the documents given by the defendant and from other admissions and documents produced to the Court. If either from the description of the documents, or from the answers with regard to the other documents, or from an inspection of other documents which have been produced without any objection being made, or from any other admission in the course of the proceedings, the whole of which are before the Judge or the Court, it can be seen, with the certainty I have before described, that the defendant cannot be trusted when he swears in the form I have already described, then the Court will not give effect to the defendant's oath, but will act upon their own view, that

the description of the documents given by the defendant cannot be trusted. Where the documents are shewn to be of such a nature that the Court alone at the final hearing can say that they will not assist the plaintiff's case, and cannot negative the defendant's case, and where, in the opinion of the Court, it is certain that the affidavit which has been made cannot properly be met, there the Court will act upon the affidavit. But where the Court are certain in the sense I have described that the documents will assist the plaintiff's case or will negative the defendant's case, there they will not act upon the affidavit. I desire to say distinctly that if the nature of the documents is shewn to the Court to be such that the Court can say with certainty that no person in the position of the defendant can affirm or negative the parts which he does affirm or negative, then the affidavit cannot be accepted by the Court as a satisfactory affidavit. The Court, unless they can, in the manner and to the extent described, be certain that the document is of such a character that the defendant cannot properly swear to the effect to which he is bound to swear, must trust the oath of the defendant and refuse the order for production.

The rule laid down in the way I have described reconciles the rules laid down by all the Judges excepting that by Vice-Chancellor Page Wood in *Newall* v. *The Telegraph Construction Company* (11), who described it in terms which, to my mind, are not sufficiently accurate to be a guide.

The rule now laid down is, no doubt, the rule which was applicable to the former proceedings in the Court of Chancery, but it seems to me that the rule as to the sufficiency of the affidavit and the mode in which it is to be treated is equally applicable to an affidavit which claims protection from the production of documents under the Orders and Rules of the Judicature Act as it was to the proceedings in the old Court of Chancery.

The next question, which is a difficult matter, is the application of the rule to the present case. If the court rolls are put in, I think it is true to say that the admissions of persons in the court rolls cannot in one sense assist the plaintiff's case or negative the defendant's case. The court rolls must assist the defendant's case as to what is the extent of the manor. The existence of admissions to a certain boundary to a certain extent, and the absence of any admissions beyond that extent upon the whole of the court rolls, would negative or tend to negative the defendant's case. I, therefore, am not prepared to disagree with the decision of Mr. Justice Denman at chambers, who came to the conclusion that he was certain, in the sense which I have described, that in his view these admissions of tenants in the court rolls might assist the plaintiff's case, or might have an effect either to negative or to affirm the defendant's case. If they would negative the defendant's case, I think that they ought to be produced.

The case is within the rule, and the decision of the Divisional Court must therefore be affirmed.

LINDLEY, L.J.—I am of the same opinion. I concur with the paraphrase given of the rule as laid down by Vice-Chancellor Knight-Bruce in *Combe* v. *The Corporation of London* (8). To my mind I do not see much distinction between the expressions "the Court sees," "the Court is satisfied" or "the Court is reasonably satisfied." The expressions are substantially equivalent, and ought to be accepted as such.

In this case we have to see whether there are sufficient materials before the Court for distrusting the defendant when he swears that certain documents which are relevant to the matters in question in the case do not assist the plaintiff. We have to see some reason for distrusting the defendant.

It is impossible for the defendant or anybody else to say that these court rolls cannot assist the plaintiff's case. It appears to me to be almost certain that they must assist the plaintiff in this way—the real question in dispute is as to where are the boundaries of these manors north and east of Havengore Creek, and these boundaries can only be ascertained from the court rolls and a map. The fact that the defendant does not know the boundaries makes one distrust him when he

says that that cannot appear from the court rolls. But what does appear is this, that the court rolls contain statements of admissions to certain parcels of land described in a way which is frequently the practice, and identified by linking them together with a map. Knowing what court rolls are, we are entitled to assume that the court rolls sought to be protected here contain admissions, and that they are, as all court rolls are, connected more or less by previous descriptions.

The court rolls when connected together will shew where the particular spots of land mentioned are, and then the boundary can be ascertained with considerable accuracy. That being the inference to be drawn from what one knows of court rolls, it is obvious that neither this nor any other Court could hesitate to say that this affidavit, even if it were a sufficient affidavit, which it is not, should be distrusted by the Court. Under these circumstances the Court sees, or is satisfied, or is reasonably certain that the defendant has erroneously represented or misconceived the nature of the documents as to which he is swearing.

The case is free from all reasonable doubt, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—T. W. Gorst, for the Crown; Goodhart & Medcalf, for the defendant.

[IN THE COURT OF APPEAL.]

1882. Dec. 7.

In re CHAPMAN.*

Practice—Costs—Taxation between Solicitor and Client—Employment of Counsel at Chambers—Rules of Court (*Costs*), 1875, *Special Allowances, Rule* 14.

Rule 14 *of the Special Allowances as to Costs of the Additional Rules of Court*, 1875, *which provides that "as to counsel attending at Judges' chambers no costs thereof shall in any case be allowed unless the Judge certifies it to be a proper case for counsel to attend," applies to taxation of costs between solicitor and client, as well as between party and party* :—So held, *by the Court of Appeal, affirming the judgment of the Queen's Bench Division.*

Appeal from the Queen's Bench Division.

The case is reported 51 Law J. Rep. Q.B. 337.

On the taxation of a bill of costs delivered by a solicitor to his client, the Taxing Master disallowed the fees paid to counsel in respect of attendance at Judges' chambers. As the party had not succeeded on the summons, no application had been made to the Judge for a certificate for counsel. The client had expressly authorised the solicitor to employ counsel. A summons to review this taxation was dismissed by the Judge at chambers, and the Queen's Bench Division affirmed that decision.

The solicitor appealed.

Muir, for the appellant.—The question is whether a solicitor who has employed counsel by the direct authority of his client is liable to have that item disallowed on taxation. If rule 14 (1) of the order as to costs applies as between solicitor and client, he is subject to that liability; but it is submitted that the rule does not so apply. The rule is drawn with reference to two scales of costs which precede it, and those scales of costs apply between party and party. It has been suggested that as the old rule (2) contained words which are omitted from rule 14, therefore the intention was to make a new rule altogether; but it would rather

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J., and Lindley, L.J.

(1) Additional Rules of Court, 1875, Order VI. (Costs), Special Allowances, rule 14: "As to counsel attending at Judges' chambers, no costs thereof shall in any case be allowed, unless the Judge certifies it to be a proper case for counsel to attend."

(2) Directions to the Masters, Hilary Term, 1853, rule 6: "The costs of attendance by counsel or special pleader before a Judge at chambers shall in no case be allowed as between party and party, unless the Judge shall certify for such allowance."

seem that the new rule is taken from the old Chancery rule, and that rule never applied between solicitor and client; a certificate is necessary if it is desired to charge another party or to charge a fund; but that cannot apply to this case, which is one between solicitor and client, and one in which there was express authority.

[COLERIDGE, C.J.—Is it suggested that none of these rules apply in a case between solicitor and client? Does not rule 29 apply in such a case?]

That applies to a case where there is a fund in Court.

[COLERIDGE, C.J.—These rules are made under the Judicature Act, which authorises rules to be made with regard to the practice and procedure of the Court, or to the costs of proceedings therein. Can it be said these rules do not apply to *ex parte* proceedings where the application fails?]

In such a case the taxation would be under the Attorneys and Solicitors Act, and not under these rules. Here the Master exercised no discretion, as he considered the rule was imperative.

[LINDLEY, L.J.—The discretion is by the rule given to the Judge before whom the summons is heard.]

No such rule existed between solicitor and client before the Judicature Act; under the Common Law Procedure Act the rule only applied between party and party; in the rules made under the Judicature Act the words "between party and party" are omitted; but that does not give rise to any inference against the argument of the appellant, as the new rule is copied from the old Chancery rules. The practice between solicitor and client remains unaffected by these rules, so that the unsuccessful party need not ask for a certificate, as the rule does not apply. This taxation was not under the Judicature Act, but under the Attorneys and Solicitors Act; and as the practice under that Act is not inconsistent with that under the Judicature Act, it remains unaffected.

McLeod, for the respondent, was not called on.

LORD COLERIDGE, C.J.—I do not complain that this case has been brought before this Court, although it involves but a small sum; for I am of opinion that it relates to a question of importance, and that the decision will extend beyond the particular matter now before the Court. It is, therefore, not merely an appeal for costs, but it is an appeal on a serious question. Having said thus much, I must confess that the case appears to me to be tolerably clear. The bias of my mind is always to stand by the plain words of a rule or enactment, and not to attempt to fritter them away. Here we have to deal with a rule made under the authority of an Act of Parliament. The Act of Parliament is the Judicature Act, 1875, which provides, in section 17, that rules may be made, *inter alia*, "for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein." That provision is in fact recited at the head of the rules, which are made pursuant to it, one of which is now under discussion. It is plain, therefore, that unless the words of rule 14 (1), which says that "no costs . . . . shall in any case be allowed," mean costs other than those incurred in *ex parte* proceedings, the rule which has been made empowers the application of the principle contained in it to questions between solicitor and client. It is, in my opinion, difficult to suppose that it was intended to exclude from the operation of these rules a large class of questions, such as *ex parte* proceedings; and yet, if the argument on behalf of the appellant is right, then all such proceedings (and they are often proceedings which go no farther) are excluded from the operation of this rule. If the authority given by the rule were so limited, or if it were a necessary inference from the plain words that they must mean something other than that which they appear to mean, then I should acquiesce; but I cannot see that any such construction can here be placed upon the language of the Act or on the words of the rules.

If, indeed, as has been argued, no part of these rules could apply to *ex parte* proceedings, or to transactions between solicitor and client, I admit that the appellant

would go far in establishing his case; but it is, on the contrary, clear that this is not so, as even if the 28th rule—which provides that rules, practice and orders existing prior to the new rules of 1875 shall, so far as they are not inconsistent with the Act and the rules made in pursuance thereof, remain in force—does not apply so as to abolish those rules which are inconsistent, yet there are other rules which cannot receive an adequate interpretation unless you include therein the relation of solicitor and client and the taxation of costs in such cases, so that there is no reason so to limit the operation of rule 14, for it appears to me clear that an application between solicitor and client is within the operation of these rules. I am, however, anxious that the order which we intend to make should not do injustice to the particular person interested, and that we should not interpret the rule under consideration so as to work injustice. I think, and I believe my colleagues agree with me, that there has in all probability been a very general impression that this rule does not apply to such a case as the present. I gather that the attention of the Judge at chambers was not called to the fact that counsel had been instructed by the direct desire and authority of the client; and it seems to me, therefore, that there might be some hardship if we were simply to affirm the judgment of the Divisional Court without attaching thereto a condition that the judgment of this Court is to be without prejudice to the appellant's making, if he thinks fit, an application to the Judge who heard the summons, or to the Judge at chambers at the time of the application, to give a certificate such as is required by rule 14 (1), if it shall so seem right to him. If I were at chambers, I should not feel the mere fact that the client had authorised the employment of counsel decisive. These rules were passed for the protection of clients; and in all these matters clients are necessarily to a great extent in the hands of their solicitors, so that the mere assent of the client would not much weigh with me, or go far with me in inducing me to give a certificate; but of course I can only speak for myself. It seems to me, however, *valeat quantum*, that on the application to the Judge at chambers it should be brought to his notice that we dismiss this appeal and affirm the judgment of the Divisional Court without prejudice to any application which may be made to him.

BAGGALLAY, L.J.—I am of the same opinion.

LINDLEY, L.J.—I agree in the judgment which has been delivered, and I agree that the matter is one of importance. There are three methods in which costs may be taxed—one is between party and party; the second, between solicitor and client, when there is a fund; and the third, between solicitor and client in other cases. Some of the rules of this Order, such as 23, and rules 28 to 32 inclusive, apply to all cases of taxation. I doubt whether the consequences of rule 14 (1) were altogether foreseen; but I can see no escape from the language of the rule. In all probability the attention of the Judge at chambers was not called to the fact that in this case counsel had been employed at the request of the client. The construction there put on this rule may result in a change in practice which may cause some surprise; but I think that the permission now given to apply to a Judge at chambers will prevent this decision from working hardship in this particular case.

Judgment affirmed.

Solicitors—Appellant in person; Kisch, Son & Hanbury, for respondent.

1882. Nov. 21, 22. Dec. 8. } KENT *v.* THE LOCAL BOARD OF HEALTH FOR THE DISTRICT OF WORTHING.

Highway—Neglect to Repair—Dangerous Projection—Cover of Water Valve Pipe—Highway Authority—Water Authority—Local Board.

A local board, as water authority, fixed in the highway a pipe with an iron valve cover at the top, which was originally level with and formed part of the roadway, but

which, in consequence of the road wearing away, gradually projected considerably above it. The local board were also the highway authority, and as such were under a duty to keep the road level. An injury was caused to two horses by one of them stumbling against the valve cover:— Held, *that the local board were liable to the owner of the horses, for that a duty was cast upon them, apart from their duty as highway authority, to take care that that which they had placed in the highway did not become dangerous to persons passing along it.*

This was an appeal from the decision of the Judge of the Worthing County Court.

The action was brought for damages in respect of an injury occasioned to the plaintiff's horses by an iron valve cover placed in the roadway, and which, in consequence of the road having worn away, projected above the surface. The learned County Court Judge found—first, that the injury to the horses was caused by one of them stumbling against the valve cover, which projected above the level of the road; secondly, that the valve cover was *per se* proper, and that it was in proper order at the time of the accident, and that it had been originally properly fixed in the road, but that, the road having worn away, it projected above the road and so became a stumblingblock; thirdly, that it was not practicable to adjust the valve cover by lowering it as the road from time to time wore away, and that it was the duty of the surveyors of the highway from time to time to replace the road; fourthly, that there was no want of care on the part of the local board as water authority having duties under the Public Health Act in connection with the supply of water, and that in that character they were not liable in this action; fifthly, that there had been an omission to repair on the part of the local board as surveyors of the highway, but, on the authority of the case referred to by Lord Blackburn (1) in *White* v. *The Hindley Local Board* (2), that the local board were not liable for non-repair. Judgment for the defendants.

The plaintiff having obtained a rule calling upon the defendants to shew cause why the judgment for the defendants should not be set aside and judgment entered for the plaintiff for 21*l.*, or a new trial had on the ground that the defendants were liable either as the water authority or in the double capacity of water and highway authority:—

English Harrison shewed cause.—The only negligence on the part of the defendants found by the County Court Judge is negligence as surveyors of the highway. Mere non-repair of the roadway is not a thing for which the highway authority would be liable. That is shewn by the cases. The duty which has not been performed in this case is the duty of laying down stones round the valve cover, which was the duty of the surveyor of the highways. As water authority, the defendants were not negligent, and are therefore not liable in that capacity. The County Court Judge finds that the valve was originally properly fixed; and it has continued in its original position. If the local board would not be liable as highway authority or as water authority, they can incur no additional liability because they combine the two characters.

He cited *Gibson* v. *The Mayor of Preston* (1), *White* v. *The Hindley Local Board* (2), the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 57 and 64, *Smith* v. *The West Derby Local Board* (3) and *Blackmore* v. *The Vestry of Mile End Old Town* (4).

Horne Payne, in support of the rule.—It may be admitted that the board would not be liable for an act of non-feasance occurring in the performance of a duty cast upon them as surveyors of the highway. But the defendants were authorised to put this valve where it is, not by the Waterworks Act, but by the Public Health Act, and they had a duty to put it there with proper precautions, the Legislature knowing that they had the power to do so,

(1) *Gibson* v. *The Mayor of Preston*, 39 Law J. Rep. Q.B. 131; Law Rep. 5 Q.B. 218.

(2) 44 Law J. Rep. Q.B. 114; Law Rep. 10 Q.B. 219.

(3) 47 Law J. Rep. C.P. 607; Law Rep. 3 C.P. D. 423.

(4) 51 Law J. Rep. Q.B. 496; Law Rep. 9 Q.B. D. 451.

being the highway authority. What has been done by the local board has not been done by them as surveyors of the highway; but if it had been done by them as surveyors of the highway, they would have been liable. The surveyor of the highway has no power to put down a hydrant or anything of the sort. If the defendants put a thing liable to become dangerous into the highway, they are bound to see that it does not become dangerous. In the present case, either the valve cover must not project, or the defendants must surround the projection with stones. First, the defendants have done this act in a new character, and in the exercise of new powers conferred upon them by the Public Health Act. But, secondly, even if they had done it as surveyors of the highway, they would have been liable.

He cited *Hartnall* v. *The Ryde Commissioners* (5) and *The Borough of Bathurst* v. *Macpherson* (6).

Cur. adv. vult.

The judgment of the Court (7) was (on Dec. 8) delivered by

STEPHEN, J.—This is an appeal from the decision of a County Court Judge, delivered in the County Court at Worthing, on the 17th of July, 1882.

The facts were as follows: The Worthing Local Board are both the water authority and the highway authority for Worthing. They put down in one of the highways within their district an iron valve cover, the top of which when all was in proper order was level with and formed part of the roadway. The ordinary wear and tear of the highway caused the roadway adjacent to the valve cover to wear down to such an extent that after about three months wear the cover, unless the road were kept level, would project about an inch above the road. It was the duty of the local board as surveyors of the highway to keep the road level so as to prevent the valve cover from projecting. They neglected to do so. The valve cover projected, and the plaintiff's horse stumbled over it and fell, injuring himself and another horse of the plaintiff's to the extent of 21*l.* The question was whether this sum could be recovered from the local board. The learned County Court Judge was of opinion that it could not. He found that the valve cover was proper in itself, that it was originally properly fixed, and that at the time of the accident it was in proper order. Hence, in their capacity of water authority, the local board had committed no breach of duty. In their character of surveyors of highways they had committed a breach of duty by omitting to repair the road, but for this the learned County Court Judge considered, on the authority of *White* v. *The Hindley Local Board* (2), they were not liable to be sued.

After argument and a full consideration of the cases we are unable to agree in this view, and we are of opinion that the learned County Court Judge's decision must be reversed, and judgment entered for the plaintiff, with 21*l.* damages and costs.

The following is the view which we take of the authorities on the subject:

It was held in *Russell* v. *The Men of Devon* (8) that an action would not lie against the inhabitants of a county for an injury caused by the neglect of the inhabitants to repair a county bridge, the case proceeding mainly on the ground that the inhabitants of the county could not be regarded as a corporation in such a sense as to be liable to be sued for their acts and defaults. The case was thus understood in *McKinnon* v. *Benson* (9) which decided that an action would not lie against the surveyor of a county bridge for an injury done by its want of repair, although, by 43 Geo. 3. c. 59. s. 4, the surveyor may in some cases be sued. It was held in this as in some later cases that in all such cases the question to be determined by a consideration of the language of the statutes is whether the Legislature intended or not to make a surveyor of highways liable to an action in cases in which, according to the principle of *Russell* v. *The*

(5) 4 B. & S. 361; 33 Law J. Rep. Q.B. 39.
(6) 48 Law J. Rep. P.C. 61; Law Rep. 4 App. Cas. 256.
(7) Field, J., and Stephen, J.

(8) 2 Term Rep. 667.
(9) 8 Exch. Rep. 319; 22 Law J. Rep. M.C. 57; affirmed in error, 9 Exch. Rep. 609; 23 Law J. Rep. M.C. 97.

Men of Devon (8), the inhabitants are liable only to an indictment.

This question was raised in a variety of subsequent cases under the provisions of several different statutes, one of which only need be mentioned here. This is *Gibson* v. *The Corporation of Preston* (1). In this case it was held that the provisions of the Public Health Act of 1848, which are substantially re-enacted by the Public Health Act of 1875, did not incorporate local boards of health in such a way as to give a right of action against them for injuries arising from the non-repair of highways. The judgment of Mr. Justice Hannen in this case reviews all the authorities on the subject, and the decision is undoubtedly binding on this Court. We are, however, of opinion that the facts of this particular case do not bring it within the principle of *Gibson* v. *The Corporation of Preston* (1), but do bring it within a different class of cases, of which *White* v. *The Hindley Local Board* (2) and *The Borough of Bathurst* v. *Macpherson* (6) are the most important. These cases appear to us to establish the principle that the water authority is under a legal obligation to make such arrangements that works of whatever nature under their care shall not become a nuisance to the highway, and that if they happen to unite in themselves (as is the case with the Worthing Local Board) the double character of highway authorities and water authorities their duty to do so is clearer than it otherwise would be. In *White* v. *The Hindley Local Board* (2) the accident was caused by a defective grid, which was used partly to stop up the hole which would otherwise have been left in the road, and partly in order to allow the surface water to pass into the sewer. In *The Borough of Bathurst* v. *Macpherson* (6) the accident was caused by the defective state of a barrel drain, which was in such a state that the adjacent soil of the road washed into it and made a hole which occasioned the accident. In reference to this Sir Barnes Peacock says, in delivering the opinion of the Court, "Their Lordships are of opinion that under these circumstances the duty was cast upon them" (the municipality of Bathurst) "of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway, which, but for such artificial construction, would not have existed, or, at the least, of protecting the public against the danger when it arose either by filling up the hole or fencing it."

It seems to us that this principle applies to the present case. In this instance the local board as water authority fixed in the highway an iron pipe with a valve cover at the top, proper in itself, but certain in the ordinary course of things to become a dangerous nuisance as the road wore away, unless proper precautions were taken, which precautions the local board were able to take. It was their duty to take such precautions independently of and apart from their duties as surveyors of highways. It is true that the danger was caused by the wearing down of the road and not by the rising of the pipe, but it seems to us that the position of the local board was precisely the same as if for some purpose they had planted in the road something which would grow. In such a case it would be their duty to cut it down to a level with the surface of the road, and in this case it was, we think, their duty to take one or other of the precautions described in the evidence to produce practically the same result. In the words of the judgment in *The Borough of Bathurst* v. *Macpherson* (6), "the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which but for such artificial construction would not have existed." There must accordingly be judgment for the plaintiff for 21*l.* with costs.

Appeal allowed.

Solicitors—Bury Hutchinson, for plaintiff; John Hands, agent for W. F. Verrall, Worthing, for defendant.

[IN THE COURT OF APPEAL.]

1882. Nov. 30. Dec. 21. } COOMBER *v.* THE JUSTICES OF BERKS.*

Revenue—Income Tax—County Buildings used as Assize Courts and Police Stations—Liability of to Assessment—5 & 6 Vict. c. 35; 16 & 17 Vict. c. 34. schedules A and B.

The Justices of a county erected, under the provisions of certain statutes, a building consisting partly of courts, with the usual appurtenances, used by the Judges as Assize Courts, by the Justices for holding quarter and petty sessions, and by the County Court Judge; and partly of a central county police station, with accommodation for constables who lived there, and for the temporary detention of prisoners. No rent was received for or profit made out of the building or any part thereof:—Held, *affirming the judgment of the Queen's Bench Division, that income tax was not payable, under schedules A and B of the Income Tax Acts, in respect of this building.*

Appeal from the Queen's Bench Division.

The case is reported 51 Law J. Rep. Q.B. 297, where the Case stated by the Commissioners of Income Tax is set out.

The Justices of the county of Berks were assessed under the Income Tax Acts in respect of certain buildings described as "Assize Courts, &c.," of the alleged annual value of 300*l.* They appealed by the clerk of the peace to the Income Tax Commissioners, who discharged the assessment, subject to a case, the material facts of which may be summarised as follows:—

The Assize Courts and the county police station form one block of buildings, which were erected at different times under powers given by general public statutes. The cost of building the Assize Courts was provided for by money borrowed upon a mortgage of the county rates, and the maintenance of the building is provided for out of the county rates. Besides the Assize Courts with their customary appurtenances, there are in the building offices for the county constabulary and a police dormitory; there are also cells where prisoners are detained; a married constable and a hall-keeper sleep on the premises; the clerk of the peace also has a room which he uses at quarter sessions, and in which records and plans are deposited.

The building is used by the Judges of Assize, by the Justices of the county for quarter and petty sessions, by the Judge of the County Court, by the Recorder of Reading, and as a polling station at county elections; and some of the rooms have been occasionally, by permission, used by the militia, by a friendly society, and by the under-sheriff for holding writs of enquiry.

On no occasion has any payment or remuneration been received for the use of the building or any part of it, and no profit whatever has ever been made out of it.

The land on which the buildings were erected was conveyed under 21 & 22 Vict. c. 92 to the then clerk of the peace and his successors for ever, on trust to permit a police station-house to be constructed, and otherwise to permit the premises to be used as the Justices of the county should from time to time order.

The block of buildings is not assessed to the district, borough or poor rates, and no inhabited house duty is charged on it.

The Commissioners found as a fact that none of the persons who used these buildings derived any benefit from them, nor had they any occupation whether beneficial or not by their use of them; that they were not owners or occupiers of them; that the buildings were not adapted for any other purposes, and that no rent had ever been received for them.

No evidence was given of the alleged annual value of the premises, nor was there any separation in the assessment of the different parts of the block of buildings.

The Queen's Bench Division gave judgment in favour of the Justices of the county, and affirmed the decision of the Commissioners discharging the assessment.

The Surveyor of Taxes appealed.

The Solicitor-General (*Sir F. Herschell*) and *A. Dicey*, for the appellant.—There are two questions here which it is neces-

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

sary to keep distinct—first, whether this property is chargeable under the Income Tax Acts; and, secondly, who is the person to be charged. As to the first point, it may be observed that schedule A is the same in both of the Acts—5 & 6 Vict. c. 35 and 16 & 17 Vict. c. 34. No. I. of the rules following section 60 of 5 & 6 Vict. c. 35 states that rule is to be construed as extending to "all lands, tenements, hereditaments or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed." These buildings are in fact capable of being occupied within the meaning of the Act; the rule therefore applies, no matter for what purpose the buildings may be occupied. The Act 5 & 6 Vict. c. 35 contains the additional words, "this rule to be construed as extending to all lands, &c.," which do not appear in the earlier Act 43 Geo. 3. c. 122; the wider terms were introduced into the later Act for the express purpose of meeting the present case. Under the general terms of schedule A all lands, tenements, &c., are taxable; but under the rules the terms are somewhat wider and carry schedule A further. No. VI., which is headed "allowances to be made in respect of the said duties in schedule A," provides that certain allowances are to be made in the case of college halls, public schools, almshouses and literary institutions: the insertion of these shews that the Legislature intended that the Act should be wide in its operation. The property here does not fall within any of the specified exemptions, but is property which, vested in trustees, may produce profit. The general terms of the Act are sufficient to render this property taxable under schedule A, and if it had been intended to exempt this property from taxation, the exemption would have been inserted in the Act.

The Crown is not bound by any statutory enactment unless specially named, but may take advantage of every enactment although it is not named. The tax is not a tax upon the occupier under schedule B, but a tax upon the owner of land under schedule A; the claim for exemption must therefore be in respect of ownership. The Crown is not the owner of this land; the legal ownership is vested in the clerk of the peace, but the Justices have the use and occupation of the premises—*Clerk* v. *The Dumfries Commissioners* (1). One definition of the word "occupier" is contained in section 31 of 43 Geo. 3. c. 122, schedule B, and there the expression is, "every person deriving a profit from the use of any lands," &c., shall be considered the occupier; but in schedules A and B of 5 & 6 Vict. c. 35, the phrase is that "every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands or tenements." The omission of the provision that the person must derive a profit is very important, the object being to give the tax-gatherer some person to whom he might go at once to get the tax.

Next, as to the use of the land. The owner of the land, in the absence of a tenant of the land, is taxed as the owner and occupier of the land. The Justices here have the use of and control over the building, and can appoint persons to look after it; they are therefore occupiers within the meaning of the Acts. *Bent* v. *Roberts* (2) was not rightly decided, for a person may be an occupier under the Taxing Acts who would not be an occupier under the statute of Elizabeth.

If it be said that these Justices are not persons within the meaning of the Income Tax Acts, they are surely a "society of persons" under 5 & 6 Vict. c. 35. s. 40: they have the power of acting together, they have a legal existence, and, being a society, there is nothing to exempt them from taxation.

It is said that the tax is to be paid, not for the land, but for the profits of the land. That, however, cannot be maintained without importing into the Act the title of the Act. As a general rule, the title of an Act cannot be taken as part of the Act; although in some cases it has been imported into the Act to explain what has been already shewn to be the intention of the Act. In all the cases where the title has been imported, it has been imported by reason of some ambiguity

(1) 7 Sc. Sess. Cas. (4th series) 1157; 17 Scottish Law Reporter, 774.

(2) 47 Law J. Rep. Exch. 112; Law Rep. 3 Ex. D. 66.

in the Act inself and in order to remove that ambiguity. *The Justices of Lancashire* v. *Cheetham* (3) shews that the Justices there were rateable as occupiers of the courts at Manchester, although the case may be distinguishable on other grounds.

H. Matthews, Q.C., Gorst, Q.C., and *H. D. Greene*, for the respondents.—This is the first time that it has been attempted thus to tax such buildings as these; and it should be noted that this tax is a tax on profits, and not, like the land tax, a tax upon property. The intention of these Acts was that the real benefit which an owner gets from his property should be ascertained, and that the actual profits received by him should be taxed, and not anything else. The Justices for the county of Berks do not either occupy or own the land and buildings in question; an occupation to be liable to taxation must be beneficial, it must produce money or money's worth; where, as here, the occupation is for public purposes the principle of the decision in *The Mersey Docks and Harbour Board* v. *Cameron* (4) applies, and the occupation must be held to be the occupation of the Crown for public purposes.

If no return is made, it is then enacted that the assessment to the poor-rate is to be taken as the basis of the tax; so that it is assumed that only property which is assessed to the poor-rate can be taxed under these Acts.

These county buildings are, by 21 & 22 Vict. c. 92, vested in the clerk of the peace, and the control is given to the Justices in quarter sessions assembled; they alone can deal with them, and not, as must be contended by the appellant, all the Justices in the commission of the peace for the county, nor the inhabitants of the county, who, if any one is, must be the owners of the property; regard being had to the various statutes relating to this kind of building from 7 Geo. 4. c. 63 to 40 & 41 Vict. c. 21.

A permissive use, a precarious use, an official use, is not a use within the Income Tax Acts—*Bent* v. *Roberts* (2). All the exemptions created by the Act are exemptions given in respect of property which is beneficial to individuals, and therefore no argument can be drawn from the fact that buildings of this nature were not the subject of special exemption in the statute. The case of *Clerk* v. *The Dumfries Commissioners of Supply* (1) does not really supply an argument for the taxation of these buildings, as there the commissioners were incorporated; further, it was found as a fact that they were in occupation, and therefore that they were liable.

Hodgson v. *The Local Board of Carlisle* (5), *The Queen* v. *Worcestershire* (6), *The Queen* v. *The Overseers of Manchester* (7), *The Mayor of Worcester* v. *Droitwich* (8) and *The Justices of Lancashire* v. *Stretford* (9) were also cited.

The Solicitor-General (*Sir F. Herschell*), in reply.—These buildings are within the taxing words of the statute, and the Justices are the occupiers. There is no distinction between different parts of this building. Since the case of *The Mersey Docks and Harbour Board* v. *Cameron* (4) all the poor-rate cases in which the Crown was not the occupier must be considered as overruled; they cannot be extended by analogy to cases of taxation; and there is a distinction pointed out in that case between occupation by the Crown and user by other persons, even though such user be for public purposes. The user need not be beneficial or profitable.

[BRETT, L.J., referred to *Hare* v. *The Overseers of Putney* (10).]

If the Justices were to hire buildings for these purposes and pay rent for them they would then be occupiers and could be taxed, and the fact that they are owners as well as occupiers does not relieve them from their liability.

Cur. adv. vult.

The following judgments were delivered on December 21 :—

(3) 37 Law J. Rep. M.C. 12; Law Rep. 3 Q.B. 14.
(4) 11 H.L. Cas. 443; 35 Law J. Rep. M.C. 1.
(5) 8 E. & B. 116.
(6) 11 Ad. & E. 57.
(7) 3 E. & B. 336; 23 Law J. Rep. M.C. 48.
(8) 46 Law J. Rep. M.C. 241; Law Rep. 2 Ex. D. 49.
(9) E., B. & E. 225; 27 Law J. Rep. M.C. 209.
(10) 50 Law J. Rep. M.C. 81; Law Rep. 7 Q.B. D. 223.

Coomber v. *Justices of Berks, App.*

BAGGALLAY, L.J.—This appeal has been brought under the following circumstances:

The Justices of the county of Berks, having been assessed under schedule A of the Income Tax assessment for the parish of St. Lawrence, Reading, for the year ending the 5th of April, 1879, in respect of certain buildings described in the assessment as "Assize Courts, &c.," of the alleged annual value of 300*l.*, appealed against such assessment to the Commissioners for general purposes under the Income Tax Acts.

The buildings so described as "Assize Courts, &c.," comprised the County Assize Courts and the county police station, which formed one block of buildings, within the same walls and covered by the same roof.

The Commissioners, being of opinion that the assessment could not lawfully be maintained, discharged it; but, on the application of the surveyor, stated a Special Case for the opinion of the Queen's Bench Division of the High Court of Justice. The Special Case came on to be heard in the Queen's Bench Division on the 24th of March, 1882, when the decision of the Commissioners was affirmed. From that decision the present appeal is brought.

The material statements in the Special Case are set forth in the report of the proceedings in the Queen's Bench Division, and I deem it unnecessary to refer to them further than to note that it appears from such statements that the Assize Courts and police station were erected at the same time, though under different statutory powers; that the land on which they were built was conveyed in 1859, under 21 & 22 Vict. c. 92, to the then clerk of the peace, to hold to him and his successors for ever, upon trust for the public uses or purposes of the county, and that no profit or pecuniary benefit was derived from the use of the building.

In the course of the arguments on the present appeal the case of *The Mersey Docks and Harbour Board* v. *Cameron* (4) has been much discussed, and the principles enunciated or recognised in the decision in that case have been quoted and relied upon by both sides. Fully recognising the important bearing which principles so enunciated and recognised have upon the case now under consideration, I propose, in the first instance, to direct attention to the purport and effect of what was then decided.

The Mersey Docks and Harbour Board were constituted trustees by Acts of Parliament, and were specially appointed to have the control of certain docks and other property vested in them as such trustees, in order to maintain those docks for the benefit of the shipping frequenting the port of Liverpool; and the question involved in the then appeal to the House of Lords was whether they were rateable to the relief of the poor as occupiers of the docks. The previous decisions upon the statute of Elizabeth had been numerous, and by no means consistent, and the object of the appeal was to obtain a definite declaration of the principles on which the statute was to be construed. In answer to certain questions put to the Judges by the Lord Chancellor at the close of the arguments, Lord Blackburn, then Mr. Justice Blackburn, on behalf of five of the six Judges who attended, traced in great detail and with great care the progress of the decisions on the questions of the liability to contribute to the relief of the poor of those occupiers of valuable property who in their own persons derived no benefit from such occupation, or, in other words, occupied in a merely fiduciary character; and after pointing out that for a long series of years, when Lord Mansfield, Lord Kenyon and Lord Tenterden presided in the Court of King's Bench, the current of authority was favourable to the exemption of such persons from liability to be rated, but that such decisions had been subsequently to some extent broken in upon, he referred to the case of *The Tyne Improvement Commission* v. *Chirton* (11), decided in the Court of Queen's Bench in 1859, as indicating what, in the opinion of himself and the other Judges who concurred with him, was the principle upon which alone exemption from liability upon the grounds that the occupation was by bare trustees could be maintained—namely, that the property was occupied for the purposes of the government of the country. In an earlier part of the answer Lord Blackburn had drawn

(11) 1 E. & E. 516; 28 Law J. Rep. M.C. 131.

attention to a long series of cases (12) which had established that no one was rateable in respect of the occupation of property which was occupied for the purposes of the government of the country, and that under that head were included the police and the administration of justice; and he had gone on to say that this rule applied not only to property occupied for such purposes by the servants of the great departments of State, such as the Post Office, the Horse Guards and the Admiralty, in all of which cases the occupiers might strictly be called the servants of the Crown, but also, amongst others, to property occupied by local police and to county buildings occupied for the assizes and for the Judges' lodgings, as to which he made the following comments (13):—"In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign so as to make the occupation that of Her Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government and are committed to the sovereign, so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered in *consimili casu*. These decisions are uniform, and it was not disputed at the bar that the exemption applies so far." The views thus expressed by Lord Blackburn were adopted by the Lord Chancellor and by Lords Cranworth and Chelmsford by whom the appeal was heard.

In moving the judgment of the House, Lord Westbury, Lord Chancellor, said:—"The only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the sovereign is not bound by that statute, and that, consequently, when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance) is sought to be exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown." Upon this point Lord Cranworth expressed himself as follows:—"The Crown not being named is not bound by the Act. It follows, therefore, that lands or houses occupied by the Crown, or by servants of the Crown, or for the purposes of the Crown, are not liable to be rated; and I conceive that it is from a confusion between property occupied for public purposes and property occupied by servants of the Crown that this mistake has arisen. This principle exempts from rates, not only royal palaces, but also the offices of the secretaries of State, the Horse Guards, the Post Office and many similar buildings. On the same ground, police courts, county courts, and even county buildings occupied as lodgings at the assizes for the Judges, have been held exempt. These decisions have, however, all gone on the ground, more or less sound, that these might all be treated as buildings occupied by servants of the Crown and for the Crown, extending in some instances the shield of the Crown to what might more fitly be described as the public government of the country."

Applying the principles thus enunciated and recognised, the House of Lords held that the Mersey Dock trustees were liable to be rated to the relief of the poor in respect of their occupation of the docks, on the ground that such occupation did not come within the only class of exemption which the Act of Elizabeth, when properly construed, recognised.

But upon an application of the same principles to the occupation of the Berkshire Assize Courts and police station, the occupiers must be held entitled to exemption from liability to be rated to the relief of the poor, upon the ground that the occupation is for public purposes, which, to use the language of the Lord Chancellor, "are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown." That this view has been acted upon appears from the statement in the Special Case that the block of buildings comprising the County Assize Courts and the county police station has not, nor has any part thereof, ever been assessed to the poor-rates.

(12) 11 H.L. Cas. at p. 464; 35 Law J. Rep. M.C. at p. 10.

(13) 11 H.L. Cas. at p. 465; 35 Law J. Rep. M.C. at p. 10.

If, then, the Justices are to be regarded as the occupiers of the Assize Courts and police station, a view, however, to which they do not assent; and if, as such, they are not rateable to the poor-rate in respect of such occupation on the ground that their occupation is for the purposes of the government of the country as explained in *The Mersey Dock Case* (4), the question at once suggests itself, are they to be assessed in respect of the same premises to the income tax? This brings me to a consideration of the provisions of the Income Tax Acts. By the statute 42 & 43 Vict. c. 21 the income tax for the year commencing on the 6th of April, 1879, is charged upon the property, profits and gains made taxable by the statute 16 & 17 Vict. c. 34, and by section 5 of the latter Act the duties are to be assessed and raised under the regulations and provisions of the statute 5 & 6 Vict. c. 55. Consequently, we have to look to the 16 & 17 Vict. for the subject-matter of the tax, and to the 5 & 6 Vict. for the mode in which it is to be assessed and raised.

First, then, as to the subject-matter of the charges to be made. For the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which the duties are granted by the 16 & 17 Vict. c. 34, the duties are classified under five several schedules marked respectively A, B, C, D and E, of which schedules A and B are in the following terms: "Schedule A. For and in respect of the property in all lands, tenements, hereditaments and heritages in the United Kingdom, and to be charged for every 20*s.* of the annual value thereof"; and schedule B. "For and in respect of the occupation of all such lands, tenements, hereditaments and heritages as aforesaid, and to be charged for every 20*s.* of the annual value thereof." It is immaterial to our present purpose to refer to the other schedules, save only to note that they, as well as schedules A and B, indicate that the subject-matters of charge are such as are productive of benefit to the persons who are to bear the charge. Mr. Justice Grove, in the course of his judgment in the Queen's Bench Division, is reported to have said in reference to these schedules: "the language tends to shew that the tax contemplated is a contribution to the revenue of the country in respect of annual profit or benefit;" and again, "the object which the statute aims at is to make each person pay the tax according to the aid he may receive, either from his property, or from his labours in his profession, trade or employment." In the view so expressed I entirely concur.

Let us now turn to the statute 5 & 6 Vict. c. 35, and note the mode which is provided for assessing the property thus made chargeable. Section 60 provides that the duties in schedule A are to be assessed and charged under certain rules, which are arranged under separate consecutively numbered headings. The heading No. I. is in the following terms:— "General rule for estimating lands, tenements, hereditaments or heritages mentioned in schedule A," and the rule is as follows: "The annual value of lands, tenements, hereditaments or heritages charged under schedule A shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement, commencing within the period of seven years, preceding the 5th day of April next before the time of making the assessment; but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, hereditaments or heritages capable of actual occupation of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in No. II. and No. III. of this schedule." It is immaterial to notice these exceptions. The heading of No. IX. is entitled "Rules for charging the said duties under schedules A and B." There are three rules under this heading, the first and second of which are as follows: first, "The said duties, except where other provisions are made as aforesaid for estimating particular properties, shall be estimated according to the general rule contained in schedule A, and shall be charged on and paid by the occupier for the time being, his executors, administrators and assigns"; second, "Every person having the use of any lands or tenements shall be taken and considered,

for the purposes of this Act, as the occupier of such lands or tenements." And section 70 of the statute 5 & 6 Vict. c. 35 provides, "that the several duties shall be assessed on all lands, tenements and hereditaments, whether occupied at the time of assessment or not"; but that the assessments on houses shall be discharged for the period they are unoccupied. The counsel for the appellant insist that the portion of the several Income Tax Acts to which I have referred establish the liability of the Justices to be assessed to the income tax in respect of their alleged occupation of the Assize Courts and police station; but I am unable to adopt this view. Even if it is to be assumed, as contended on behalf of the appellant, that the premises in question were at the date of the assessment in the beneficial occupation of the Justices, there is nothing in the Income Tax Acts to negative, or even to throw a doubt upon the proposition which I have already advanced, that the purposes for which they were so occupied were public purposes of a kind which, according to the authorities cited by Lord Blackburn and recognised by the Lord Chancellor and Lord Cranworth in *The Mersey Dock Case* (4), entitled them to exemption. The provision in rule No. I. that it shall be construed as applying to lands or tenements, "for whatever purpose occupied or enjoyed," has been relied upon; but the Crown not being named in the Acts, such a provision is inoperative as regards the Crown, or as regards the servants of the Crown strictly so called, or as against those occupiers for public purposes to whom the like benefit of exemption is accorded as is accorded to the servants of the Crown strictly so called.

For the reasons which I have assigned, I am of opinion that the appellant has failed to establish the liability of the Justices to be charged with income tax in respect of the County Assize Courts and the county police court, and that this appeal ought to be dismissed.

But some propositions have been pressed upon us in argument which I desire not to pass over.

I assent to the proposition that, in order to establish a liability to the charge, it is not essential that there should be a beneficial ownership or occupation; but if the ownership or occupation is not beneficial, the property must, in my opinion, be capable of being made a source of benefit to the owner or occupier.

Again, as at present advised, I adopt the view which has been pressed on us on behalf of the appellant, that the Justices must be regarded as the occupiers of the premises, within the meaning of the statutes, as having the use of them; but I deem it unnecessary to express a positive opinion upon the point.

I am, however, unable to assent to the proposition that there is any beneficial occupation of the premises by the Justices, or that the premises are capable of beneficial occupation or enjoyment by any one. In any view of the case it can hardly be disputed that the Justices have not any present beneficial occupation or enjoyment of the premises; and inasmuch as by virtue of the statute 21 & 22 Vict. c. 92, and of the conveyance made thereunder in 1859, the Assize Courts and the police station were, on the 8th of April, 1879, and have ever since been, vested in the clerk of the peace, upon trust for the public uses or purposes of the county, they have been and are incapable of any such beneficial ownership or occupation as could render the owner or occupier liable to be charged in respect thereof.

There is but one more suggestion—it can hardly be called an argument—on behalf of the appellant to which I will advert. It was urged before us, and it was apparently urged in the Divisional Court, that if the Legislature had desired to exempt assize courts and police stations from the operation of the Acts they would have been included amongst the exemptions mentioned in or provided for by the 5 & 6 Vict. c. 35. This suggestion may be met by another of at least equal materiality: if it was intended that Justices should be charged in respect of this description of property, it is somewhat strange that from the year 1842, when the 5 & 6 Vict. c. 35 was passed, and until the year 1879, no attempt was made to enforce, or even to assert, any such liability.

The costs of the appeal must, of course, follow the result.

Coomber v. *Justices of Berks, App.*

BRETT, L.J.—During the argument I confess I was under the impression that, even if everything else were in favour of the appellant, it was impossible that this assessment could be upheld, and that, on the ground that the persons assessed are the Justices. I was under the impression that it had hardly been urged that they could be assessed, and that what the Court was asked to determine was not whether the Justices could be properly assessed, but whether any person could be assessed—that is, whether these buildings were, in fact, assessable property. The reason why I think it impossible to hold that the Justices can be assessed under any view of the case is, that the Justices are not a corporation, and that they are not an aggregation or association of persons at all, unless they be assembled in quarter sessions. The Justices as such have no property upon which anything could be levied, and it can hardly be maintained that this tax could be recovered from them individually and personally either by action against them or by seizure of their goods. The Justices, as Justices, are persons not capable of having property belonging to them as Justices; therefore it seems to me that this assessment must, in any view of the case, fail, and that the judgment must be for the respondents. But we were asked, on behalf of the appellant, to give an opinion as to whether the clerk of the peace, or some other person, might not be nominally and legally assessed for this tax, if this property was assessable at all. I am of opinion that nobody can be assessed to this tax in respect of these buildings. I think it impossible at this time to reopen the question as matter of law, whether these buildings are to be considered, not indeed as Crown property properly so called, but as property which is to be treated as in the nature of Crown property. It would be impossible now, after the long series of decisions and after the long lapse of years, for any Court to hold, whatever it might have been ready to hold if the matter had been new, that buildings in the position of these buildings could be assessed to the poor-rate, and it would be impossible to say that it was not a good ground of exemption that they are considered, in point of law, to be in the nature of Crown property. That was not only determined by a long series of decisions before the case of *The Mersey Docks* v. *Cameron* (4) in the House of Lords, but it was enunciated without objection and stated to be the law in the opinion of Mr. Justice Blackburn then given to the House of Lords, and which was in terms as to that point adopted by the Lords who gave judgment in the case.

Now, with deference, it seems to me that that is the only application which that case has to the present case. The only way in which it can be applicable at all to the present case is with regard to the enunciation of that part of the law in respect of such buildings. If, then, these buildings are to be considered as in the nature of Crown property within the Poor Law Acts—that is to say, if they are to be exempted from rating to the poor-rates on the ground that they are buildings in the nature of Crown property, is it possible to say, with regard to the present statute, that they are not buildings in the nature of Crown property? Is it possible, by any logical mode of reasoning, to say it is the law that when you are considering the poor-rate assessment that these buildings are to be considered in the nature of Crown property, but that when you are considering a tax you are to consider that they are not buildings in the nature of Crown property? I cannot adopt such an argument; and therefore I am of opinion, not that these buildings are Crown property, but that they are in law considered as in the nature of Crown property, so that it follows that they are exempt from the Income Tax Acts by reason of that privilege.

That of itself would be sufficient to decide the case; but it seems to me that there are other and strong reasons why we ought to hold that this property is not assessable under these statutes. It was ingeniously said on behalf of the appellant that we ought to divide the argument into two heads, and then that we could consider the matter under one head without any reference to the other. We were thus asked to consider whether this property was assessable property, without at the same time considering who it was, if anybody, who could be assessed in respect of it. I admire the ingenuity, but

I think I see through the meaning of that argument: it was so put in order to avoid the difficulty which would certainly present itself of determining who could, by any possibility, be assessable in respect of this property. It was said that we ought to consider whether the property was assessable, and to consider that without reference to anything else. The immediate result of so considering it was laid bare in the further argument on behalf of the appellant, when it was stated that every foot of land in this kingdom, whatever be the circumstances under which it exists, must be assessable to this tax. Of course, if the question is considered without reference to anything else, every foot of land is assessable; but it seems to me that, in order to decide this case, we are bound to consider whether it is possible, under any circumstances which we are entitled to imagine, to apply to the buildings in question the machinery of these statutes; and, if it is not possible so to apply the machinery of these statutes, it seems to me to follow that these buildings are not assessable. Now, the statutes which relate to this subject begin, no doubt, by laying down that all lands are to be assessed. If these words are alone regarded, then it is true to say that every foot of land in this kingdom is assessable; but the further question immediately arises, and that is, In respect of what is it that all lands are to be assessed? Now, the statute answers that question by the words, "in respect of the annual value thereof." Therefore, if there be any land in this kingdom which cannot, under any circumstances, have any annual value, it is obvious that in respect of such land the incidence of the tax fails to attach. If the land has no annual value, and cannot have any annual value, then, though it is land, there is nothing upon which the tax can be imposed. In my opinion, these buildings considered as land are land which cannot, under any circumstances that we have a right to consider, have any annual value whatever; they are struck with sterility by statute; they cannot by law have any annual value any more than if they were barren rock, which could not, under any circumstances, possibly have any annual value. These buildings were erected under and by authority of an Act of Parliament, which Act of Parliament declares that nobody shall ever legally enjoy any benefit from the use of them. It is true to say that some person might take into his possession these buildings, and, by breaking the law and disregarding the statute, obtain an annual value from them; for if a person were to set the law at defiance, and take possession of this property, claiming it as his own, and then let it from time to time for profit—then if such a person so breaking the law were to be in possession of these buildings, he could not be heard to say that, though he obtained a profit from these buildings, yet that by Act of Parliament he had no right to do so, and therefore that he would not pay the tax. He could not so set up his own wrongful act, and therefore, under those circumstances, he might be assessable. But as long as these buildings are legally used according to the Act of Parliament, not only cannot the Justices have any benefit from the use of them, but nobody can—for the statute is express that nobody is to have any benefit from the use of them. It seems to me that we are not entitled until the fact actually arises to consider that anybody will break the law; we must consider these buildings as they are under their legal disability. Their legal disability is that nobody can receive any benefit from the use of them. It follows, then, that they are by law struck with sterility as to their annual value, and that as long as the law is observed, they cannot have any annual value in the hands of anybody; and if this is so, then there is nothing upon which the statute can act. But more than that, it seems to me that, as long as these buildings are used legally, there cannot be any occupier of them. That there could be any occupier of them in the ordinary sense of the word "occupier" is hardly contended; but it is said that the word "occupier" in this statute is enlarged by the definition clause—that it is stated in the definition clause that anybody who has the use of them is an occupier. That is the phraseology found in the Act of Parliament, and it is of so large and indefinite a nature that it immediately gives rise to a difficulty. It

cannot mean that anybody who has the use of these buildings is an occupier within the meaning of the statute. It cannot mean that the Judges who sit in the Assize Courts, that the witnesses, the public or the prisoners, all of whom use these buildings, are therefore occupiers within the statute. It cannot mean that a mere servant who has the use of them is an occupier within the statute, or else, even in the case of a house in which the master lived, it might still be said each of his servants had the use and was an occupier of that house within the statute.

The person who, within the meaning of the statute, is the person who has the use of the house, is, though from some technical difficulty he might not be called an occupier, a person who has the same use of the house as the occupier of the house has. Now the Justices have no such use of these buildings; the Judges have no such use of these buildings; the inhabitants of the county have no such use of these buildings; the public have no such use of these buildings; the servant, if there be a servant, who has to take care of them has no such use of these buildings; the policemen, if there are any, who have to sleep in these buildings for the purpose of doing their duty have no such use of these buildings. As long as these buildings are legally used, there is no person who can have the use of them within the meaning of this Act of Parliament; there is no person who can be the occupier of them within the meaning of this Act of Parliament. Therefore, these buildings, as long as they are legally used, are struck with sterility as to annual value. They can have no annual value, and there can be no person who is the occupier of them. If that is so, there is nothing in these buildings upon which the machinery of this Act can, under any circumstances, as long as they are legally used, be brought to bear. Therefore, I decline to consider this case as to the property itself alone. I say that it must be considered with regard to the property itself, and with regard to the persons who could, under proper circumstances, be made liable to assessment; and if you find that, taking those two together, this property is in such a position that the machinery of the Act can never be applied to it, it follows logically that this Act does not apply to it and that this property cannot be assessed. Therefore, I am of opinion that the judgment of the Court below was right, and that our judgment ought to be for the respondents.

LINDLEY, L.J.—I am of the same opinion. I concur with the judgment which Lord Justice Baggallay has read; and I also agree with the judgment of Mr. Justice Grove, in the Court below, which I have studied with great attention.

Appeal dismissed.

Solicitors — Solicitor of Inland Revenue, for appellant; Newman, Stretton & Hilliard, agents for Morland, Abingdon, for respondents.

[IN THE COURT OF APPEAL.]

1882. Dec. 14. } DOBBS *v.* THE GRAND JUNCTION WATERWORKS COMPANY.*

Waterworks Company—Water-rate, how calculated—Actual Amount on which Assessment to Poor-rate is computed—Annual value—7 Geo. 4. c. cxl. s. 27—15 *&* 16 *Vict. c. clvii. ss.* 46 *and* 57.

A water company was required by its special Act to supply water to inhabitants of dwelling-houses at certain rates, and it was provided that the rates should be payable "according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district."

A later special Act altered the rates to be paid per cent., varied the mode of supply in certain details, and enacted that the company might charge, "where the annual value of the dwelling-house" did not exceed a certain sum, a percentage "on such value." This Act also enacted that, except

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J., and Lindley, L.J.

as expressly provided therein, "this Act shall not repeal, alter, interpret or in any manner affect" the provisions of the earlier Act.

In a case where the occupier of a house supplied with water by the company was lessee for a long term at a ground rent, so that the actual amount of the rent could not be ascertained,—

Held *(reversing the judgment of the Queen's Bench Division), that the water-rate must be calculated on the amount of the gross estimated rental appearing in the poor-rate assessment, and not on the net rateable value; that the later Act did not repeal the earlier Act, and that the words "annual value" in the later Act meant the same as the words "actual amount or annual value upon which the assessment to the poor's rate is computed" in the earlier Act.*

Appeal from the judgment of the Queen's Bench Division on a Special Case stated by a police magistrate. The case is reported 51 Law J. Rep. Q.B. 501.

The Grand Junction Waterworks Company supplied water to a house of which one Dobbs was the occupier under a lease for a term, of which seventy years were unexpired. Dobbs paid a ground rent of 15*l.* In the poor-rate assessment his house was assessed as follows: "Gross estimated rental, 140*l.*; net rateable value, 118*l.*"; and the company sought to charge Dobbs at the rate of four per cent. per annum on 140*l.*; but he contended that, on the true construction of the two special Acts of the company, 7 Geo. 4. c. cxl. s. 27 (1) and 15 & 16 Vict. c. clvii. s. 42 (2), the company was only entitled to charge him on the net rateable value of 118*l.*

The Queen's Bench Division gave judgment in favour of Dobbs.

The company appealed.

(1) 7 Geo. 4. c. cxl. s. 27: "Provided always, and be it further enacted, That the said Grand Junction Waterworks Company shall be obliged, by means of any leaden or other pipe or pipes, . . . to furnish a sufficient supply of water at a height not exceeding six feet above the flag pavement to the house of every inhabitant occupying a private dwelling-house . . . . for the use of his or her own family, at the following rates per annum—that is to say, where the rent of such dwelling-house shall not exceed twenty pounds per annum, at a rate per centum per annum not exceeding seven pounds and ten shillings; and where such rent shall be above twenty pounds and not exceeding forty pounds per annum, at a rate per centum per annum not exceeding seven pounds; and where such rent shall be above forty pounds and not exceeding sixty pounds per annum, at a rate per centum per annum not exceeding six pounds and ten shillings; and where such rent shall be above sixty pounds and not exceeding eighty pounds per annum, at a rate per centum per annum not exceeding six pounds; and where such rent shall be above eighty pounds and not exceeding one hundred pounds per annum, at a rate per centum per annum not exceeding five pounds and ten shillings; and where such rent shall be above one hundred pounds per annum, at a rate per centum per annum not exceeding five pounds; and every such rate shall be payable according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district where the house is situated: Provided, nevertheless, that the said company shall not be entitled to receive from any such inhabitant as aforesaid more than the sum of twenty pounds in any one year for such supply, nor shall such company be obliged to furnish such supply to any such inhabitant as aforesaid for less than twelve shillings in any one year, unless they shall think fit so to do"; and the section further provides that in the case of the persons requiring a supply of water for other purposes than those of their own family consumption or for the purposes of any trade, such supply shall be furnished at such rate as shall be settled between the company and such persons.

(2) 15 & 16 Vict. c. clvii. s. 46 enacts "that the company shall at the request of the owner or occupier of any house . . . . furnish . . . . a sufficient supply of water for their domestic purposes at the rates hereinafter specified—that is to say, where the annual value of the dwelling-house or other place supplied shall not exceed two hundred pounds, at a rate per centum per annum on such value not exceeding four pounds;" and where such annual value shall exceed two hundred pounds, at a rate per centum per annum on such value not exceeding three pounds." The section further provides that if there be a water-closet or fixed bath or high service in the house, then certain further specified rates shall be payable.

Section 57 enacts: "That, except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret or in any manner affect any of the provisions of the recited Acts or any of them in force at the commencement of this Act."

The Act recited 7 Geo. 4. c. cxl., and incorporated certain general provisions of the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17.

Dobbs v. *Grand Junction Waterworks Co.*, *App.*

The Solicitor-General (*Sir F. Herschell*) and *J. F. Clerk*, for the appellants.—The judgment of the Divisional Court decided that the Act of Geo. 4 is not repealed, and therefore that the rate is only to be charged on the net rateable value of the premises; consequently the question of the meaning of the words "annual value" in 15 & 16 Vict. c. clvii. was not argued. It is, however, submitted that the provisions of the Act of Geo. 4 are not the provisions which govern this case; but further, that even if they do, still that the net rateable value is not the true basis on which the water-rate should be calculated. It is to be observed that what is called a water-rate is really a charge to be paid by a person who consumes water. The later Act is inconsistent with the earlier Act; and therefore, notwithstanding section 57 (2) of the Act of the Queen, as the two Acts cannot be read together, the earlier statute, which is inconsistent with the later statute, must be held to be repealed. The prices and the scale are altered, and the basis for the charge is different in 7 Geo. 4 from that in the later Act. By the earlier Act it is to be made on rent; by 15 & 16 Vict. on annual value; so that now annual value is the test for all cases, and no provisions which apply to rent can be made applicable to annual value. There is no clause in 15 & 16 Vict. which says how the amount of the annual value is to be ascertained. The annual value is what a house lets for from year to year, and that is the gross estimated value before any deductions have been made. The term "annual value" in 15 & 16 Vict. is a new expression, and the expressions found in 7 Geo. 4 must not be read in to explain it; the words in the earlier Act are not appropriate words to add to the words of the later Act. The later Act alters the per centage, it also expressly alters the language, and the words "annual value" cannot mean the same thing as rateable value. Before 6 & 7 Will. 4. c. 96, which provided a principle on which assessments should be made all over the country, the overseers could, so long as all were rated alike, make any deductions they chose, and then impose a higher rate on a lower rateable value, so that they could in the case of a water company, whose rates are fixed by statute, reduce the amount to be paid to a nominal charge; therefore, even if the Act of Geo. 4 is not repealed, still the "annual value" upon which the assessment to the poor's rate is computed must mean the same thing as "annual value" in the later Act. The word "computed" shews that regard must be taken of gross value; it refers to some earlier stage than that in which the assessment is actually made—that is, the value before any deductions have been made. This payment for water is a charge on the occupier, so that considerations as to deductions to be made do not apply. The object was to secure an equal rate on houses of the same value; but if the judgment of the Queen's Bench Division be upheld, the result would be that in the case of two houses of exactly similar value, one of which is occupied by the owner and the other of which is let, there may be a totally different assessment.

[Lord Coleridge, C.J.—We are at present all of opinion that the true construction is that "actual amount or annual value" in 7 Geo. 4 means gross rental, and that "annual value" in 15 & 16 Vict. c. clvii. has the same meaning, but we are not yet in a position to determine whether the later Act has repealed the earlier Act.]

H. Sutton and *A. P. Poley*, for the respondent.—This case is governed by 7 Geo. 4. c. cxl. s. 27, and the words "actual amount or annual value upon which the assessment to the poor's rate is computed" mean the net rateable value. When the Act of Geo. 4. was passed "annual value" always meant only a part of the rent received—such a sum, in fact, as was necessary to keep the hereditaments in a position to command the rent—*The King* v. *Tomlinson* (3), *The King* v. *Adams* (4) and *The King* v. *Granville* (5). Then 6 & 7 Will. 4. c. 96 made the net annual value the universal basis for rating. Without doubt the Legislature intended that there should be an equality in these matters, and net rateable value secures that equality. Rent is as elastic a term as annual value: it is the proper sum to be paid by a tenant

(3) 9 B. & C. 163.
(4) 4 B. & Ad. 61; 2 Law J. Rep. M.C. 90.
(5) 9 B. & C. 188.

to a landlord, and is probably something near the rateable value; but the annual value to the landlord is what he receives as clear profit after the necessary deductions have been made. Wherever the Legislature deals with questions in which the money raised does not go into the Imperial Exchequer it will be found that annual value is always equivalent to rateable value. In *Hamilton* v. *Bass* (6) it was held that the clear yearly value was what a tenant would give if he were to do the repairs, and the reason why in the case of a borough franchise a question of deductions is not considered is because the criterion there is the value of the hereditaments to the occupier. If, however, it be held that the words of the earlier Act are not equivalent to net rateable value, then the respondent will adopt the argument as to the repeal of the earlier Act offered on behalf of the appellants; and, if this be the case, words "annual value" in the later Act must mean net rateable value, for the expression is one found in the Waterworks Clauses Act, 1847, and as this expression always had a recognised meaning and represented a part of the rent or gross annual value, the Legislature accepted the meaning given to it in the poor law cases, and did not deem it necessary to give any further expressed definition.

The object of the Legislature was to give a definite ascertained standard to which the parties could appeal as the basis of the charge, and therefore it intended to fix the net rateable value as the basis of the assessment.

LORD COLERIDGE, C.J.—An important question is raised upon the construction of two sections of two Acts of Parliament. These Acts are the special Acts of the Grand Junction Water Company, 7 Geo. 4. c. cxl. (1) and 15 & 16 Vict. c. clvii. (2). The substantial question is on what footing a water-rate, although perhaps this may not be the most strictly correct technical expression, is to be calculated. On the one hand it is argued that the basis on which the rate is to be calculated is not the gross annual value of each house—I abstain for the moment from saying what "annual value" means for this purpose—but that it is the gross annual value subject to those deductions with which one is familiar in rating cases. On the other side it is said that the words of the statute are express, and that on the true construction of the earlier statute—that is, of 7 Geo. 4. c. cxl.—the Legislature manifestly intended that the assessment was to be made on the gross value year by year of the houses and tenements in respect of which the money is to be paid, without any such deductions. Then there is another question, whether the two sections are at the present time co-existing sections. It was argued on behalf of the company, the appellants, that these sections do not both exist; but it was further urged that if they are both in force, then that the larger view—that is, the second of the views which I have already mentioned—should prevail. I am of opinion that both the earlier and the later sections are in existence, and that the later section has not repealed the 46th section of the Act of Geo. 4. Section 57 of the later Act, the Act of the Queen, provides "that, except as by this Act expressly provided, this Act or anything therein contained shall not repeal, alter, interpret or in any manner affect any of the provisions of the recited Acts." Now the Act of Geo. 4 is one of the recited Acts, so that the section in question must, unless it is expressly repealed, still be in force. If, indeed, there were any sections in the later Act which were in terms absolutely inconsistent with the provisions of the earlier Act, then, according to a general well-known principle of interpretation, there would to that extent be a repeal of the earlier statute; but section 46 of the statute of the Queen is not, with regard to section 27 of the earlier Act, such a section. The limit of 20*l.* as a maximum and of 12*s.* as a minimum sum which the company need receive or can charge, is apparently common to both the statutes, and remain in force, except so far as the limit of 12*s.* may be varied, and unless there is something in the Waterworks Clauses Act which alters that limit. I am, therefore, clearly of opinion that section 27 of the earlier Act is not entirely repealed; I think it may well stand with

(6) 12 Com. B. Rep. 631 22 Law J. Rep. C.P. 29.

section 46 of the later Act, and that the section of the later Act may be confined to this, that whereas the earlier Act fixed a certain rate per cent. and gave a limit of physical level and certain terms on which supply was to be given, the later Act alters some of those particulars; and that in so far as there is an express distinct alteration in those points the two Acts cannot stand together, but that except so far as the earlier Act is thus superseded it remains in force, and that it therefore is still alive to fix the mode in which the rate per cent. is to be ascertained.

The enactment in section 27 of 4 Geo. 4. c. cxl. is that the rate "shall be payable according to the actual amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the actual amount or annual value upon which the assessment to the poor's rate is computed." I construe that to mean this, that there is to be a certain rate fixed at so much per cent. on rent—the word rent being used in its ordinary meaning of a sum paid by a tenant to a landlord for the occupation of a dwelling-house, that is usually a rack-rent, and means the rack-rent to be paid by the tenant to the landlord—and where the amount of that rent can be ascertained the rate is to be paid upon it. Ground rents are not paid for the occupation of a dwelling-house, so that they do not come within the definition, and private arrangements such as have been suggested do not come within this part of the enactment, unless the rack-rent, in addition to the ground rent or the amount of the premium or the value of the arrangement made, can be ascertained, and a fair proportion be allotted, by way of division, to each year, so as to define, year by year, the true amount paid to the landlord. Where this cannot be done then it seems to me that according to the provisions of the statute the rate must be payable "according to the actual amount or annual value upon which the assessment to the poor's rate is computed." These words, when taken and considered with the rest of the sections, are reasonably clear, and they mean that the full amount at which a house on which a rate had to be levied would at the time when the Act of Geo. 4 was passed have been taken as the basis on which the rate would be computed, without any allowance being made for those deductions to which reference has been made, and which would be made before any assessment was actually made upon any individual. If it had been intended the charge should be made on the assessment in the poor-rate book the statute could have been so worded. But the words are different, they are "the actual amount upon which the poor's rate is computed." It is well known that at the time of this Act the general value of the house or premises was first ascertained, and the occupier was rated in respect of the full value, subject to certain deductions which were generally made prior to the Parochial Assessment Act of Will. 4. It may be observed that the poor-rate is not strictly a rate levied on houses or lands or property, although we are accustomed so to speak of it; but the statute of Elizabeth, which has never been altered, makes it a charge on persons which is to be levied according to their ability; and no doubt it is usual, in order to compute the ability of persons, to consider the value of that which they occupy, so that the rate is still a charge made upon individuals in respect of the occupation of property. This, as it seems to me, shews that the words, the "value upon which the assessment to the poor's rate is computed," have a well-understood meaning, and that they mean the value of the occupation taken in the first instance generally and roughly, and then the value of the property to the individual computed according to well-known principles, the result giving the amount upon which the poor-rate is actually levied. I am therefore of opinion that the true construction of the statute of Geo. 4 is that the company is to levy a rate or charge, and that that rate or charge is to be assessed on the actual amount of the rent paid—that is, the full amount of the rent paid where it can be ascertained, and where it cannot, then the charge is to be made upon the full value of the amount of property in the hands of the owner before any of the deductions with which one is familiar are made. This appears to me to be the true view of these sections; they stand together, and the section of the

earlier Act is still in operation. That being so, we are unable to agree with the judgment of the Court below, and we think that the assessment should be made upon 140*l.* and not upon 118*l.*

We have not heard an argument at full length on the meaning of the words "annual value" in 15 & 16 Vict. c. clvii. and therefore any opinion which I may give upon the meaning of those words is of course subject to that disadvantage; but the strong inclination of my opinion is, that there is no difference between the meaning to be attributed to the two sections under consideration, and that the words "annual value" in the later statute mean the same as the words "annual value or actual amount" in the statute of Geo. 4. Analogy is in favour of this view; and, further, the two Acts are to be construed together. Section 27 of the earlier Act is an existing section, and as the same words occur in two Acts which are Acts in *pari materia*, the reasons which appear to me to apply to the construction which we give to the earlier statute lead me to the opinion that the words "annual value" bear the same meaning in the later as in the earlier statute. It appears to me, therefore, that it does not signify whether we consider the earlier statute to be repealed or not, as I should come to the same conclusion upon the words in the later Act.

BAGGALLAY, L.J.—I am of the same opinion, and have little to add. The two statutes under consideration both contain provisions as to the supply of water and the charges to be made for that supply; but there is a difference in the purposes for which that supply is to be used. The Act of Geo. 4 first enacts the conditions on which a supply is to be given for domestic purposes generally; then there are limitations in favour of the company; and there is a proviso that any supply required for other than domestic purposes shall be the subject of a special arrangement.

Turning to the later statute we find it is limited to water for domestic purposes; it substitutes a per centage of rate upon annual value for per centage of rate upon rent; it makes special provisions for the supply of water to closets and baths; and it varies the conditions of the high level service. Section 48 excludes several purposes for which water was to be supplied by the Act of Geo. 4, so that to some extent at least section 27 of the Act of Geo. 4 must still be in force. Further, section 57 of the later Act provides that nothing in that Act shall repeal, alter or in any manner affect the provisions of the earlier. To some extent, however, section 27 of the earlier Act must be repealed; and it seems that so far as the basis for the per centage rate is varied, so far also as special arrangements are made for the supply of water to baths and for high level service, the former Act must be considered to be repealed by the later Act; but, except so far as the former Act is repealed by reason of there being in the later Act express provisions directed to the same subject-matter as the former Act, it appears to me that the Act of Geo. 4 remains in force.

The test given in the Act of Geo. 4 was rent, and where the rent could not be ascertained then the basis of the charge was to be on "the actual amount or annual value on which the assessment to the poor's rate is computed." The mode in which the assessment to the poor-rate was computed at the time when the Act of Geo. 4 was passed was well known. The cases referred to which were decided prior to the passing of the Parochial Assessment Act shewed how the assessment was computed and the principles on which certain deductions were made from the actual rack-rent before the rate was, in fact, levied. If the actual rack-rent could not be determined, then an estimated annual value was assumed, and from that deductions were made in the same way as was done in cases where the actual rack-rent was known. That system remained in force until the Parochial Assessment Act became law.

It appears to me that the words of the Act of Geo. 4 meet the case, and that when the annual value of the premises has been computed there is then established, not the annual value at which the house is assessed to the rate, but the basis upon which the assessment to the poor-rate is computed. Having made that assessment,

there can then be computed that particular annual value which is known as net annual value as distinguished from gross annual value or gross estimated value. It appears to me, therefore, that in this view of the case the earlier Act is not repealed by section 46 of the later Act, and that the mode of assessment is that which Lord Coleridge has pointed out.

If, however, we were to treat this portion of section 27 of the earlier Act as repealed, still bearing in mind the 57th section of the later Act, we find that the words "annual value" are used in the later Act, and as the words "annual value" are referred to in section 27 of the Act of Geo. 4, and as the one Act is recited in the other, the provisions in the later Act may be considered as supplemental to or taking the position of those in the earlier Act; and it appears to me to be impossible to give a different meaning to these words in the later Act from that given to them in the Act of Geo. 4.

LINDLEY, L.J.—I am also of opinion that this appeal must be allowed. The question is, how the price which a consumer of water is to pay for that water, is to be ascertained. It is not to be ascertained like gas by means of a meter, but by reference to the class of house occupied by the consumer, and the class of house is to be ascertained by the method given in the Act. The earlier statute makes the rent paid a standard, and by the rent paid I do not mean ground rent, but the rent the occupier pays for the house; the rent paid is, in fact, the purchase-money, paid by instalments, and a premium or bonus paid is, in fact, part of the rent. The Act of Geo. 4 further provided that where rent could not be ascertained, then the charge was to be made upon the actual amount or annual value upon which the assessment to the poor-rate is computed. Now there is nothing said there about net annual value nor about rateable value, nor is it to be an amount on which the assessment is made; but it is the amount on which the assessment is computed. If we look at the state of the law at the time when the Act was passed we find that the principles on which the poor-rate was to be levied were well known. They are found in *The King* v. *Adams* (4) and other cases. But it would seem to lead to an absurd conclusion were we to hold that the price of water is to vary with or depend upon the rateable value of property, when it is remembered that, according to the old law, the rateable value might be a mere proportion of the value of the property, and that it was immaterial for the purpose of rating to decide what proportion it was; so that it seems almost impossible to suppose that the Legislature could have placed in the hands of the overseers the power of fixing the price to be paid for water by the occupiers of houses. I feel the force of the observation that the object of the Legislature was to give the parties an ascertainable standard to which they could appeal, and no doubt rateable value has the advantage of being an ascertainable standard; but as this would lead to an unjust and almost absurd conclusion, and as the language of the Act does not force us to adopt it, but admits of a different construction, it appears to me that the alternative construction, which makes the whole section intelligible, is to be preferred. The real meaning of the section is that the rent, when you can find it out, is to be taken as the basis, and when the rent cannot be discovered then you must take the sum for which the premises would let.

It is not very clear whether the later Act of Parliament does, or does not, repeal section 27 of the earlier Act. I do not think it does repeal it altogether; but, in truth, the greater part of that section has become obsolete. It is difficult to say how much of it is obsolete, but I am of opinion that it is not wholly repealed. It appears to me, therefore, that, having regard to section 27 of the earlier Act, we have a clue to the meaning of the words "annual value," and that the words "annual value" in 15 & 16 Vict. c. clvii. must be construed with reference to the meaning which they bear in the earlier Act; and in either case the real meaning is, what the house would let for.

If it is held that the earlier Act is wholly repealed by the later Act, then the ques-

tion is, what the words "annual value" in the later Act mean. This point has not been fully argued, but I think that the words "annual value" have the same meaning in both the Acts of Parliament; and, therefore, I agree that this appeal must be allowed.

Appeal allowed.

Solicitors—Bircham & Co., for appellant company; Hollingsworth, Tyerman & Andrewes, for respondent.

1882. Nov. 25. GOODHAND *v.* AYSCOUGH.

Practice—Rules of the Supreme Court (Costs), Order VI. rule 2—Costs on the Higher Scale—Injuries to Property—Injunction—Trespass in Assertion of Right—"Breaches of Covenant."

The words "injuries to property" in rule 2 of Order VI. (Costs), regulating the allowance of costs on the higher scale in certain actions, mean substantial physical injuries. A trespass on land, therefore, involving no substantial injury to the land, although committed as an assertion of right, does not entitle a plaintiff who has obtained damages and an injunction in an action upon such trespass to costs on the higher scale; nor, in the absence of a deed between the parties, are the words "breaches of covenant" in the same rule satisfied by the breach of the covenant for quiet enjoyment to be implied in a parol tenancy from year to year.

In this case the plaintiff had claimed damages for a trespass, and also an injunction on his writ. An interim injunction had been refused at chambers, and the action came on for trial, at Lincoln Summer Assizes, before Fry, J.

The plaintiff alleged that he was tenant from year to year to the defendant of a field at the same rent as that paid by the defendant to the owner, and that during the tenancy the defendant had wrongfully turned plaintiff's cattle out and taken possession himself, breaking the lock of a gate and occupying the field by his own cattle.

The defendant's case was that the plaintiff was only a licensee, and had been allowed by him to put his cattle in the field on paying the amount mentioned, but that he had never been tenant, and had not had any exclusive occupation of the field in law or in fact, and that the licence had been revoked before the defendant entered.

The jury found a verdict for the plaintiff, damages 20*l.*, and the learned Judge gave judgment for that amount, and granted an injunction to restrain any further trespasses by the defendant during the continuation of plaintiff's tenancy.

Upon taxation of the costs, the plaintiff required the Master to tax upon the higher scale, alleging that this was an action for a special injunction to restrain the commission or continuance of injuries to property where the procuring of such injunction was the principal relief sought to be obtained, within the provisions of Order VI. (Costs) rule 2. The Master refused to review his taxation which he had made on the lower scale.

The plaintiff then appealed to the Judge, and North, J., at chambers, dismissed the appeal. The plaintiff then appealed to the Divisional Court, and that Court, consisting of Field, J., and Stephen J., referred the matter to Fry, J., for his advice, thinking that, as he had tried the case, he was especially qualified to deal with the question.

Accordingly, on the 25th of November, *A. P. Stone* argued for the plaintiff.—The plaintiff is entitled to costs on the higher scale, because the action was one within the words in Order VI. rule 2 (Costs), and under rule 3 of the same Order the Court has power to allow such costs independently of the express words of the preceding rule.

Etherington Smith, for the defendant, objected that no application had been made by the plaintiff at any time under rule 3, and that he must now be confined to rule 2, having appealed against both the Master's and the Judge's order, on the

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ground that he was entitled as of right under rule 2.

[FRY, J.—This is referred to me for advice, but the judgment on the appeal from Mr. Justice North will have to be that of the Divisional Court. I must, therefore, hear the argument on the legal right of the parties, and cannot treat it as an application to my discretion under rule 3.]

A. P. Stone.—This action was really brought to obtain the injunction. That was the principal relief sought, the damages were immaterial. The defendant set up a claim of right, so title was involved. In *Chapman* v. *The Midland Railway Company* (1), Lush, J., says, "It was not committed in the assertion of any right," shewing that such assertion is one of the criteria by which the application of the rule will be decided. Further, he says, "all the particular instances of special injunctions mentioned are, it seems to me, cases where title is involved." Here the defendant did assert title, and claimed to have possession of the field as of right. The case cited went to the Court of Appeal, where the judgments in no way express dissent from the principle laid down by Lush, J.

This case also falls within the words "breaches of covenant," as the defendant, by letting to the plaintiff as tenant from year to year, impliedly covenanted for quiet enjoyment.

[FRY, J.—That expression can refer only to covenants in deeds.]

Etherington Smith, contra.—The rule does not apply to a case of mere trespass, where there has been no real injury to property. Trespass is not mentioned in the rule, and the words "infringement of rights" sufficiently provide for other cases. In *Chapman* v. *The Midland Railway Company* (1), as decided in the Court of Appeal, there is no trace of the suggested principle that where title is involved a plaintiff is to have costs on the higher scale. Brett, L.J., says that the inclination of his opinion is that there must be something more than a mere trespass—there must be some actual injury to the land to satisfy the words "injuries to property," and the other Lords Justices express the same opinion as to the necessity of shewing a substantial injury. The Court of Appeal clearly lay it down that the rule is in two parts, and that the plaintiff must bring his case within both parts, and the state of facts mentioned in each part must co-exist. He must, therefore, also shew that the injunction was the principal relief sought, and the Court of Appeal have said that the Master is the person to judge of that.

[FRY, J.—I should not be disposed to agree with the Master's decision as to that, but I need not hear you further, as I decide upon the first point in the defendant's favour.]

FRY, J.—The question referred to me by the Judges of the Queen's Bench Division turns on the 2nd rule of Order VI. of the rules of August, 1875. The words there are these: [His Lordship read the words of the rule.] Now, as has been pointed out in the case to which my attention has been called, it is plain that to bring the case within the right to the higher scale of costs the action must satisfy two conditions mentioned in the rule. I will not further refer to the second condition, because it is my present impression that the injunction was the principal relief sought. The enquiry then turns on the question, whether the action comes within the classes of actions enumerated, and the argument has been based entirely on the two classes, injuries to property and breaches of covenants. I will dispose of the last first. I think it applies to contracts under seal. I do not think it applies to what have been (with not great exactitude) called implied covenants, where an action for covenant would not have laid. The enquiry then is, whether the injunction sought is to restrain injury to property. Now I pause to observe that injunctions to restrain substantial injuries to property were familiar in the old Court of Chancery, and are now known in all branches of the High Court, especially in this division. Such cases are injunctions to restrain cutting of turf, digging gravel, cutting down trees, doing injury to houses. In all those cases there is what I may call a phy-

(1) 49 Law J. Rep. Q.B. 245, on appeal, 449; Law Rep. 5 Q.B. D. 167 and 431.

sical injury to property. They are all cases very familiar to us, and it appears to me that it is to that class of cases that the word "injuries" applies where there is a substantial physical injury to property. In the present case, what is really complained of is trespass, and not injury to property, except so far as it is incidental to trespass. The extent of the injury is the breaking of a gate and injury by cattle eating grass and trampling on it. The real object of the injunction, as appears by the statement of claim, the indorsement of the writ, and the claim made by the statement of claim, was to restrain the repetition of trespass. It appears to me, therefore, that *prima facie* the case is not within those words.

But then it is said that in the present case the defendant not only trespassed but asserted a title. Does that convert a trespass which does not substantially injure property into injury to property? I think it does not; and, if such an action were intended to have been included, the rule would have expressly provided for it.

I have been referred to a case of *Chapman* v. *The Midland Railway Company* (1), and it is quite true that one learned Judge, Mr. Justice Lush, in the Queen's Bench Division seems to have taken a somewhat different view of the construction of the rule. But the case was taken before the Court of Appeal, where all three Judges gave elaborate judgments, and I find that none of them adopted the view taken by the Court below. That being so, I must make answer to the Divisional Court that the case does not come within the higher scale, and with that expression of opinion I leave the matter in their hands (2).

[On a subsequent day the Divisional Court accordingly dismissed the appeal, with costs.]

Solicitors—Collyer-Bristow & Co., agents for Bell & Ingoldby, Louth, for plaintiff; Toynbee, agent for Toynbee, Larken & Toynbee, Lincoln, for defendant.

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(2) See *Horner* v. *Oyler*, 49 Law J. Rep. Q.B. 655.

1882. Nov. 11. } FELL AND OTHERS *v.* PARKIN AND ANOTHER.

Estoppel—Choice of Debtors—Election—Refusal to assent to a Composition.

The rule that where there is a choice of debtors an election must be made within a reasonable time ought to be strictly applied when a liability is sought to be created by estoppel and the remedy against the person who ought to pay is likely to be imperilled by delay.

A creditor having a choice of debtors attended at a meeting of the creditors of one of such debtors, handed in a claim which was allowed, took the chair at the meeting, and voted against the acceptance of a composition:—

Held, *that the creditor had elected to accept the liability of that debtor, and to give up his claim against the other.*

Scarf *v.* Jardine (51 Law J. Rep. Q.B. 612; Law Rep. 7 H.L. Cas. 345) *followed.*

This was a case tried without a jury at the Summer Assizes, 1882, at Leeds, and reserved by Mathew, J., for further consideration.

The facts and arguments appear in the judgment.

A. Wills, Q.C., with him *Wilberforce*, for the plaintiffs.

D. Seymour, Q.C., with him *Cyril Dodd*, for the defendants.

MATHEW, J.—In this case, which was tried before me without a jury at the last Leeds Assizes, the plaintiffs sought to recover a sum of 414*l.* 13*s.* 11*d.* for goods supplied to the defendants at various dates between the 8th of December, 1880, and the 23rd of March, 1881.

The defendants are the executors of John Pitt, who carried on business in his own name at Sheffield up to his death on the 10th of June, 1879. The business was continued under the name of John Pitt by the defendants, as his executors, up to the 12th of May, 1880, when it was transferred by them to the testator's son, T. Swallow Pitt, who had previously acted as manager. The plaintiffs received orders for goods, purporting to come from "the executors

of John Pitt," and were paid by acceptances of the executors up to the time of the transfer. Afterwards orders continued to be received by the plaintiffs. The orders purported to come from John Pitt, and were, in fact, sent by T. Swallow Pitt. Some of the goods so ordered were paid for by acceptances of the executors, obtained from them by T. Swallow Pitt for his accommodation.

It was admitted that down to the 20th of April, 1881, the plaintiffs had no notice of the transfer of the business by the executors. On the other hand, it was not suggested that the defendants had intended to mislead the plaintiffs, or that they were aware that the plaintiffs had not been informed that the business was no longer carried on by them.

On the 20th of April, 1881, John Charles Fell, one of the plaintiffs, called on T. Swallow Pitt, and saw him with reference to their account, which then amounted to 414*l.* 13*s.* 11*d.*, the sum sought to be recovered in the action. According to the evidence of John Charles Fell, T. Swallow Pitt offered his acceptances in the name of John Pitt for the first two items in the account—namely, 57*l.* 6*s.* 8*d.*, for goods supplied up to the 24th of December, 1880, and 80*l.* 0*s.* 7*d.*, for goods supplied up to the 16th of February, 1881. These acceptances John Charles Fell agreed to take, and T. Swallow Pitt signed them in the name of John Pitt and handed them to John Charles Fell. Nothing was said before the acceptances had been handed to John Charles Fell about the transfer of the business; but upon his asking for a further order Pitt informed him that for the future the business would be his. I am not satisfied that the recollection of John Charles Fell was correct as to this. The fact that he took the two acceptances signed by T. Swallow Pitt was significant, and led me to think that T. Swallow Pitt must have informed him that he, and not the executors, was liable for the whole amount then due to the plaintiffs, and therefore that the witness must have known that the transfer had taken place before the first item in the account had become due. The witness then took a further order for goods from T. Swallow Pitt, and it appeared that the plaintiffs continued to supply him with goods, for which they were not paid, down to May, 1881, when T. Swallow Pitt died.

Mr. Seymour, who appeared for the defendants, while admitting that the plaintiffs had no notice of the transfer before this interview, and that until notice had been given the defendants might have been estopped from denying their liability, insisted that on and after the 20th of April, 1881, the plaintiffs elected to look to T. Swallow Pitt instead of the defendants for the amount due to them.

Two witnesses, Goodwin and Ehrenfeldt, were called. One of them, Goodwin, an accountant at Sheffield, who took charge of the business after the death of T. Swallow Pitt, stated that he had written to the plaintiffs about the two acceptances which T. Swallow Pitt had given, and which had not matured at the time of his death. One of the plaintiffs' firm, Robert Fell, afterwards called upon him, when the witness requested that the bills should be retired by the plaintiffs at maturity.

Robert Fell asked what was the position of T. Swallow Pitt's affairs, and the witness said he thought "straight." Robert Fell said he hoped so, because deceased owed them between 700*l.* and 800*l.* Robert Fell then said his firm would retire the bills; and this was afterwards done. The witness further said that, with respect to an acceptance which had been given by the executors for goods supplied to T. Swallow Pitt before December, 1880, and which the witness described as an accommodation acceptance, he referred Robert Fell to the executors. The other witness, Ehrenfeldt, proved that he had been afterwards called in to investigate the affairs of T. Swallow Pitt, and to prepare a statement for his creditors; and that a meeting of the creditors was held on the 17th of October, 1881, at which Robert Fell attended and handed in a claim against the estate for 706*l.* 12*s.* 1*d.*—that is, for 414*l.* 13*s.* 1*d.* for goods supplied before the 20th of April, 1881 (the amount in question), and the balance, 291*l.* 18*s.* 2*d.*, for goods subsequently supplied. The claim was allowed, and Robert Fell was voted into the chair, as representing the largest creditors. An offer was made of 7*s.* 6*d.* in the pound, which the plaintiff, on behalf of his

firm, declined to accept. It appeared that Goodwin had offered to purchase the business at an amount which would have paid the creditors 7*s.* 6*d.* in the pound. In consequence of Robert Fell's refusal to accept the composition offered, and of his standing out for a larger sum, no arrangement was come to. When this evidence was given Robert Fell was in Court, and was not called. It would seem, therefore, that he was not in a position to deny what had been proved by Ehrenfeldt and Goodwin. It would follow that Robert Fell must have known when he saw Goodwin that T. Swallow Pitt was liable for the goods supplied from and after the 8th of December, 1880, and that the transfer of the business from the executors had taken place some time before that date. Assuming that John Charles Fell had not ascertained on the 20th of April, 1881, that the transfer had taken place in the previous year, Robert Fell knew it at some time (it did not appear when) before his interview with Goodwin, and the plaintiffs were then in a position to give the executors, the present defendants, notice that they looked to them for payment for the goods supplied before the 20th of April, 1881. No such notice, nevertheless, was given, until shortly before the writ was issued, on the 26th of October, 1881.

This delay would, of itself, be strong evidence against the plaintiffs, for when there is a choice of debtors an election should be made within a reasonable time—*Smethurst* v. *Mitchell* (1) and *Curtis* v. *Williamson* (2); where a liability is sought to be created by estoppel, and the remedy against the person who ought to pay is likely to be imperilled by delay, this rule ought to be strictly applied. In this case the plaintiffs, as men of business, ought to have known that the position of the defendants might be seriously prejudiced from the absence of notice, that they were interested to the amount of the plaintiffs' claim in the realisation of Pitt's estate.

But the case of the defendants does not depend merely upon the plaintiffs' *laches.*

There is the evidence of the witness Ehrenfeldt, which remained unexplained and uncontradicted. The proper inference from his statements seems to me to be that the plaintiffs had elected when the meeting of creditors took place to accept the liability of T. Swallow Pitt and his estate, and to relinquish their claim against the executors. The conduct of Robert Fell at the meeting is as clear and unequivocal an indication of intention as that which was held to be conclusive in *Scarf* v. *Jardine* (3).

This refusal to accept the composition materially affected the position of the other creditors.

Observations of counsel were confined to the question whether or not it ought to be inferred, as matter of fact, that the plaintiffs had made a final election which disabled them from maintaining this action.

I find, upon that issue, in favour of the defendants, and I direct judgment for them, with costs.

Judgment for defendants, with costs.

Solicitors—J. W. Sykes, agent for Ramsden & Sykes, Huddersfield, for plaintiffs; Pilgrim & Phillips, agents for Smith, Smith & Elliott, Sheffield, for defendants.

(1) 1 E. & E. 622; 28 Law J. Rep. Q.B. 241.

(2) 44 Law J. Rep. Q.B. 27; Law Rep. 10 Q.B. 57.

(3) 51 Law J. Rep. Q.B. 612; Law Rep. 7 H.L. Cas. 345.

1882. Nov. 11. } TAYLOR *v.* HAILSTONE.

Husband and Wife—Necessaries—Costs—Proceedings for Judicial Separation and Correspondence with a View to a Reconciliation—Reasonable Belief on the part of the Solicitor that Wife was entitled to Judicial Separation.

Unless the necessity for proceedings by a wife against her husband for a judicial separation be made out in point of fact, the husband cannot be made liable for costs incurred by the wife, although the solicitor for the wife may have had reasonable grounds for supposing, upon the statements of the wife, that proceedings ought to be taken.

This was a case that was tried at the Summer Assizes at Leeds, in 1882, and

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came on for further consideration on the 11th of November, 1882. The facts and arguments appear in the judgment.

Lockwood, for the plaintiff.

A. Wille, Q.C. (with him *West*), for the defendant.

MATHEW, J. — In this case, which was tried before me without a jury at the last Leeds Assizes, the plaintiff, who is a solicitor, sued the defendant for the sum of 207*l.* 6*s.* 1*d.*, the amount of a bill of costs. The defendant resisted the claim, on the ground that the costs had been incurred by his wife without his authority.

It appeared from the statement of counsel, that in April, 1878, the plaintiff had been sent for by the defendant's wife, in consequence of differences which had arisen between her and her husband, and that she had given him instructions to institute proceedings to obtain a decree for judicial separation.

The plaintiff at first endeavoured, by corresponding with the defendant and his solicitors, to bring about an arrangement for a separation; but these efforts failed. The plaintiff then proceeded, upon the instructions of the defendant's wife, to prepare a case for the opinion of counsel; and, upon their advice that there were no grounds for commencing a suit for a judicial separation, the plaintiff declined to proceed further.

The defendant's wife, however, instructed another solicitor, and a suit was instituted, which came on for hearing before Sir James Hannen on the 21st of June, 1882, and terminated in a compromise and agreement for separation. The plaintiff's counsel contended that the defendant was liable on two grounds — first, that the costs incurred with reference to the proceedings for a judicial separation were necessaries for which the defendant's wife had authority to pledge his credit; and, secondly, that so much of the bill of costs as related to the negotiations for a separation was incurred by the defendant's sanction.

It was urged on the part of the defendant—first, that there were no reasonable grounds for instituting the proceedings in the Divorce Court, and that costs incurred with respect to such proceedings were not necessaries; and, secondly, that the correspondence as to a separation had never been carried on with the consent or sanction or upon the credit of the defendant.

It was agreed that, instead of going into evidence upon the question of the necessity of the proceedings in the Divorce Court, I should read the shorthand notes of the evidence given by the defendant's wife, and should consult the learned President of the Probate, Divorce and Admiralty Division upon the question of the reasonableness of the grounds for instituting the proceedings. The correspondence between the plaintiff and the defendant's solicitors was put in, and also the case prepared by the plaintiff and the opinion of counsel upon it.

It was admitted that the defendant told his wife, when he heard that the plaintiff was acting for her, that he would not be responsible for any costs which she might incur. But it also appeared that the plaintiff had not been informed of the defendant's statement to his wife.

Upon perusing the shorthand-writer's notes of the evidence given at the trial, I am of opinion that there were no grounds for instituting proceedings to obtain a judicial separation. In this view I am fortified by the opinion of Sir James Hannen. But it was argued for the plaintiff that although the proceedings might not be reasonable, still if the plaintiff had reasonable grounds for supposing upon the statements of the wife that proceedings ought to be taken, the costs incurred while the plaintiff held this reasonable belief would be recoverable from the husband. I do not concur in this view of the law. I think that unless the necessity for the proceedings is made out in point of fact, the husband cannot be made liable. The case of *In re Hooper* (1), which I presume was intended to be relied upon for the plaintiff, is not an authority in the plaintiff's favour on this point.

But even if the question were whether the plaintiff had reasonable grounds for believing that the defendant's wife was

(1) 2 De Gex, J. & S. 91; 33 Law J. Rep. Chanc. 301.

entitled to a judicial separation, I should come to the conclusion that there were no reasonable grounds for any such belief. There was no reason for charging the defendant with conduct to his wife that rendered a suit in the Divorce Court necessary for her protection. That of which the defendant's wife complained had, according to her own statement, taken place many years before the plaintiff was consulted. The defendant denied that there was any foundation for the charges made against him by his wife, and there was no reason at the time to apprehend any conduct on his part that was likely to be injurious to her. The costs of the Divorce proceedings could not therefore be recovered.

Then, as regards the remainder of the bill, I think the plaintiff could not have supposed that the defendant intended to make himself liable to the plaintiff. The correspondence was a hostile one, and was commenced and continued under protest. The plaintiff could not reasonably have inferred that the defendant intended to pay him either for the letters which passed between the plaintiff and the defendant's solicitors on the subject of a separation, or for those afterwards written in the interest of the defendant's wife to bring about a reconciliation.

I therefore give judgment for the defendant, with costs.

Judgment for the defendant, with costs.

Solicitors—Field, Roscoe & Co., agents for Taylor, Jeffery & Co., Bradford, for plaintiff; T. W. Nelson, agent for Nelson, Bulmer & Nelson, Leeds, for defendant.

[IN THE COURT OF APPEAL.]

1882. Nov. 23. SMITH AND SON *v.* THE ASSESSMENT COMMITTEE FOR LAMBETH AND OTHERS.

Poor—Rating—Exclusive Occupation—Bookstalls at a Railway Station—Demise or Licence—43 *Eliz.* c. 2; 32 & 33 *Vict.* c. 67.

[For the report of the above case, see 52 Law J. Rep. M.C. 1.]

1882. Nov. 14. FULLER AND COMPANY *v.* ALEXANDER BROTHERS.

Practice—Leave to Defend—Bill of Exchange—Bona fide Holder for Value—Order XIV. rule 1*a.*

In an action on a bill of exchange the defendants set up a case of fraud, and the plaintiffs upon a summons under Order XIV. filed an affidavit that they were bona fide holders for value of the bill:—Held, *that the defendants were entitled to unconditional leave to defend.*

Two actions were brought on two bills of exchange, dated respectively the 23rd of September, 1881, and the 20th of May, 1882, against the acceptors of the same, by the plaintiffs, the indorsees. The defence set up in the affidavit, in opposition to the application to sign judgment, was that the bills were accepted by one of the defendants' firm in fraud of the partnership. The plaintiffs, in answer, swore an affidavit that did not contain, but was in the argument by consent taken as containing, a clause to the effect that they gave value for the bills and were *bona fide* holders. The Master refused to grant leave to sign judgment, and gave the defendants unconditional leave to defend in the two consolidated actions. The plaintiffs appealed to Chitty, J., who affirmed the Master's order. The plaintiffs then appealed to the Divisional Court.

D. Kingsford, for the plaintiffs.—The plaintiffs by an affidavit prove *bona fides* and value given, and the only object of trying the case is to see whether or not that which has been sworn is true. But under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), s. 2 (1), a defen-

(1) 18 & 19 Vict. c. 67. s. 2: "A Judge of any of the said Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into Court the sum indorsed on the writ, or upon affidavits satisfactory to the Judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit."

dant, in order to obtain leave to defend, had formerly to find security or bring the money into Court. And it is submitted that the rule ought to be similar now in actions on bills of exchange.

Verrall, for the defendants, was not called upon.

DENMAN, J.—I think this application should be dismissed. First, on the ground that the Court ought to be very unwilling to interfere with a decision at chambers refusing leave to sign judgment absolutely, or to impose conditions on a defendant while allowing him to defend. Secondly, in this case, where the acceptors of a bill of exchange are sued, the defence sets up a case which, if made out, would constitute a case of fraud. The plaintiffs are thus called on to prove that they gave value for the bill. The plaintiffs swear that they gave value; but, in my opinion, that is not sufficient to entitle them to sign judgment, or to justify the Court in hampering the defence by requiring payment into Court. The Judicature Acts and Rules, with which we are now dealing, apply equally to actions of every kind, and upon them I think we must decide that, if grounds be shewn for the belief that it would be inequitable for the plaintiffs to have final and immediate judgment, it is not just that the plaintiffs should, by merely swearing in an affidavit that they gave value, be entitled to deprive the defendants of their right to have the matters in controversy between them and the plaintiffs tried in open Court and fully investigated by a jury. This view has, I believe, always been followed at chambers, and has been acted on by the Divisional Court, nor am I aware of any case in the Court of Appeal to the contrary.

MANISTY, J.—I am of the same opinion. The question is, whether the circumstances of this case, in our judgment, entitle the defendants to defend. The defendants have shewn that they have been defrauded, and the plaintiffs are thus called on to prove that they were *bona fide* holders for value. This might be a very intricate question, and the defendants are entitled to have it tried out by a jury, who would be able to judge from the circumstances not only as to the fact of value being given, but as to the *bona fides* of the plaintiffs when they gave consideration for the bill.

Appeal dismissed with costs.

Solicitors—F. Sheffield & Co., for plaintiffs; G. S. Warmington, for defendants.

[IN THE COURT OF APPEAL.]

1882. Dec. 1. Dec. 15. } ANCKETILL *v.* BAYLIS.*

Parliament—Borough Vote—Tenant or Lodger—Vacation of a Portion of House let in Tenements—30 & 31 *Vict. c.* 102. *ss.* 3 *and* 4; 41 & 42 *Vict. c.* 26. *s.* 5.

A tenant of part of a house wholly let out in tenements does not lose his qualification for a vote at Parliamentary elections by reason only that during the qualifying year the tenant of another part of the house gave up his tenancy to the common landlord, and that part remained unlet.

Dictum of BRETT, L.J., *in* Bradley *v.* Baylis (51 Law J. Rep. Q.B. 183) *overruled.*

Appeal from a Revising Barrister in a consolidated case upon objection taken to the retention of the name of William Roberts and 114 others on the occupiers' list of voters for the Parliamentary borough of Chelsea.

For upwards of twelve calendar months previous to the 15th of July, 1882, the voter had, as sole tenant at a weekly rent, occupied a room in a dwelling-house as his residence. He had a right of ingress and egress by the stairs of the house, passage and front door. The room was let unfurnished and was furnished by the voter. The room was rented by the voter from the landlord, who was tenant of the entire house at a yearly rent. The voter had a key to his room door and a key (one of several) to the front door of the house. The entire house was rated to the poor-rate during the qualifying period, but the

* *Coram* Baggallay, L.J., Sir James Hannen, and Lindley, L.J.

rooms occupied by the voter were not separately rated. All rates had been duly paid.

At the beginning of the qualifying period all the rooms in the house were let to tenants as their residences with the like rights as to ingress and egress as the voter had. During the qualifying period a tenant of another room in the house relinquished the tenancy of such room, and gave up the key of the room and also his own key of the front door to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacated room. During no portion of the qualifying year did the landlord actually reside in the house or any part of it, either by himself or by any servant, or attempt to exercise or in fact have any control over it, except such control (if any) as may have been by law conferred on him by reason of the vacation of the room by the outgoing tenant as before mentioned and delivery up to him as the landlord of the keys of the outgoing tenant's room and of the outgoing tenant's front door key. No services were rendered by the landlord to the voter.

The Revising Barrister overruled the objection, subject to the opinion of the Court on the present case.

Webster, Q.C. (*Crump* with him), for the appellant.—The vote was claimed in virtue of the occupation of part of a house under 41 & 42 Vict. c. 26. s. 5. The voter lost his qualification through the other tenant vacating his room, whereupon the landlord *ipso facto* resumed control of the house, and the voter became a lodger. The facts of the case are precisely the same as those put by Brett, L.J., in *Bradley* v. *Baylis* (1). The Lord Justice in that case lays down the rules on the lodger and occupier qualifications as follows:—"If the owner of the house reserves to himself a control over it (which he does if he resides in part of it, and where there is only the use of the passages and staircases given to the inmates to whom he lets the rest of it, or if he does not reside in it, yet if he, by his servants, performs any duties in the house or undertakes a certain control) any person who occupies only a part of that house as his tenant may be properly said to be a lodger with him. But if the owner of the house has entirely left the house, and has given up the actual occupation of it to other people, not reserving any part of the actual occupation of it to himself, nor any control over any part of it, then, although in truth those persons are not occupying a house but only part of a house, they may, if other conditions are fulfilled, be said to occupy 'a dwelling-house' within the definition of 41 & 42 Vict. c. 26. Cavillers may say that such nice distinctions look exceedingly like nonsense; I can only answer, if Judges seem to talk nonsense, it is because Parliament has written nonsense. Supposing a man remains in the house and lets off several rooms to different persons, who are then his lodgers, and he afterwards lets off all the rest of the rooms, and leaves the house, and preserves no actual control over it, so that he is not to go into it either by his servants or by himself, then those persons who were before lodgers have become by that fact householders. But suppose during the qualifying year one of those lodgers leaves, and the owner thereupon (as he assuredly must) resumes the control over that unlet part, according to my view of the statutes, immediately by that act of his those people left in the house who have been householders become lodgers again." He also cited *Morton* v. *Palmer* (2).

G. M. Freeman, for the respondent.—The expression of opinion by Brett, L.J., was an *obiter dictum* unnecessary for the decision of the case before the Court of Appeal, and the matter is now open for this Court to decide. The circumstances in which the voter occupied after the other tenant had vacated were precisely the same as before so far as his relation to the landlord was concerned. His qualification was not affected by an act which took place between the landlord and a third person. He cited *Toms* v. *Luckett* (3).

Webster, Q.C., in reply.

LORD COLERIDGE, C.J.—This question arises upon two Acts of Parliament — the

(1) 51 Law J. Rep. Q.B. 183, at p. 203; Law Rep. 8 Q.B. D. 195, at p. 235-6.

(2) 51 Law J. Rep. Q.B. 7.

(3) 5 Com. B. Rep. 23; 17 Law J. Rep. C.P. 27.

Representation of the People Act, 1867, and the Registration Act, 1878—which in their combined effect have been called nonsense written by Parliament. I should not have so described them; but I must be wrong, because they have been so described in the Court of Appeal. I should have thought them tolerably clear, but I am bound by the decision in *Bradley* v. *Baylis* (1), and I shall give it the fullest effect. But I do not think the facts of this case bring it within the authority of that decision. Two paragraphs of the case stated by the Revising Barrister are as follows: "During the qualifying period a tenant of another room in the house relinquished the tenancy of such room, and gave up the key of the room and also his own key of the front door to the landlord, who thereupon took the usual steps to obtain a new tenant of the vacated room." But "during no portion of the qualifying period did the landlord actually reside in the house or in any part of it, either by himself or by any servant, or attempt to exercise or in fact have any control over it, except such control (if any) as may have been by law conferred upon him, by reason of the vacation of the room by the outgoing tenant." Those are the facts stated by the Revising Barrister, and they do not appear to me to prevent the occupier of part of the house being an occupier within the meaning of the two Acts. I think the decision of the Revising Barrister right. I abstain from giving elaborate reasons, because it is better that the case should go to a higher Court unencumbered by any argument of mine. I am conscious that in so deciding I am deciding contrary to the principle of a passage in the judgment of Lord Justice Brett, especially as reported in the *Law Reports*, where he is made to say that "supposing during the qualifying year one of those lodgers leaves, and the owner thereupon, as he assuredly must (4), resumes the control over that unlet part, according to my view of the statute, immediately by that act of his those people left in the house, who had been householders, become lodgers again." There is no doubt that in this case during the qualifying year one of the tenants left, and a part of the house was unoccupied. It is true that the Revising Barrister finds that the landlord did not exercise any control, but that fact may be immaterial, in the judgment of my brother Brett. It may be that control is resumed by mere force of law apart from any fact. I am of opinion that the decision of the Revising Barrister must be affirmed, but that leave to appeal should be given.

(4) The words, "as he assuredly must," do not appear in the Law Journal Reports.

FIELD, J.—This question turns on section 3 of the Representation of the People Act and section 5 of the Registration Act, and but for the opinion expressed by eminent Judges I do not think that I should have had much difficulty in deciding it. The only point on which Mr. Webster has put his finger is a point of time when by the act of two other people the tenant became converted into a lodger. I am of the same opinion as my Lord, and but for the judgment of Lord Justice Brett I should have had no difficulty.

STEPHEN, J.—I am of the same opinion; but I feel greater sympathy with the difficulties felt in the Court of Appeal than my brothers. I think the Acts are not clear, but I put my judgment on the ground that the facts do not come within *Bradley* v. *Baylis* (1). Mr. Webster asked us in effect to add a proviso to the sections, that if any one of the occupiers having tenements should go away from the house, all the occupiers lose their qualifications altogether, as the effect would be that they lost their qualifications as tenants and they could not gain a qualification as lodgers. I agree with the decision of the Court, but am more struck with the difficulties of the sections.

Decision affirmed; leave to appeal.

Dec. 15.—The appellant appealed to the Court of Appeal.

Crump (with him *Webster, Q.C.*), for the appellant.—The facts of this case bring it within the *dictum* of Brett, L.J., in *Bradley* v. *Baylis* (1), that if during the qualifying year one of the lodgers leaves, and the landlord thereupon resumes control over the unlet part, the other people left in the house who have been householders become lodgers again. There cannot be overlapping franchises, and a person cannot be a lodger and at the same time a

householder in respect of the same subject-matter of occupation. The words of section 3 of the Act of 1867 are in favour of the appellant's contention. It is not absolutely necessary that the landlord should go into the house and take physical possession. There must be an occupation by the claimant as householder during the whole of the qualifying year, and it must be proved that in no part of the qualifying year was his status as householder altered.

Bompas, Q.C. (with him *G. M. Freeman*), for the respondent.—The test as to what constitutes a man a householder is laid down in *Bradley* v. *Baylis* (1), and depends upon the fact whether the occupation is the occupation of a rateable hereditament. In *Smith* v. *St. Michael's, Cambridge* (5) was considered the question as to what constitutes part of a house a rateable hereditament. It is a matter of fact when a landlord retains part of his house and when he sublets, whether he sublets it as a lodging or as a tenement. In *Smith* v. *St. Michael's, Cambridge* (5), it was held to be possible for part of a house which was let to be a rateable hereditament, although the landlord continued to live on the premises. That decision was followed in *The Queen* v. *St. George's Union* (6) and in *Allan* v. *The Overseers of Liverpool* (7). The effect of the decision in *Bradley* v. *Baylis* (1) is that the *prima facie* test whether a person is a lodger or a tenant is not so much whether the landlord has control of the outer door, but whether he resides upon the premises or not. If he does reside on the premises he presumedly keeps control over the rooms. The *ratio decidendi* of that case is that if the landlord is not living there he does not reserve the control over the hall and staircases. The landlord here had a legal right to go into the house, and to confer with regard to this one room the same rights as those he had conferred on the occupants of the other rooms. The fact of the landlord being on or off the premises is only *prima facie* evidence. The real test is, what is the agreement between the landlord and the tenant? If in law the tenant agrees to give some control over the premises to the landlord, then he is a lodger; but if the landlord has expressly given up all right of control over the premises, then the tenant is an occupier.

Crump, in reply.—The question of rating, as pointed out by the Master of the Rolls in *Bradley* v. *Baylis* (1), has nothing to do with the question raised in that case. The present case rests upon the construction of the Act of 1867, as interpreted by the Act of 1878, which contains nothing at all about rating. Undoubtedly there must be a rateable hereditament; but inasmuch as the statutory qualifications have not been fulfilled, the claimant here is a lodger and not an occupier.

BAGGALLAY, L.J.—I am unable to take a different view to that taken by the Revising Barrister and by the Court below. The Act of 1867 created two kinds of borough franchises—the one an occupation franchise, and the other a lodger franchise. These two franchises are distinct: for in the case of the occupying tenant it is sufficient as regards the nature of the premises that they are rateable, but as regards the lodger franchise it is essential that the rent must be 10*l.* a year. It is not necessary to consider the effect of the Act of 1878, except to say that in order to guard against any question as to separate occupation, it was provided that the term "dwelling-house" should include any part of a house which is separately occupied as a dwelling. There is no doubt that the portion of the house which was occupied by Roberts was occupied by him as a separate dwelling, and I will assume that it was rateable. The only question we have to consider is, what is the character of the occupation, and whether he was an occupying tenant or a lodger. It is curious that neither this Act nor the Lodgers' Protection Act (34 & 35 Vict. c. 79) gives any definition of a "lodger." The effect of these clauses came before the Court of Appeal in *Bradley* v. *Baylis* (1), where three separate cases were brought under the consideration of the Court. *Bradley* v. *Baylis* (1) and

(5) 3 E. & E. 383; 30 Law J. Rep. M.C. 74.
(6) 41 Law J. Rep. M.C. 30; Law Rep. 7 Q.B. 90.
(7) 43 Law J. Rep. M.C. 69; Law Rep. 9 Q.B. 191.

Morfee v. *Novis* (1) were substantially the same, but there is a clear distinction between the occupation in those cases and that in *Kirby* v. *Biffin* (1). Those appear to be two extreme cases, and the present one lies between the two. Roberts was one of several persons who occupied rooms in one house under circumstances which would have entitled all of them to have been recognised as occupying tenants. That is admitted; but what is stated is this, that in the course of the qualifying term one of the occupiers ceased to occupy, and that the part previously occupied by him became at the disposal of the landlord.

It does not appear whether that part of the house was subsequently let, and whether it was let or not does not seem to me to be material. The circumstances as regards all the other occupants were not in the slightest degree altered by the fact that one of the occupying tenants had given up his rooms; it would appear from the stated case that the tenant when he gave up his rooms handed to the landlord the keys of the rooms and outer door. It may therefore be said that the landlord had obtained control over that portion of the premises, but not over the portions occupied by the other tenants. The landlord had obtained possession to this extent, that he could get another tenant. There could be no possible doubt as to the application of the principles laid down in *Bradley* v. *Baylis* (1), but for certain remarks made by Lord Justice Brett, of which a view has been taken which was never contemplated by the Lord Justice at the time. No doubt the language used by his Lordship would at first sight bear the construction which has been sought to be put upon it by the appellant; but I cannot think that such a case as the present was contemplated by his Lordship. I think that by resuming control over the portion which had been previously let, was meant resuming a complete control over it, as if the landlord had continued to reside in the house during the qualifying year.

That certainly would be the view I should draw from the observations of the Master of the Rolls as to the consideration what might or might not constitute a lodger. I think that the Court did not intend to give anything like an exhaustive definition of those who occupy as lodgers as distinguished from those who occupy other than as lodgers. But it was there indicated that regard must be had to the particular circumstances of each case and to the cases decided previously. I feel bound to go further and say, that if Lord Justice Brett intended to use the language in the sense contended for, I must respectfully dissent from him. It was no portion of his judgment, and was only in the form of an illustration. I am of opinion the decision of the Court below was right, and the appeal must be dismissed.

Sir James Hannen. — I am of the same opinion. After the full consideration which has been given to this subject in *Bradley* v. *Baylis* (1) it is not necessary to enter into that decision, which, so far as it goes, defines the law very clearly. It was admitted that when this house was wholly let out, the tenants were occupiers, and not lodgers. The question is, whether the fact of one room becoming vacant altered the character of the other tenants into that of lodgers. I agree that there is a difficulty, no doubt, in defining a lodger as distinguished from an occupier. One fact probably which has most weight in determining a particular case is whether the landlord is residing in the house or not. Usually a landlord, when he lets out rooms, intends to exercise a general control over the house, and the tenants submit to that control. On the other hand, where a man, who does not reside in the house, lets out several parts of it, the general relation arising is an independent one on the part of the tenant towards the landlord. The fact whether the landlord resides in the house or not is not conclusive. No one would say that the inmates of a building were lodgers because the landlord occupied a set of rooms at the bottom of the house: as, for instance, where there are several independent dwellings in one passage over which the landlord retains a control and where there is a porter, or, as in those cases which we are familiar with abroad, a *concierge*. Yet in those cases, although the landlord may live in the house, either himself or by his servants, there is a separate

occupation by the several tenants. The general principle which I should desire to lay down is this—that whatever is the relation created in the beginning between the landlord and his tenants, that relation will continue, unless there is something from which it may be inferred that the tenant has agreed or submitted to a change in the relation created between him and the landlord. Take a clear case of a lodging. If the owner of a house lets rooms in a house, but finds it more convenient to dwell somewhere else, the fact that he does so will not change the lodgers into occupiers if he does not give up the right to come into the house. Lord Justice Brett said that where the landlord goes out of the house and gives up all control, that in fact and in law would make a difference. But, on the other hand it may be said that, where the tenants come in as occupiers, as in this case, the mere fact of one of the rooms becoming vacant makes no difference. If the landlord had in fact come in himself or by his agent and exercised a control over the whole of the house different to that which he had exercised while the room was vacant, that would be a fact from which it might be inferred that the several tenants had acquiesced; otherwise the same state of circumstances as existed previously must be presumed to have continued. For these reasons I am of opinion that the appeal must be dismissed.

LINDLEY, L.J.—I also am of opinion that the view taken by the Revising Barrister and the Court below was correct. We start with this: that Roberts was an occupier as distinguished from a lodger, and the only question we have to consider is, whether the facts stated here converted him from an occupier into a lodger. I adhere to what I have said before—that the word "lodger" involves the idea of some relation with the person who lets the lodging. It is much easier to destroy than to create that relation without the consent of the lodger. I cannot at present see how a person can be turned into a lodger without his consent. But, as in the case of *Morton* v. *Palmer* (2), it is more possible to destroy than to create that relation. The question we have to consider is, whether a person who was an occupier has become a lodger by the fact of another tenant having vacated his tenancy. If Lord Justice Brett meant to say that under circumstances like those stated here the tenant ceases to be an occupier, I cannot assent to that view. If the *dictum* goes the length supposed, I dissent from it. For these reasons I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors—Lee & Pembertons, for appellant; Baylis & Pearce, for respondent.

1882. Dec. 1.

FRIEND *v.* TOWERS.

Parliament—Registration—Amendment by Barrister—10l. Franchise—Household Franchise—"House"—"Dwelling-house"—41 & 42 Vict. c. 26. s. 28. sub-s. 12.

The Revising Barrister may amend the description of the nature of the qualification for a Parliamentary vote in a borough by changing "house" in the occupiers' list into "dwelling-house," when it is proved that the property is below 10l. a year annual value, but has been occupied by the claimant as a dwelling-house during the qualifying year.

CASE stated by the Revising Barrister for Exeter in a consolidated appeal, regarding the claim to the Parliamentary franchise of the respondent, and 279 others objected to on similar grounds.

The name of the respondent appeared in the occupiers' list of persons entitled to vote, with the word "house" in the third column, under the heading "nature of qualification." The respondent had during the qualifying year occupied as tenant the "qualifying property" named in the fourth column of the list as his dwelling-house. The clear yearly value of the property was less than 10*l.*

The Revising Barrister decided that the word "house" was sufficient to include dwelling-house, and that it was a matter of evidence whether the "house" was a house, as required by the Reform Act,

1832, of the value of 10*l.*, or whether it was a dwelling-house under the Representation of the People Act, 1867. He further amended the description by adding the word "dwelling" to "house," and retained all the names so objected to on the list.

Charles, Q.C. (*Bucknill* with him), for the appellant, argued that the term "house" was appropriate to the franchise under the Reform Act, 1832, and did not describe the nature of the qualification under the Representation of the People Act, 1867, and referred to *Townshend* v. *The Overseers of St. Marylebone* (1), *Ford* v. *Boon* (2) and *Bradley* v. *Baylis* (3). These were cases of overlapping franchises, but the present is not.

[The Court intimated an opinion that the Revising Barrister had power to amend under the Registration Act, 1878, s. 28, sub-s. 12.]

Bompas, Q.C., for the respondent, was not called upon.

COLERIDGE, C.J.—I am of opinion that the decision of the Revising Barrister in this case must be affirmed. On the question whether "house" sufficiently describes a dwelling-house qualification, I was exceedingly impressed with the argument. I think that matter is entitled to consideration, but I do not decide it, because I think that the 12th sub-section of section 28 of the Registration Act exactly meets this case, and was intended to do exactly what has been done here. It provides that "where the matter stated in a list or claim, or proved to the Revising Barrister in relation to any alleged right to be on any list, is, in the judgment of the Revising Barrister, insufficient in law to constitute a qualification of the nature or description stated or claimed, but sufficient in law to constitute a qualification of some other nature or description, the Revising Barrister . . . shall correct such entry by inserting such qualification accordingly." Where it is proved that the qualification exists, but it is described in words appropriate under another statute, then, by the express words of this section, the Revising Barrister may make the alteration. I avoid the subtle questions of franchises overlapping, but I think the amendment was rightly made.

FIELD, J.—I am of the same opinion. I think the Revising Barrister pursued a wise course in exercising his discretion in this manner.

STEPHEN, J.—I am of the same opinion.

Decision affirmed.

(1) 41 Law J. Rep. C.P. 25; Law Rep. 7 C.P. 143.

(2) 41 Law J. Rep. C.P. 28; Law Rep. 7 C.P. 143.

(3) 51 Law J. Rep. Q.B. 183; Law Rep. 8 Q.B. D. 210.

Solicitors—S. Hamilton, agent for J. W. Friend, Exeter, for appellant; J. E. Fox & Co., agents for H. & B. J. Ford, Exeter, for respondent.

1882.
Dec. 13, 14. } BLAIBERG *v.* PARKE.

Bill of Sale—Registration—Affidavit of Execution and Attestation—Residence, &c., of Attesting Witness — Description by Introduction to Affidavit by Attesting Witness—Description by Reference—Bills of Sale Act, 1878, *s.* 10. *sub-s.* 2.

The affidavit of execution and attestation filed upon the registering of a bill of sale was made by the attesting witness, and a description of the residence of the deponent was contained in the introduction to the affidavit, and was the same as the description of the residence of the attesting witness in the attestation clause:—Held, *that there was a description of the residence of the attesting witness satisfying* 41 *&* 42 *Vict. c.* 31. *s.* 10. *sub-s.* 2, *by* MANISTY, J., *on the ground that the affidavit incorporated the description in the attestation clause, relying on* Routh *v.* Roublot (28 Law J. Rep. Q.B. 240); *by* NORTH, J., *on the ground that the description in the introduction to the affidavit (whether perjury could be assigned upon it or not) sufficed, relying especially on* Allen *v.* Thomson (2 Jur. N.S. 451), *followed in Ex parte* Lowenthal (43 Law J. Rep. Bankr. 132); *by* DENMAN, J., *on the ground that* Routh *v.* Roublot (28 Law J. Rep. Q.B. 240) *was in point on one or the other of those two grounds.*

Blaiberg v. *Parke.*

This was an interpleader issue between Benjamin Blaiberg, claimant, and Charles Parke, execution creditor of one Frank Ricardo Francis, which was tried before Cave, J., on November 6, 1882, when a verdict was found for the claimant, and in which a rule *nisi* was obtained on behalf of the execution creditor for a new trial on the ground of misdirection by Cave, J., in directing the jury that an affidavit filed upon the registration of a bill of sale granted by Francis, under which Blaiberg claimed, satisfied the requirement of the Bills of Sale Act, 1878, s. 10. sub-s. 2, as to a "description of the residence" "of every attesting witness" (1). The material facts in evidence were these:—

The bill of sale in question was granted on the 15th of December, 1881, and purported to be attested by S. A. Kisch, of 3 Chancery Lane, in the City of London, solicitor. The affidavit of execution and attestation filed upon its registration was, so far as material, in the following terms:—

"I, Simon Abraham Kisch, of No. 3 Chancery Lane, in the City of London, make oath and say as follows:—

"1. The paper writing hereto annexed . . . . is a true copy of a bill of sale, and of every . . . attestation of the execution thereof, as . . . given . . . . by Frank Ricardo Francis . . . .

"2. The said bill of sale was . . . . given . . . . on the 15th day of December, 1881.

"3. I was present and saw the said" [grantor] "duly execute the said bill of sale on the said" day.

"5. The name . . . . subscribed to the said bill of sale as that of the witness attesting the due execution thereof is in the proper handwriting of me this deponent.

"6. I am a solicitor of the Supreme Court, and reside at ."

A. T. Lawrence (on December 13), for the claimant, shewed cause.—The requirement of the Bills of Sale Act, 1878, s. 10. sub-s. 2 (1), as to a "description of the residence . . . . of every attesting witness" was satisfied. In *Ex parte Mackenzie; in re Bent* (2), it was held that an insufficient description of an attesting witness in his affidavit might be cured by reference to a sufficient description of him in the attestation clause of the bill of sale, and the like was held in *Jones* v. *Harris* (3) as to the grantor of a bill of sale. But the affidavit is sufficient without any incorporation of the attestation clause. This case differs essentially from *Pickard* v. *Marriage* (4). There the affidavit did not contain, either in the body or in the introductory part, any description of one of the attesting witnesses, whereas here the residence of the attesting witness, though omitted from the body of the affidavit, is described in the introductory part. It has long been required, by express rule, as to affidavits generally, that an affidavit should state the residence of the deponent, the Rules of Hilary Term 1853, rule 138, saying, "The addition and true place of abode of every person making an affidavit shall be stated therein," and the Rules of the Supreme Court, Order XXXVII., rule 3*b* (April, 1880), saying "Every affidavit shall state the description and true place of abode of the deponent"; but it has never been considered necessary, in order to comply with such a rule, that the residence should be stated in the body of the affidavit — *Chitty's Practice* (5) and *Chitty's Forms* (6).

Yelverton (*Vennell* with him), for the execution creditor, in support of the rule.

(1) 41 & 42 Vict. c. 31. s. 10. "A bill of sale shall be attested and registered under this Act in the following manner: . . . . (2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with, the Registrar within seven clear days after the making or giving of such bill of sale. . . ."

(2) 42 Law J. Rep. Bankr. 25.

(3) 41 Law J. Rep. Q.B. 6; Law Rep. 7 Q.B. 157.

(4) 45 Law J. Rep. Exch. 594; Law Rep. 1 Ex. D. 364.

(5) 13th ed., 1879, p. 1292.

(6) 11th ed., 1879, p. 696.

—*Blount* v. *Harris* (7) shews that what has to be looked to is the description of the residence in the body of the affidavit, the Court of Appeal there disregarding the description in the introductory part. *Jones* v. *Harris* (3) recognises that where the affidavit contains no description of the residence the bill of sale cannot be looked to to cure it, as the description must be sworn to; and *Pickard* v. *Marriage* (4) is a decision to that effect. In *Pickard* v. *Bretts* (8), where the affidavit described the grantor as the said so-and-so of so-and-so in the said bill of sale mentioned, the affidavit was held insufficient, although the bill of sale contained a complete description of him. In *Brodrick* v. *Scale* (9) Willes, J., expressly negatived the suggestion that the law was less strict in respect of the description required as to an attesting witness than in respect of that required as to a grantor.

He referred also to *Sharp* v. *Birch* (10) and *Ford* v. *Kettle* (11).

The following judgments were delivered on December 14:—

NORTH, J.—In this case my brother Cave held that the affidavit made by an attesting witness to a bill of sale, to which an objection had been made that it did not contain a sufficient description of his residence, was sufficient, and a verdict was entered for the claimant accordingly. This rule raises the question whether his decision was correct, and in my opinion it was.

The material parts of the affidavit are the introductory words and the 6th paragraph [the learned Judge read those parts of the affidavit]. The occupation of the deponent is sufficiently described as "solicitor." It was not disputed at the trial that, as a matter of fact, the words "No. 3 Chancery Lane in the City of London" so aptly and fully described his residence that if they had been found at the end of the 6th paragraph the affidavit would have been sufficient. But from some cause—probably gross carelessness on the part of the solicitor or his clerk—the description of the residence is not filled in there.

It was contended before us that the attestation clause to the bill of sale fully describes the residence of the attesting witness, and that this clause is referred to in the affidavit, and several cases are cited to shew that this is enough to satisfy the requirements of the Act. But I do not think that these cases establish the point for which they are cited. In my opinion, the contents of the attestation clause are not verified by the affidavit, or incorporated therein either directly or indirectly, and the witness could not have been convicted of perjury upon this affidavit for any wilful misstatement in his description which might have been found in the attestation clause. I may add that in the case of *Ex parte Mackenzie; in re Bent* (2), cited by Mr. Lawrence, upon which Mr. Justice Cave acted, that point does not seem to have been argued; and I think that there are many other cases not quite consistent with that, of which *Brodrick* v. *Scale* (9), cited yesterday, is one.

But there were other points raised on the part of the holder of the bill of sale which I now proceed to deal with. The 10th section of the Bills of Sale Act, 1878, sub-s. 2 (1), requires that a copy of every bill of sale, with its attestation clause, "together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same . . . . and of every attesting witness to such bill of sale," shall be filed within seven days. I may add in passing that so far as relates to the present question the words of the Act of 1854 are identical with those I have read. Now the earlier words in sub-section 2 might be read as if the description need not be in the affidavit, by reason of the introduction of the two words "a description" into that sub-section; but the provision at the end as to filing the copy bill of sale and affidavit does, I think, shew that the description

(7) 48 Law J. Rep. Q.B. 159; Law Rep. 4 Q.B. D. 603.
(8) 5 Hurl. & N. 9; 29 Law J. Rep. Exch. 18.
(9) 40 Law J. Rep. C.P. 130; Law Rep. 6 C.P. 98
(10) 51 Law J. Rep. Q.B. 64; Law Rep. 8 Q.B. D. 111.
(11) 51 Law J. Rep. Q.B. 558; Law Rep. 9 Q.B. D. 139.

must be found somewhere in the affidavit itself, or (which is the same thing) in some document incorporated by reference into the affidavit.

The question then is whether, supposing the words "and reside at ——," at the end of paragraph 6, had been omitted from the affidavit, the affidavit would have contained a sufficient description. I think it would.

In the case of *Routh* v. *Roublot* (12) the description of the attesting witness was found in the introductory words of the affidavit, and not in the body of it, and the affidavit was held sufficient. I gather from the *Law Reports* that the description was contained in the introductory words only of the affidavits in the case of *Pickard* v. *Marriage* (4), cited yesterday, and in the case of *Button* v. *O'Neill* (13) (in the Court of Appeal), and I believe that this has been so in many other cases also.

But there are three other cases I must refer to. The first is *Allen* v. *Thompson* (14), in which, a verdict having been found for the claimant under a bill of sale, a rule to enter a verdict for the defendant was applied for upon three grounds. Upon the first a rule was granted, and made absolute upon argument, and is reported in *Hurlstone and Norman's Reports* (15), but that is not material to the present question. The decision refusing the rule on the two other points is only reported in *The Jurist* (14). The second point was that the affidavit was made by a person who described himself as "R. W. Patton, clerk to Mr. Keighley, 73 Basinghall Street," without adding London or any other place; and it was objected that this was not a compliance with the General Rules of Hilary Term, 1853, requiring that the addition and place of abode of every person making an affidavit should be inserted therein. The third point was that, though the person making the affidavit was the attesting witness to the bill of sale, the affidavit did not contain a separate statement that he, as the attesting witness to the instrument, had such a description. It was objected that this did not satisfy the requirements of the statute that the affidavit should contain a "description of the residence and occupation" of the attesting witness.

The Court, in refusing a rule on the second and third points, said that the description "73 Basinghall Street" was reasonably certain, and that the allegation "I, A.B., of such a place, swear, &c.," was equivalent to an oath that he resided at that place.

The next case is *Ex parte Torkington* (16), before the Court of Appeal in Chancery. It was a case under rule 15 of the Bankruptcy Rules, 1870, which provides that a debtor summons against a person indebted to a partnership authorised to sue in the name of a public officer may be sued out by a public officer on behalf of the partnership, on his filing an affidavit, according to the form in the schedule (where, however, no such form is found), stating that he is such public officer and is authorised to sue out such summons. A debtor summons was taken out by John Parker, who was in his affidavit described as, but did not otherwise expressly swear that he was, one of the registered public officers of the National Bank. Many objections were taken to the affidavit and summons, but one of them was that the affidavit was insufficient by reason of Parker not swearing to the fact that he was the registered public officer of the bank, and this objection was treated as a good one. If matters rested there, this decision would be a strong authority against the view I take. But about a month afterwards the same point precisely came again before the Court of Appeal in Chancery in *Ex parte Lowenthal*; *in re Lowenthal* (17). In that case an affirmation (in the place of an affidavit) was made by one Barber, who, after describing himself as the manager and registered public officer of the Sheffield Banking Company, proceeded to make certain statements, not including a descrip-

(12) 1 E. & E. 850; 28 Law J. Rep. Q.B. 240.

(13) 48 Law J. Rep. C.P. 368; Law Rep. 4 C.P. D. 354.

(14) 2 Jur. N.S. 451.

(15) 1 Hurl. & N. 15; 25 Law J. Rep. Exch. 249.

(16) Law Rep. 9 Chanc. App. 298.

(17) 43 Law J. Rep. Bankr. 132; Law Rep. 9 Chanc. App. 324.

tion of the character he filled. The same objection was taken as in *Ex parte Torkington* (16), which was cited, as was also *Allen* v. *Thompson* (14). The objection was overruled.

Lord Justice Mellish said in his judgment: "It is objected that the affirmation did not comply with the 15th rule, which says that the public officer is to make an affidavit stating that he is such public officer. On the authority of *Allen* v. *Thompson* (14) there is no doubt that it is sufficient that he described himself in the affirmation as the public officer of the bank. That case was not cited in *Ex parte Torkington* (16), in which case there were also other irregularities in the affidavit upon which the decision of the Court was founded." Lord Cairns, Lord Chancellor, also dealt with this point by saying, "it is said that the affirmation does not state expressly that Barber was the public officer. I think that as he is described as the public officer the fact is sufficiently stated. If he was not really the public officer he would have been liable on that affidavit for false swearing." These cases fully bear out the view which I took yesterday that if a sufficient description be found in the introductory portion of the affidavit that is sufficient. With respect to one of the points argued by Mr. Lawrence—namely, that a deponent could be convicted of perjury if he gave a wilfully false description of himself in the introductory part of an affidavit—it will be seen that the decision in *Allen* v. *Thompson* (14) and the observations of Lord Cairns in *Ex parte Lowenthal* (17) go the whole length contended for. I must admit that during the argument I entertained considerable doubt upon this point, and I do not yet feel entirely satisfied about it. In the case of *The Queen v. Chapman* (18) the same point arose, but the Judges abstained from deciding it. For present purposes, however, this seems to me quite immaterial; for the cases I have referred to shew that a sufficient description may be found in the introduction to an affidavit; and all that the statute requires is that it shall be found somewhere in the affidavit; and it does not make it imperative that the description be found in such part of the affidavit that perjury can be assigned upon it.

One question remains—whether the fact that the words "and resides at ——" are found in the affidavit makes any difference in this case. I think not. They do not contain any misstatement; they cannot deceive or mislead; and though it is only by great carelessness that they are found there they cannot, in my opinion, do any harm; for it is obvious from the course taken at the trial that the contest here has not been occasioned by the existence of those words in the affidavit.

MANISTY, J.—I agree in the conclusion at which my brother North has arrived, but I am not sure that I agree in his premises. I am not sure that a description contained only in the introductory part of an affidavit will suffice to satisfy the Act; still less am I prepared to say that if perjury is not assignable upon it, it will nevertheless suffice. But the ground on which I think the affidavit sufficient is that the affidavit does sufficiently describe the residence of the attesting witness by reference to the accompanying copy of the bill of sale; and, in my opinion, *Routh* v. *Roublot* (12) is a conclusive authority to that effect. The deponent in this case, it is important to remember, is also the attesting witness.

Routh v. *Roublot* (12) shews that an affidavit filed on the registration of a bill of sale may be compared with the copy of the bill of sale filed with it, and if it appear by reasonable inference from the comparison that the deponent and the attesting witness are the same person, that will cure any objection to the affidavit depending on its not appearing from the affidavit that the deponent is the attesting witness. If in the present case the affidavit be compared with the bill of sale, it appears by reasonable inference that the deponent is the person whose name and description are appended to the bill of sale as those of the person attesting the same; and so the affidavit incorporates the description in the attestation clause of the bill of sale. In *Routh* v. *Roublot* (12) the bill of sale purported to be witnessed by "Isc. Simpson, Clerk to F. L. Lyne, Solicitor, 12 Pancras Lane, City." The affidavit filed began by saying, "I, Isaac

(18) 2 Car. & K. 846.

Simpson, Clerk to Frederick Lewis Lyne, in the City of London, gentleman, make oath and say"; and, after verifying the correctness of the accompanying copy of the bill of sale with its attestation, went on to say, "I was present and did see" the grantor execute the bill of sale on its date. But the affidavit did not say that the deponent attested the bill of sale; and it was objected that there was consequently no description of the residence and occupation of the attesting witness to satisfy 17 & 18 Vict. c. 36, and contended that the want of a statement in the affidavit that the deponent was attesting witness and resided at, &c., could not be supplied by inference. The Court, however, held that the affidavit was sufficient, Lord Campbell, Chief Justice, saying the affidavit gave all the information which any reasonable person would require, Mr. Justice Erle saying there was nothing to justify the supposition that the attesting witness and the deponent were two different persons with the same name, Mr. Justice Crompton and Mr. Justice Hill concurring in the decision. That case is, I think, conclusive. There was gross negligence, I agree, in leaving the blank which occurs in the 6th paragraph of the affidavit in question in this case, but the existence of that blank does not militate against the applicability of *Routh* v. *Roublot* (12).

Pickard v. *Bretts* (8) may at first sight look like an authority against the view I have taken; but the question there was as to the description of the occupation of the grantor; the affidavit itself contained no description of it, and the Court, without denying that a description by reference to the bill of sale would suffice, held that there was, as a matter of fact, no description of it by reference to the bill of sale. I may add, although I do not like to say I doubt that case, that I should myself have been inclined to consider that there was a sufficient incorporation of the description of the grantor's occupation given in the bill of sale.

DENMAN, J. — I also think the rule ought to be discharged. The case is one of considerable difficulty. It was closely argued, and many authorities were cited; and my brothers Manisty and North, although they agree in thinking that the rule ought to be discharged, and also agree in thinking *Routh* v. *Roublot* (12) an authority applicable to this case, yet differ as to the grounds on which the rule ought to be discharged and as to the grounds on which *Routh* v. *Roublot* (12) applies.

Whichever was the ground of the decision in *Routh* v. *Roublot* (12), I think the decision there applies. The heading of the affidavit in that case was "I, Isaac Simpson, Clerk to Frederick Lewis Lyne, in the City of London, gentleman, make oath and say"; and in the body of the affidavit the deponent said, "I was present and did see" the grantor execute the bill of sale on its date. The description of the deponent in the heading of the affidavit agreed, I should add, with the description of the attesting witness given in the attestation clause of the bill of sale. It was there held that the affidavit satisfied the Act as to a description of the residence of the attesting witness. And, that being so, the decision is, I think, a clear authority in the present case; which, besides having features similar to the features I have stated of *Routh* v. *Roublot* (12), has this additional feature —namely, that the deponent says that the name subscribed to the bill of sale as that of the witness attesting the same is in his (the deponent's) proper handwriting.

I am inclined to think that the Act, although requiring a description of the residence and occupation of the attesting witness, does not require an affidavit of the description. I am also inclined to think, upon the authority of what was said by Lord Cairns in *Ex parte Lowenthal* (17), that a description of a deponent in the heading of an affidavit is part of the affidavit, and that if that description were wilfully false, the deponent would be indictable. But it is unnecessary, I think, to express any opinion upon either of those points, for, whichever may be the correct view of the law upon them, *Routh* v. *Roublot* (12) is an authority applicable to the present case.

Rule discharged.

Solicitors—Moresby-White & Co., for claimant; C. J. Parke, in person.

1882. Dec. 2. GILBEY (*executrix*) *v.* JEFFRIES.

Bankruptcy—Scheme of Settlement—Annulling Adjudication—Implied Discharge—32 & 33 *Vict. c.* 71. *s.* 28.

Where, under section 28 *of the Bankruptcy Act*, 1869, *a general scheme of settlement of the affairs of a bankrupt includes a condition that the order of adjudication is to be annulled, the bankrupt is thereby discharged and released from his debts.*

By section 28 *of the Bankruptcy Act*, 1869, *the trustee may, with the sanction of the creditors, assent to any general scheme of settlement of the affairs of the bankrupt upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject to the approval of the Court.*

J. was adjudicated a bankrupt. It was subsequently resolved by a statutory majority of creditors that, upon the defendant assigning to the trustee under the bankruptcy all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. J. executed a deed of assignment, the resolution was approved by the Court, and the bankruptcy was annulled. One of the creditors subsequently brought an action against J. for his debt:—

Held, *that the provision that the bankruptcy should be annulled released J., and was an answer to the action.*

Demurrer to certain paragraphs in a statement of defence.

This was an action by the executrix of G. K. Gilbey, deceased, for the price of goods sold, for money lent, and upon certain bills of exchange.

The amended statement of claim, after setting out the particulars of the above claims, continued:—

6A. "After the accrual of the said debt the defendant was adjudicated bankrupt, and the said bankruptcy was subsequently annulled, pursuant to a resolution of a statutory majority of creditors, whereby it was resolved that, upon the defendant assigning to the trustee under the said bankruptcy and the committee of inspection of his estate, all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. The defendant executed a deed of assignment in accordance with the said resolution, and the said resolution was filed in the Court in which the said bankruptcy was depending, and the said resolution was approved by the said Court and the Judge thereof, and the said bankruptcy was afterwards annulled as hereinbefore mentioned; but no estate or effects were ever delivered to or received by the said trustees or the said committee of inspection, and the plaintiff has not, nor had the said G. K. Gilbey received any sum whatever on account of the said debts."

The material paragraphs of the statement of defence were as follows:—

1. The defendant admits, in reference to the first five paragraphs of the amended statement of claim, that on the 14th of June, 1879, he was indebted to G. K. Gilbey deceased, the plaintiff's testator, in the sum of 311*l.* 16*s.* 6*d.*, being the amount stated in the plaintiff's particulars to be the sum at that date due to the said G. K. Gilbey deceased.

3. With reference to paragraph 6A, the defendant denies that no estate or effects were ever delivered to or received by the trustee or committee of inspection therein mentioned.

4. With further reference to the said paragraph, the defendant says that the debt therein mentioned was in fact proved in the said bankruptcy by the said G. K. Gilbey deceased, and that on the 8th of July, 1879, the said G. K. Gilbey deceased was appointed trustee therein. The defendant says further, that the said G. K. Gilbey voted in favour of the resolution in the said paragraph mentioned. One of the assignees under the said deed of assignment was the said G. K. Gilbey deceased.

5. Save as appears in the third and fourth paragraphs hereof, the defendant admits the allegations of paragraph 6A of the amended statement of claim.

The plaintiff demurred to the above paragraphs of the defendant's statement of defence on the ground "that the said paragraphs admit the debt claimed in this

action, and do not state any release, discharge or satisfaction of such debt."

W. Graham, for the plaintiff.—The short question here is, whether a general scheme of settlement of the affairs of a bankrupt, under section 28 of the Bankruptcy Act, 1869 (1), which does not in terms release the debtor, does so in effect. The assent of the testator to the scheme is no bar to the present action. All that the scheme says is that the adjudication is to be annulled; and section 81 of the Act says what the consequences of annulling an adjudication are. In schemes of this sort, there is usually some provision that the debtor should be discharged; there being no such provision here, he is not discharged— *The Ipstones Park Iron Ore Company* v. *Pattinson* (2).

[FIELD, J.—The only question here is, what is the effect of the words as to annulling the bankruptcy, whether they do not import the discharge of the bankrupt. To what are the creditors bound by this scheme?]

To nothing.

[FIELD, J.—The Act says that the scheme shall be binding on all the creditors.]

They are bound to the annulment of the bankruptcy. They might sue for their debts the day after the resolution had been passed. The scheme is binding on the debtor, but he is not released by it. Section 48 of the Act points out under what circumstances the debtor is discharged. Section 49 provides that the discharge of the debtor is to be a release from the debts. Here there has been no discharge, so the debtor is not released.

[FIELD, J.—The debtor gave up his right to go on under the bankruptcy and get his discharge, giving up all his property, and, according to your contention, getting no release.]

If he made an improvident bargain, that does not affect the question.

[FIELD, J.—This is a statutory mode of administering a bankrupt's estate, and by it the bankruptcy may be, and in this case has been, annulled. The question is, what is the fair meaning of that, looking at the whole object of the scheme.]

J. L. Walton, for the defendant.—The object of all the methods provided by the Act is that the debtor shall be released from his debts. The creditors may proceed under section 125, or under section 126, or they may proceed in bankruptcy. If they proceed in bankruptcy, the bankrupt can apply, under section 48, to the Court for his discharge, or they may let it go on for three years, when the bankrupt will get his discharge by effluxion of time; or they may say, under section 28, although we proceeded in bankruptcy, we are content now to enter into a scheme of settlement.

He was stopped by the Court.

FIELD, J.—My judgment must be for the defendant. The facts pleaded are—that the defendant owed the plaintiff's testator a sum of money on the 14th of July, 1879; and that on that day the defendant was duly adjudicated a bankrupt.

(1) Section 28 of the Bankruptcy Act, 1869, is as follows:—"The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting of which notice has been given specifying the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject nevertheless to the approval of the Court, to be testified by the Judge of the Court signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the Court.

"Where the annulling the order of adjudication is made a condition of any composition with the bankrupt, or of any general scheme for the liquidation of his affairs, the Court, if it approves of such composition or general scheme, shall annul the adjudication on an application made by or on behalf of any person interested, and the adjudication shall be annulled from and after the date of the order annulling the same.

"The provisions of any composition or general scheme made in pursuance of this Act may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court. The approval of the Court shall be conclusive as to the validity of any such composition or scheme, and it shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy."

(2) 33 Law J. Rep. Exch. 193.

Gilbey v. *Jeffries.*

If the bankruptcy had been carried on, the defendant, if he observed all the provisions of the Act of Parliament, would have obtained his discharge; he would then be a free man again, and not liable for any of his old debts. That would have been the case if the bankruptcy had gone on. There might also have been a scheme for liquidation by arrangement under section 125, or for a composition under section 126; and then, if there was no provision for the release of the debtor, it might happen that he would remain liable. In *The Ipstones Park Iron Ore Company* v. *Pattinson* (2) it was held that a deed of arrangement under the Bankruptcy Act, 1861, not on its face purporting to release the debts, cannot be pleaded in bar to an action. So that if there had been a scheme for liquidation by arrangement, or for a composition, and no provision for the debtor's release from his debts—or if the proceedings under the bankruptcy had been continued, and the bankrupt had not obtained his discharge, there would have been nothing to prevent this action from being brought; but here what was done amounted in the intention of all parties to a release.

What are the facts here? After the accrual of the debt for which this action is brought, the defendant was adjudicated bankrupt, and the bankruptcy was subsequently annulled, pursuant to a resolution of a statutory majority of creditors, whereby it was resolved that, upon the defendant assigning to the trustee under the bankruptcy and the committee of inspection of his estate all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. The defendant executed a deed of assignment in accordance with the resolution, and the resolution was filed in the Court in which the bankruptcy was depending, and the resolution was approved by the Court, and the bankruptcy was afterwards annulled. The debt for which this action is brought was proved in the bankruptcy, and the creditor whose executrix is now suing voted in favour of the resolution for a settlement. The question is whether, under those circumstances, it is competent for the plaintiff to sue for this debt. Mr. Graham says that I must come to the conclusion that what was done here, there being no express provision operating by force of the statute as a discharge of the debtor, did not release the defendant. But the resolution expressly provides that, upon the defendant assigning to the trustee all his estate, the order of adjudication in bankruptcy should be annulled. I think that that, by virtue of the statute, operates as a discharge. The creditors might, if they had chosen, have gone on with the bankruptcy in the ordinary course, and the bankrupt would then have ultimately got his discharge. The effect of this arrangement is to deprive him of that mode of release, at all events. I have always understood that the object of the *cessio bonorum* which bankruptcy provides for is to release the debtor who has got into a hopeless condition of insolvency. It is no doubt thought to be for the benefit of the State that his debts should in some way or other be discharged; but it is also obviously for the benefit of the debtor himself to a certain extent. What did the creditors intend here by this resolution, which was afterwards approved by the Court? They first provide that he shall assign all his property to them. They said, If you will assign your property to the committee of inspection, the bankruptcy shall be annulled. What is the effect of that? Mr. Graham says that the property was assigned, and that the resolution has no other effect whatever, Who gains, then, by the bankruptcy being annulled? The debtor certainly gains nothing, but loses — because if the bankruptcy had gone on he would ultimately have got his discharge. Therefore that construction renders the annulling of the bankruptcy a dead-letter. Mr. Graham says that you must not construe the annulling of the bankruptcy as a release from debts, because the Act does not say so. I do not assent. You must read the Act fairly to see if it was intended to release the debtor from his debts by a scheme such as this. If a composition had been agreed on, the debtor would certainly have been discharged. It is not a bad plan where an Act provides two alternative courses to construe it by making the alternatives as nearly as possible equivalent. If the Act says that one course of pro-

ceeding is to end in the release of the debtor, and another alternative course is provided, *prima facie* that course should also end in the release of the debtor. I must give some effect to the words of the resolution as to the bankruptcy being annulled. By the section, the scheme that is to be approved by the Court is either a composition or a general scheme of settlement of the affairs of the bankrupt. By this scheme, as Mr. Graham construes it, the debtor gives up all his property, and gets nothing. That would not be a general scheme of settlement of his affairs at all. The committee of inspection obtained the property; but the debtor is in no better position than he was before he made it over to them. In my opinion, the effect of annulling the bankruptcy is the same as if the bankruptcy had gone on and the bankrupt had obtained his discharge under the Act of Parliament. My judgment will therefore be for the defendant.

Judgment for the defendant.

Solicitors — Haynes & Clifton, for plaintiff; E. J. Lewis, for defendant.

1882. Nov. 14. MUNDAY *v.* THE THAMES IRON WORKS AND SHIPBUILDING COMPANY.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *ss.* 1 *and* 6—*Certiorari*—*Removal into High Court*—*Consolidation.*

Neither the fact that an action brought in the County Court under section 1, *sub-section* 1, *of the Employers' Liability Act involves questions of a technical character necessitating an intricate scientific investigation, nor the fact that an action has been brought in the High Court against the same defendants in respect of the same injury, constitute sufficient reason for the removal of the County Court action into the High Court.*

This was a motion by way of appeal from a refusal by Denman, J., at chambers to grant a writ of *certiorari* for the removal into the High Court of Justice of an action commenced in the County Court of Southwark by the plaintiff against the defendants under the Employers' Liability Act, 1880 (1). The plaintiff, who was seriously injured in moving a crank belonging to the defendants, owing to a defect in one of the links of the chain suspending the crank, had brought an action in the County Court under the Employers' Liability Act, 1880, s. 1. sub-s. 1 (1), and also an action in the High Court of Justice upon the alleged liability of the defendants at common law. The learned Judge having refused the writ—

The plaintiff appealed.

Walton, for the plaintiff.—The Legislature, by the Employers' Liability Act, intended to extend the common law liability of employers to cases of common employment, but did not take away the former common law liability.

(1) 43 & 44 Vict. c. 42. s. 1: "Where after the commencement of this Act personal injury is caused to a workman,"

Sub-section 1: "By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer,"

Section 5: "There shall be deducted from any compensation awarded to any workman or representatives of a workman, or persons claiming by, under or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives or persons in respect of the same cause of action, and where an action has been brought under this Act by any workman or the representatives of any workman or any persons claiming by, under or through such workman for compensation in respect of any such cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action."

Section 6: "Every action for recovery of compensation under this Act shall be brought in a County Court, but may upon the application of either plaintiff or defendant be removed into a Superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed."

If the negligence is that of the employer himself he is liable at common law. If the plaintiff, therefore, can establish proof of a scienter he may recover unlimited damages, but if he cannot then he is confined to his statute remedy. *Murphy* v. *Phillips* (2) shews that there is still the common law liability. But if the plaintiff cannot bring his case within that rule, he still can proceed under section 1 of the Employers' Liability Act (1). Unless for paramount reasons, the Court will not compel the plaintiff to pursue both remedies separately. Once brought up into the High Court the County Court action can be consolidated with the other. It is a case that is sure to come up to the Superior Court on appeal. The difficulties of the case both as to questions of law and of fact make it much more conveniently triable in the High Court.

Gaskell, for the defendants, was not called upon.

MANISTY, J.—I think we ought not to interfere with the discretion exercised by the learned Judge at chambers. In the first place is this a case, apart from the question of consolidation, for the exercise of the discretionary power of the Court under section 6 of the Employers' Liability Act (1)? No doubt that statute has increased and was intended to increase the common law liability of employers; but the Legislature has said that the action is to be brought only in the County Court, subject to the discretionary power of removal under section 6 (1). I think that power should not be exercised save in very peculiar and exceptional circumstances. Otherwise I cannot help thinking the majority of cases would be removed. The arguments used in support of the application to remove this case from the County Court are applicable to nearly every case under sub-section 1 of section 1. It is said that this case being brought under that sub-section a wide scientific and technical enquiry is required. But the Legislature has thought that as a rule the County Court Judges are quite competent to try cases coming under that section, and I see nothing exceptional in this case. It is, therefore, sufficient for us to say that we do not see any circumstances such as in our discretion would justify removal into a Superior Court. If, moreover, we take into consideration the question of consolidation, I think that is an extra reason against ordering a removal. Were it necessary to decide the point whether two such actions as that given by the Employers' Liability Act and a common law action against an employer can co-exist, I should take time to consider. As at present advised I should decide that they could not. The Legislature would have shewn any such intention distinctly, but section 5 (1) points rather the other way. I decide this case, however, on the first ground only, that there are no such circumstances as would justify removal.

DENMAN, J.—I am of the same opinion. The only argument in favour of granting a *certiorari* that I could see was that if the two actions were to go on it might be convenient to try them together in the Superior Court. But on the other hand there is nothing to shew whether the writ in the High Court is or is not a merely speculative writ, and if the issue of a writ alone is sufficient grounds for a *certiorari* any one could get any case removed into a Superior Court. It is impossible not to say that this consideration is fatal to the application. The inconvenience likely to arise from granting the writ of *certiorari* would be greater than any that may ensue from our refusal.

Appeal dismissed with costs.

Solicitors—Rodgers & Clarkson, for plaintiff; J. A. & H. E. Farnfield, for defendant.

(2) 24 W. R. 647.

1882.
June 30.
August 3.

THE MADELEY UNION *v.* THE BRIDGNORTH UNION.

Poor—Settlement—Abolition of Derivative Settlement—39 & 40 *Vict. c.* 61. *s.* 35.

[For the report of the above case, see 52 Law J. Rep. M.C. 17.]

1882. Dec. 18. 1883. Jan. 16.

WATKINS *v.* RYMILL.

Contract—Written Document not read by one Party—Deposit of Goods at Auction Rooms—Entering Judgment.

The plaintiff left a waggonette to be sold at the defendant's repository, and received a receipt, which he put into his pocket without reading it. The receipt contained the words "subject to the conditions as exhibited on the premises," and one of the conditions so exhibited was that, on the lapse of a month, property might be sold by auction without notice to the owner unless the charges were paid:—Held, *that the plaintiff was bound by the condition, and judgment was entered for the defendant, notwithstanding the verdict of the jury for the plaintiff.*

Rule in an action tried in the Mayor's Court of London to enter judgment for the defendant, or for a new trial on the ground of misdirection.

Sims shewed cause.

McLeod, Q.C. (*C. Hall, Q.C.*, and *H. Dickens* with him), supported the rule.

The facts and arguments appear from the judgment of the Court.

Cur. adv. vult.

The judgment of the Court (1) was delivered (on Jan. 16, 1883) by

STEPHEN, J.—This case was argued before my brothers Hawkins and Williams and myself at the last sittings, on a rule to shew cause why the verdict found in the Mayor's Court for the plaintiff should not be set aside and a verdict entered for the defendant, or why a new trial should not be had on the ground of misdirection.

The facts of the case were as follows:—The plaintiff was the owner of a waggonette, and the defendant is the keeper of a repository for the sale on commission of horses, carriages and harness. On the 11th of May, 1878, the plaintiff took the waggonette to the repository and left it to be sold, receiving for it a receipt on a printed form which was in these words:—

"Herbert Rymill's Royal Repository, Barbican, for the sale of horses, carriages, harness, &c. Sales by auction every Tuesday and Friday at eleven.

"Received from.....

" .....

"*Subject to the conditions as exhibited on the premises* [these words were italicised]. The proceeds paid on Monday between the hours of eleven and four, upon the production of this receipt signed by the owner, or forwarded by post if desired."

The conditions exhibited on the premises were printed conditions exhibited in conspicuous positions in many parts of the premises.

The following were the conditions bearing upon the present case:—

10. "Should any horse or other property sent to this repository remain over one month, the proprietor shall be at liberty to sell the same by public auction only, with or without notice to the owner, unless all expenses are previously paid. All horses, carriages, carts, &c., sent to this repository for sale remain at the risk of the owner."

Amongst the terms were the following:—

"Two shillings and sixpence per week standing for four-wheel carriages and Hansom cabs . . . . two shillings and sixpence for washing each carriage.

"No horses or other property allowed to be taken away until the keep, sale and other expenses are paid."

The plaintiff swore that he did not read the receipt, but put it in his pocket without noticing it.

About a month after leaving the waggonette the plaintiff called and asked after it. He was told (but not, so far as it appeared, by the manager or by any person authorised to tell him) that the waggonette was sold, and that the settling day was Monday. He returned on Monday and saw the manager, who told him he must bring the receipt. He said he had lost it, but that they must have his name on their books. They refused to go into the matter without the receipt. The receipt was not found till the 25th of October, 1881, and during this time the plaintiff took no steps except calling two or three times to make enquiries. In November, 1881, the plaintiff, through

(1) Hawkins, J.; Stephen, J., and Williams, J.

his solicitor, applied for the waggonette, and found that it had shortly before been sold for 9*l.* 19*s.* 6*d.*, of which the whole, except 6*s.* 10*d.*, was due for charges under the terms stated in the conditions quoted. The defendant sent the plaintiff a post-office order for 16*s.* 10*d.*, mistaking the amount of his charges, and thus considered himself to have overpaid him.

The defendant's counsel argued that the Common Serjeant, who sat as Judge, ought to direct the jury on these facts to find for the defendant; but the Common Serjeant held that the question was one "for the jury, whether the defendant had or had not given the plaintiff reasonable notice of the conditions." This question the jury answered in the negative, and gave a verdict for the plaintiff for 21*l.*

The question whether the direction given to the jury was correct depends upon a review of a variety of authorities which it is not altogether easy to reconcile. We will examine them in the order of their dates. Passing over earlier decisions which bear upon the subject indirectly, we may notice first the case of *Van Toll* v. *The South Eastern Railway Company* (2) decided in 1862. In this case it was decided, in substance, that a person depositing a bag at a cloak-room is bound by a notice printed on the back of a ticket which she received when she made the deposit and produced when she demanded the bag, which had been given to another person. In this case Chief Justice Erle based his judgment for the defendants on the fact, amongst others, that the defendants had used all reasonable means to make known to the depositors, and among them to the plaintiff, the terms on which they received deposits. Mr. Justice Willes said (p. 87), "Assuming that the plaintiff did not read the terms of the conditions, it is evident that she knew that they were there, and that she was satisfied to leave her goods upon those terms. The obvious result of this is, that either she must be taken to have assented to the terms, or, if she did not assent, she knew that there were terms which the railway company intended to stipulate for."

(2) 12 Com. B. Rep. N.S. 75; 31 Law J. Rep C.P. 241.

The next case is *Lewis* v. *McKee* (3). The facts of this case were dissimilar to the others, and need not be stated, but in the course of his judgment upon them, which was that of the Exchequer Chamber, Mr. Justice Willes restates the principle involved in *Van Toll* v. *The South Eastern Railway Company* (2) in such a way as to imply (though he does not exactly state) that upon the delivery by one of two contracting parties to the other of a written document stating the terms on which the party who produces it proposes to contract, the other party acts at his peril if he does not read it.

The next case in order of time is *Zunz* v. *The South Eastern Railway Company* (4), in 1869. In this case the railway company sought to protect themselves against liability for the loss of a passenger's luggage between Calais and Paris by a condition, printed on a ticket to Paris, exempting themselves from liability for losses off their own line. The Court of Queen's Bench were unanimously of opinion that the condition on the ticket was part of the contract, and Chief Justice Cockburn (p. 544) laid down the law as follows: "However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print on his ticket, which he only gets at the last moment, after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get the ticket by the next comer . . . . still we are bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it and must be bound by them."

Chief Justice Cockburn does not say to what authorities he referred. Probably, *Van Toll* v. *The South Eastern Railway Company* (2) and *Lewis* v. *McKee* (3) would be two of them. They are the strongest cases in that direction which we have been able to find, though they do not appear to have been cited in the argument, which turned to a great extent upon other topics. However this

(3) 38 Law J. Rep. Exch. 62; Law Rep. 4 Exch. 58.

(4) 38 Law J. Rep. Q.B. 209; Law Rep. 4 Q.B. 539.

may be, the principle thus stated would br sufficient to decide this case if the decision stood alone. It is in some respects a stronger case against the defendant than the present one, as the power of railways to impose conditions on passengers is to a considerable extent limited by statutes which have no application to the case of repositories. There have, however, been several subsequent decisions which, though not inconsistent with *Zunz* v. *The South Eastern Railway Company* (4), shew that it cannot be regarded as a complete statement of the law. The first of these which may be noticed is *Henderson* v. *Stevenson* (5), decided in 1875. In this case, a passenger by a steamboat took a ticket, on the face of which appeared the words "Dublin to Whitehaven." On the back were the words, "The company incurs no liability in respect of loss, injury or delay to the passenger or to his luggage, whether arising from the act, neglect or default of the company or their servants, or otherwise." There was no reference on the front of the ticket to the back of it, and the plaintiff swore that he did not look at it. It was held that the notice did not affect the company's liability. The facts of the case were so peculiar that it can hardly form a precedent for any other. It certainly does not appear that the steamboat company were guilty of fraud, but it does appear that they attempted to rid themselves of a common law liability by annexing to their contract to carry a condition most unusual in itself, and to which the course adopted by them would not naturally call the attention of the other party to the contract. The principle upon which the case was decided is expressed in a very few words by Lord Cairns (p. 475): "The question does not depend upon any technicality of law or upon any careful examination of authorities. It is a question simply of common sense. Can it be held that when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice that he ought to inform himself upon them"—(the words "he is to be bound by those terms," or some equivalent, appear to have dropped out of the report). "It appears to me impossible that that can be held." It may be added that though the case was decided mainly on this ground, several of their Lordships, and in particular Lord Chelmsford and Lord Hatherley, entertained doubts as to the right of the defendants to attach such a condition as the one in question to the contract to carry. Lord Chelmsford says (p. 477) that "of course a person may, if he chooses, take the whole risk of the voyage on himself; but the company, by a mere notice without such assent, can have no right to discharge themselves from performing what is the very essence of their duty."

The circumstances of the present case have no analogy to those of *Henderson* v. *Stevenson* (5). The notice was printed on the face of the receipt and formed a prominent part of it. The circumstances of the contract were such that any man of ordinary intelligence must have known that special terms as to its execution must in the nature of things be made, and it appears to us that by handing to the plaintiff the receipt in question the defendants called his attention to the subject as pointedly as if their clerk had said, "Read this—it expresses the terms on which we are ready to take your waggonette."

The next case to be considered is *Harris* v. *The Great Western Railway Company* (6), decided in 1876. In this case the luggage of a person who had been a passenger by the Great Western Railway was deposited by her brother on her behalf with the servants of the railway at the cloak-room, and the depositor received a ticket which on its face enumerated the articles received, stated the charge at 2*d.* for each, and ended with these words, "Left in the name of . . . . . and subject to the conditions on the other side." On the back were conditions, one of which limited the liability of the company to 5*l.* for each package unless a certain higher rate were charged. The person who deposited the articles said that he did not read the conditions on the back of the ticket, but admitted that he "believed there were some conditions."

(5) Law Rep. 2 Sc. App. 470.

(6) 45 Law J. Rep. Q.B. 729; Law Rep. 1 Q.B. D. 515.

The Judges of the Queen's Bench Division held that the plaintiff was bound by the conditions on the back of the ticket. The judgment of Lord Blackburn in this case seems specially worthy of attention, though there was no difference of opinion in the Court.

Lord Blackburn elaborately distinguishes the case from *Henderson* v. *Stevenson* (5), on grounds similar to those which we have already stated. The shortest expression of his view is on p. 734. He there says, that in *Henderson* v. *Stevenson* (5) there was nothing to shew that the Steamboat Company would believe from the conduct of the passenger that he had represented to them that he had read or looked at the back of the ticket, and, in point of fact, he had not. In the following page Lord Blackburn states the reasons which led him to the conclusion that in the case then before him, the plaintiff's agent, "by depositing the goods and taking this ticket, did so act as to assert to the defendants that he had looked at and read the ticket and ascertained its terms, or was content to be bound by them without ascertaining them, and so induced them to enter into the contract with him in the belief that he had assented to its terms." One principal reason for this conclusion is as follows (p. 735):—"The defendants as a railway company are not bound to receive goods at all for custody; they give notice that they will not receive them by any of their servants in general; but any one wishing to deposit goods with them must go to a particular office, there pay the proper remuneration and receive a ticket. No man can come to that office without knowing so much. Few can come without knowing that the ticket is to be kept, and produced when the goods are taken away, a term which would not be implied by law if the ticket were merely a receipt for the money, and Mr. Harris did in fact know this. It is clear that the defendants meant that the ticket should be the contract; what more could be required to justify their servants as reasonable men in believing that the person bringing the goods and paying the money as part of the same transaction, receiving and carrying away the ticket meant to assent to the terms in the ticket, and to induce them to receive the goods on those terms."

It is obvious that, *mutatis mutandis*, every word of this would apply to the present case. The only remaining point in this case which requires notice is that Lord Blackburn observes (p. 736):—I think, as at present advised, the proper direction to a jury in such a case as this would be that if they believed these undisputed facts they ought to find that the terms were binding on the plaintiff. This we need not decide; but where I am to act both as Judge and juror" (the Court had the power to draw inferences from fact), "I have no hesitation in so finding."

This case appears to us to be precisely in point in reference to the matter now before us, except as to the question whether the Common Serjeant ought to have directed a verdict for the defendant, as to which Lord Blackburn's expression of opinion is only a *dictum*. It is, however, necessary to refer to two other cases, in order to shew that they do not interfere with this view.

The first of these is *Parker* v. *The South Eastern Railway Company* (7), which was decided in 1877. *Gabell* v. *The South Eastern Railway Company* (7) was decided at the same time by the same judgment, the facts and directions given to the jury being identical in the two cases.

The facts in each case closely resembled those of *Harris* v. *The Great Western Railway* (6). In each case a bag was left at a cloak-room, twopence was paid, and a ticket received which had printed upon it the words, "See back." On the back were conditions, of which one was, "The company will not be responsible for any package exceeding the value of 10*l.*" Each plaintiff denied that he had read the words on the ticket or seen a printed notice to the same effect hung up in the cloak-room. In each case the Judge asked the jury—First, Did the plaintiff read, or was he aware of the condition? Secondly, Was the plaintiff under the circumstances under the obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition? In each case

(7) 46 Law J. Rep. C.P. 768; Law Rep. 2 C P. D. 416.

the jury answered both questions in the negative. In each a rule for a new trial or for judgment was refused by the Divisional Court, and in each the case came before the Court of Appeal. Of the three Judges who heard the case, Lord Justice Mellish held that there had been a misdirection, because the jury had not been asked whether the railway company did what was reasonably sufficient to give the plaintiff notice of the condition. Lord Justice Baggallay was of the same opinion, though he expressed it somewhat differently; but each of these learned Judges appears to have been of opinion that the importance to be attached and the effect to be given to a document of this nature must depend upon the character of the particular contract which it is alleged to constitute. As extreme cases, Lord Justice Mellish suggests on the one hand the case of a turnpike ticket, which a person driving through the gate on paying the toll would naturally not read, and on the other hand, that of a bill of lading, on which a person shipping goods would be held liable, although he might swear that he had never read it and did not believe it to contain conditions as to the terms of the contract of carriage.

Lord Bramwell, then Lord Justice, took a view much more decisively in favour of the defendants. The case, he said, was precisely the same as if the defendants' servants had in so many words asked the plaintiff to read the tickets, in which case, as he says, the plaintiffs would have to take the consequences if they did not read. "Why is there printing on the paper," he said, "except that it may be read? The putting of it into their hands was equivalent to saying, 'Read that.' Could the defendants practically do more than they did?" He sums up his judgment thus: "The defendants put into the hands of the plaintiff a paper with printed matter on it, which in all good sense and reason must be supposed to relate to the matter in hand. This printed matter the plaintiff sees, and must either read it, and object to it if he does not agree to it, or if he does read it and not object, or does not read it, he must be held to consent to it."

Lord Bramwell would upon these grounds have given judgment for the defendants; but he agreed that there ought at least to be a new trial.

If the judgment of Lord Bramwell in *Parker* v. *The South Eastern Railway Company* (7) is accepted, it appears to us to be an authority directly in point in favour of the defendants in the present case; but the other two Judges took a somewhat different view of the subject, and Lord Justice Mellish suggested the question which he considered proper for the jury. This question differs considerably from the one actually put by the Common Serjeant in this case. It is one thing to ask whether a defendant has done what is reasonably sufficient to give the plaintiff notice of a condition, and quite another to ask (as the Common Serjeant did) whether he has given him reasonable notice.

The latest case on the subject, and the last which we need notice, is *Burke* v. *The South Eastern Railway Company* (8), decided in 1879. In this case the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was: "Cheap return ticket London to Paris and back—second-class," and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants, and said he had not read the condition and did not know of it.

Chief Justice Cockburn asked the jury the question suggested in *Parker* v. *The South Eastern Railway Company* (7), and they answered it in favour of the plaintiff. The defendants moved to have judgment entered for them, and this was done; the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this case can hardly be supported by any principle short of that laid down in *Zunz* v. *The South Eastern Railway Company* (4), if indeed it does not go further.

Such being the state of the authorities, the question is how they bear on the case now to be decided. In a few words the matter appears to us to stand thus:—

(8) 49 Law J. Rep. C.P. 107; Law Rep. 5 C.P. D. 1.

The cases relevant to the matter are, in order of date, *Zunz* v. *The South Eastern Railway Company* (4), *Harris* v. *The Great Western Railway Company* (6), *Parker* v. *The South Eastern Railway Company* (7) and *Burke* v. *The South Eastern Railway Company* (8). All of them are in favour of the defendant except *Parker* v. *The South Eastern Railway Company* (7), and of the three judgments in this case that of Lord Bramwell is directly in the defendant's favour. To a certain extent the judgments of Lords Justices Mellish and Baggallay are in favour of the plaintiff, as they treat the question whether reasonable means to give notice were employed by the defendants as one of fact for the jury; though in another way they are unfavourable, as they suggest as the question for the jury one which in this case was not put to them. It must be remembered that the precise question before the Court in *Parker* v. *The South Eastern Railway Company* (7), was not whether the question in that case was one of law or of fact, but whether the questions put to the jury by the learned Judge at Nisi Prius were proper, which, as all the Court agreed, they were not.

It must also be observed that in *Parker* v. *The South Eastern Railway Company* (7), the question before the Court related to the common law contract of the bailment of goods for safe custody, the nature of which is well known in the absence of special terms agreed to by the parties. The present case relates to a contract of a different kind—namely, the deposit of an article for sale on commission, as to which the terms must necessarily depend upon the agreement of the parties, as none are ascertained by the common law. Besides, all the Judges in *Parker* v. *The South Eastern Railway Company* (7) agreed that the effect of the delivery of a document stating terms must depend on the nature of the contract to which it related.

We now proceed to state the principles which we deduce from this examination of the authorities, and to apply them to the case before us.

Thrown into a general form, the result of the authorities considered appears to be as follows: A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document, or otherwise informs himself of its contents, or not.

To this general rule, however, there are a variety of exceptions—(1°) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms. Some illustrations of this exception are to be found in the judgments in *Parker* v. *The South Eastern Railway Company* (7), and in the language of some of the Lords in *Henderson* v. *Stevenson* (5), though these must be received with caution, for reasons given by Lord Blackburn in his judgment in *Harris* v. *The Great Western Railway Company* (6). (2°) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document. (3°) A third exception occurs, if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson* v. *Stevenson* (5) is an illustration of this. (4°) An exception has been suggested of conditions unreasonable in themselves or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgment in *Parker* v. *The South Eastern Railway Company* (7). One is the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days. We are aware of no absolute decision on this point, nor is it material to the present case.

We now come to apply these principles to the case before us. It is obviously within the general rule—can it be brought

under any of the exceptions? The only one which can apply to it is the one which we have put first. Can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms?

It seems to us impossible to suppose that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract the terms of which are established by the common law in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract of lease, or a bill of lading, and this consideration alone seems to us to establish the conclusion that the receipt and the conditions to which it refers constituted the contract between the parties, and that the learned Common Serjeant misdirected the jury when he told them that the question was, whether the defendant had given reasonable notice to the plaintiff of the conditions. We may observe that in no view of the case could this direction be upheld. If any question at all were asked it ought to have been, whether the defendant took reasonable means to give notice of the conditions to the plaintiff, which is a very different one from that which was actually put to the jury.

This brings us to the last question in the case. Ought we to enter a verdict for the defendant, or to send the case back for a new trial in order that the question suggested by Lord Justice Mellish may be put? We think that we ought to enter judgment for the defendant. The question suggested by Lord Justice Mellish may be proper in cases falling under what we have called the first exception to what we apprehend to be the general rule; but this, in our judgment, is not one of those cases. It resembles rather the cases of *Zunz* v. *The South Eastern Railway Company* (4) and *Burke* v. *The South Eastern Railway Company* (8), in which the ticket itself was held to be the contract. It is in some cases difficult to say what is a question of law and what is a question of fact, but in this case a test may be applied which to us seems conclusive. Suppose that the case were sent for a new trial, and that the jury on the undisputed facts were to find that the defendant had not taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being in direct opposition to the evidence?—as being a verdict which, upon the evidence, no intelligent man could justly return? We think it would, and, that being so, it seems to follow that the question is one of law and not of fact. It is in one sense a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law. This may be shewn by stating it specifically. The only question which can be called a question of fact is, whether giving a man a printed paper, plainly expressing the conditions on which the keeper of a repository is willing to accept a carriage for sale on commission, with intent that he should read it when he has a fair opportunity of doing so, is, or is not, equivalent to asking the owner of the carriage to read that paper. This, we think, is a question of law to be answered in the affirmative.

As the result, the verdict and judgment for the plaintiff for 21*l.* will be set aside, and the verdict entered for the defendant, with costs.

Judgment entered for defendant.

Solicitors—L. W. Gregory, for plaintiff; Keene, Marsland & Bryden, for defendant.

[IN THE COURT OF APPEAL.]

1882. Nov. 27. Dec. 20. } MILLEN *v.* BRASCH AND COMPANY.*

Carrier—Negligence—Temporary Loss of Goods—Carriers Act (11 *Geo.* 4. *and* 1 *Will.* 4. *c.* 68), *s.* 1—*Consequential Damages.*

A carrier is protected by the provisions of the Carriers Act, s. 1, *not only from liability for the loss, whether temporary*

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

Millen v. *Brasch*, *App.*

or permanent, of undeclared goods, but also from liability for the consequences resulting from such a loss, and consequently is not liable in damages for the detention of undeclared goods, where such detention is the result of a loss in respect of which he is protected by the Carriers Act.

The plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel, consisting of silk dresses and other articles within the Carriers Act, exceeding 10*l.*, *but no declaration of their value was made. Owing to the negligence of the defendants the trunk was sent to the Victoria Docks in London, and thence shipped to New York. It was eventually recovered, and after considerable delay delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for the repurchase of other articles in Rome at enhanced prices,—*

Held, *by the Court of Appeal—first, that the trunk was lost within the meaning of the Carriers Act, and that the defendants were protected by the provisions of that Act for the loss and injury to its contents notwithstanding that the loss was temporary; secondly* (*reversing the judgment of* LOPES, J., *on this point*), *that the plaintiff was not entitled to recover, as consequential damages for non-delivery of the undeclared articles within due time, the cost of the repurchase of other articles at Rome at enhanced prices, inasmuch as such non-delivery was the result of a loss in respect of which the defendants were protected by the Carriers Act.*

Appeal by the defendants from a judgment of Lopes, J., on further consideration (reported 51 Law J. Rep. Q.B. 166).

The defendants were carriers for hire from London to Rome. On the 13th of November the plaintiff's agent delivered to the defendants a trunk to be sent by rail from London to Liverpool, and then shipped in one of Bibby's steamers for Italy. The defendants had in their possession a case of paper goods (Christmas cards) consigned to Mr. Hamburger of New York. By the carelessness of the defendants' servants, the trunk belonging to the plaintiff was taken to the Victoria Docks and shipped as and for Hamburger's case to New York. The defendants were not aware of the mistake until the 15th of December, 1879. On the 15th of December the defendants wrote to Hamburger, and on the 19th of December the trunk arrived in New York. On the 27th of February, 1881, the plaintiff claimed 210*l.* for loss of the trunk and injury to its contents. On the 11th of March the trunk arrived at the defendants' offices, and at the plaintiff's request was retained there till June, and then delivered to the plaintiff. The miscarriage of the trunk and its loss for the time were admitted. It was also admitted that some of the contents of the trunk were injured in New York, owing to the Custom House officer unpacking the trunk and negligently repacking it. It was also admitted that silk dresses and a sealskin jacket packed therein were articles within the Carriers Act, that their value exceeded 10*l.*, and that no declaration was made. It was also agreed that if the plaintiff was entitled to a verdict, the damages were to be—for the silk dresses, 36*l.*; for sealskin jacket, 4*l.*; and for repurchase of other articles in Rome at enhanced prices, 10*l.*, and that these several sums should be beyond the 5*l.* paid into Court.

Lopes, J., held—first, that the goods were lost within the true meaning of the Carriers Act, although their loss was only temporary; secondly, that the defendants were liable to pay damages for the loss and detention of those articles of apparel which there was no necessity to declare; thirdly, that the defendants were not liable to pay damages for the loss of or injury to the silks and furs, which ought to have been declared, and were not declared; but, fourthly, that the defendants were nevertheless liable to pay damages for the detention of those articles. The learned Judge accordingly gave judgment for the plaintiff for 5*l.* beyond the sum of 5*l.* paid into Court, with costs.

The defendants appealed.

C. Russell, Q.C., and *Tomlinson* (with

them *R. T. Reid*), for the defendants.—The defendants, if not liable for the loss of the goods within the meaning of 11 Geo. 4 and 1 Will. 4. c. 68, cannot be held to be liable for the consequential damages arising from the loss. The effect of the judgment of Lopes, J., is that they are liable. In *Hearn* v. *The London and South Western Railway Company* (1), the allegations set forth in the plea were consistent with the fact that the carriers never had lost the goods at all; and the plea was held bad because it did not allege that the goods were lost within the meaning of the statute. The case is unsatisfactory upon demurrer. In this case Lopes, J., has found that the goods were lost by the defendants as carriers, and were so lost when they arrived at their wrong destination. In *Morritt* v. *The North Eastern Railway Company* (2) it was held that where goods which are within the protection of the Carriers Act are, by the negligence of the carrier, carried beyond the point of destination and injured, that is an injury within the meaning of the statute. If it were not so, the statute would afford no protection at all to the carrier. The defendants, therefore, are not liable.

Edward Pollock, for the plaintiff.—Assuming that *Hearn* v. *The London and South Western Railway Company* (1) was correctly decided, the plaintiff is entitled to recover the excess price paid for the goods purchased in Rome. It is immaterial whether the goods so purchased were goods which would be within the protection of the Carriers Act, because the right of the plaintiff to recover—as was pointed out by Parke, B., in *Hearn* v. *The London and South Western Railway Company* (1)—depends, not on the question whether or not the articles were within the protection of the Act, because there they were articles within the Act, but whether or not the loss is a loss by the carrier of the articles committed to him, or an injury to them whilst in his care. If the loss is a loss sustained by the owner in consequence of the non-delivery of the articles in due time or altogether, or the loss of the use of them by him, there the owner is entitled to recover. That would be so whether the loss of the articles is permanent or temporary. Here there was no loss within the meaning of the statute, because the loss contemplated by the statute is the incapacity of the carrier to deliver up the article—that is, such a state of things that the carrier is not in a position to deliver up the articles at the time when the action is brought. It therefore becomes immaterial in this case to consider whether the goods were lost or not within the meaning of the statute, because they were subsequently restored to the plaintiff. The plaintiff is entitled to recover.

Tomlinson replied.

Cur. adv. vult.

The judgment of the Court was delivered on Dec. 20.

LINDLEY, L.J., after stating the facts, proceeded:—The 5*l.* paid into Court was sufficient to cover the damages to which the plaintiff was entitled in respect of the loss and detention of those articles which there was no necessity to declare; and, substantially, the question raised by the appeal to this Court is as to the liability of the defendants to pay damages for the loss or detention of the silks and furs which were not declared.

In holding that the defendants were liable to damages for the detention, although not for the loss of these articles, the learned Judge followed what he understood to be the law as laid down in *Hearn* v. *The London and South Western Railway Company* (1). That case at first sight appears in favour of the plaintiff. But if the pleadings demurred to are carefully examined it will be found that the plaintiff, in his new assignment, carefully negatived the loss of the goods for the detention of which he was suing, and the point really decided was that where goods which ought to be declared and are not declared are detained by a carrier without being lost by him, he is liable for such detention. This is consistent with the language of the Carriers Act, which exonerates carriers from liability for loss or injury to certain kinds of goods if not

(1) 10 Exch. Rep. 792; 24 Law J. Rep. Exch. 180.

(2) 45 Law J. Rep. Q.B. 289; Law Rep. 1 Q.B. D. 302.

declared, but does not exonerate carriers from their liability for the undue detention of such goods.

In this case, however, the learned Judge found as a fact that the goods were lost within the meaning of the Carriers Act, although the loss was only temporary; and, assuming this finding to be correct, it appears to us impossible to hold the carriers irresponsible for the loss, but responsible for detention caused by the loss. There is nothing in the Carriers Act to warrant such a refinement, nor does the decision in *Hearn* v. *The London and South Western Railway Company* (1), as has already been shewn.

Let us consider the question apart from authority, and let us take first the case of goods permanently lost. The damage to the owner of goods lost is their value, and possibly in some cases further special damage for their non-delivery in proper time. The damage to the owner of goods never delivered is precisely the same as if they had been lost. The Carriers Act protects the carrier from liability for loss, and it would simply render the act nugatory to hold him liable for detention which is itself the result of the loss for which he is not liable.

So in the case of a temporary loss by the carrier: to hold him not liable for the loss but liable for the consequences of it is practically inconsistent, and so to construe the Carriers Act would in effect be to render it inoperative.

It is to be observed that the Carriers Act protects the carrier from "liability for the loss of or injury to" undeclared goods; the Act does not simply relieve him from paying the value of undeclared goods which he loses, he is relieved from liability for their loss; and it would be to fritter away the Act and to depart from sound principles of construction to hold that loss in the Act only means value as distinguished from loss and its consequences.

If we turn to authority we shall find that this view of the Act is supported by two decisions, one in this country and one in Ireland—namely, *Pianciani* v. *The London and South Western Railway Company* (3) and *Wallace* v. *The Dublin and Belfast Railway Company* (4). Both of these cases were decided on demurrer. The first shews that where goods are lost and the owner cannot recover the loss, he cannot recover for non-delivery which is occasioned by the loss; and further, that where goods are detained but not lost the carrier is not protected. The case of *Wallace* v. *The Dublin and Belfast Railway Company* (4) appears to have been very like the case now before us, for the goods were there alleged to have been lost by the carriers, although only for a time, and the Court held that the Carriers Act applied and protected carriers from liability as well for the temporary as for the permanent loss of undeclared articles, and also from liability for the consequences of such loss. This appears to us to be the proper construction of the statute.

The result comes to this: if goods which ought to be declared and are not declared are lost, whether temporarily or permanently, the carrier is protected from liability for their loss and its consequences. But whether goods not permanently lost are lost within the meaning of the Carriers Act must depend upon whether they have been lost by the carrier as distinguished from lost to the owner—see *Hearn* v. *The London and South Western Railway Company* (1)—and this again must depend on the facts of each particular case. If the carrier temporarily loses the goods and delivers them within a reasonable time after he recovers them he will not be liable; but if he keeps them after he has recovered them the Carriers Act will not protect him from such subsequent breach of duty. The obligation on the part of the carrier to deliver the goods will remain or revive, and he will be responsible for future breaches of that obligation.

It is therefore a mistake to suppose that it will be against the carriers' interest to try and find undeclared goods temporarily lost. The utmost that can be said on that subject is, that he will gain nothing by finding them. On the other hand, to hold him liable for their detention when temporarily lost, but not when permanently lost, would be to make it beneficial to him not to find them. If that were the law it would be to his interest to con-

(3) 18 Com. B. Rep. 226.

(4) Ir. Rep. 8 C.L. 341.

vert all temporary losses into permanent losses. This anomaly would no doubt be obviated by holding the carrier also liable for the detention of goods permanently lost; but, in our opinion, this cannot be done. As already stated, the learned Judge held that in this particular case the goods were temporarily lost by the carrier within the true meaning of the Carriers Act. The appellants naturally supported that view of the facts; but the respondents contested the conclusion arrived at on this point, and we have therefore considered it; and we agree with the learned Judge in thinking that the trunk was lost. As we understand the facts, the plaintiff's trunk was shipped and sent to New York as Hamburger's case, and was incapable of being traced and found until the mistake in the substitution of one package for the other was discovered. This was, in our opinion, a loss of the trunk by the carrier; for though he had the bill of lading the trunk was not referred to in it, and the carrier had lost possession of the trunk, and did not in fact know where it was nor what had become of it.

For the reasons above given we are of opinion that the trunk being lost the defendants were not liable for any damages in respect of the loss or detention of or injury to the silks and furs contained in the trunk; and that, having paid into Court enough to cover their liability for the other articles, they are entitled to judgment in the action, with costs, and to the costs of the appeal.

Appeal allowed.

Solicitors—Wilson, Bristows & Carpmael, for respondent; Lumley & Lumley, for appellants.

1882. Nov. 10. } KNIGHT *v.* ABBOTT, PAGE AND COMPANY.

Practice—Remitting to the County Court —"Claim indorsed on Writ"—Damages for Breach of Contract—19 & 20 *Vict. c.* 108. *s.* 26.

The power of remitting to the County Court "any action of contract, where the claim indorsed on the writ does not exceed 50l.," under section 26 *of the County Court Act,* 1856, *has reference only to liquidated money claims required to be specially indorsed, and does not extend to actions of contract in which unliquidated damages are claimed, although the claim as indorsed on the writ does not exceed* 50*l.*

Appeal against the refusal of North, J., to refer the action to a County Court, under 19 & 20 Vict. c. 108. s. 26, on the application of the plaintiff. The writ was indorsed as follows:—The plaintiff's claim is 50*l.* under the defendants' undertaking in writing to repurchase from the plaintiff on the 1st of November, 1881, forty fully paid-up shares in Old Shepherds Mines, Limited, for 40*l.*, at a premium of 5*s.* per share.

1882. Feb. 3.—To forty fully paid-up shares . . . £40
Premium . . . 10
£50

The 19 & 20 Vict. c. 108. s. 26, enacts that, "Where in any action of contract brought in a Superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, although it originally exceeded 50*l.*, is reduced by payment into Court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a Judge of a Superior Court, on the application of either party after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name."

Bigham, for the plaintiff.—The terms of the section are satisfied. The action is an action of contract, and the claim indorsed on the writ does not exceed 50*l.* It may be that the plaintiff need not have indorsed his writ with the amount claimed; but he has done so; and if the action goes to the County Court, he cannot claim more. The propriety of trying small claims of contract in the County Court does not depend on the question whether liquidated or unliquidated damages are claimed. He cited *Guy* v. *Hinde* (1) as to a similar form of reference to a Civil Bill Court.

(1) Ir. Rep. 5 C.L. 247.

Knight v. *Abbott.*

Oppenheim, for the defendants, was not called upon.

FIELD, J.—I am of opinion that Mr. Justice North's order must be affirmed. At the date of this Act the word "indorsed" meant specially indorsed under the Common Law Procedure Act, 1852. Originally there was no indorsement of the amount claimed on writs, and the Common Law Procedure Act only altered the practice so as to allow liquidated claims to be indorsed. The claim indorsed in the 19 & 20 Vict. c. 108. s. 26, meant the only kind of claim that could be indorsed—that is, liquidated claims. No difference was made in this respect by the Judicature Acts. The nature of the claim only is required to be indorsed in actions for unliquidated damages by Order II., rule 1; and Appendix A, Part II., section 4, inserts the letter £ with a blank for the sum in liquidated claims, but in unliquidated claims uses the word "damages" only.

STEPHEN, J.—I am of the same opinion. There is no reason why claims like this should not be sent to the County Court; but the Legislature has not said they may be.

Order affirmed.

Solicitors—Pritchard, Englefield & Co., agents for Storer & Lloyd, Manchester, for plaintiff; Wilde, Browne & Wilde, for defendant.

[IN THE COURT OF APPEAL.]

1882. Dec. 2, 18, 19. } BROWN *v.* THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAILWAY COMPANY.*

Railway Company—Rates for Carriage of Goods—Unreasonable Condition—Alternative Rate—Railway and Canal Traffic Act, 1854, *s.* 7.

The mere fact of a railway company being willing and proposing to carry goods at their ordinary rate with ordinary liability does not of itself make a condition relieving them from all responsibility for goods carried at a lower rate reasonable.

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

The plaintiff, by a contract in writing, undertook and agreed to free and relieve the defendant company and all other companies over whose lines fish consigned to the defendants for carriage might be sent, "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the defendants carrying the same at a rate one-fifth lower than the ordinary rate:—Held, *that the condition was unreasonable.*

Judgment of the Queen's Bench Division reversed.

Appeal of plaintiff from a judgment of the Queen's Bench Division (reported 51 Law J. Rep. Q.B. 599) on a Special Case stated by the County Court Judge at Grimsby from which the following facts appeared:—

The plaintiff was a fish merchant of Great Grimsby, and had been in the habit for some years of consigning live codfish to the defendants for transport to Billingsgate Market.

On the 28th of December, 1880, the plaintiff signed the following "risk note."

"Manchester, Sheffield and Lincolnshire Railway.

"Risk Note.

"Grimsby Dock Station,
"December 28, 1880.

"Sir,—I beg to inform you that to parties willing to free and relieve this company, and the other railway companies over whose lines fish may be forwarded from any of our stations, from all liability for loss or damage by delay in transit, or from whatever other cause arising, the company agree that the rates charged will be one-fifth lower than where no such undertaking as the annexed is granted.—I am, sir, for and on behalf of the company, your obedient servant,

"James Reed."

"December 28, 1880.

"Sir,—In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to remain in force

from the present date until December 31, 1885,—I am, sir, your obedient servant,

"Henry William Brown."

"Mr. Reed, Grimsby Dock Station, Manchester, Sheffield and Lincolnshire Railway Company.

"Witness, W. H. Watkinson."

With the exception of the signatures, date and address, the above was in a lithograph form, furnished by the defendant company.

In accordance with this undertaking, all fish was from that date forwarded for the plaintiff at the lower rate.

On April 13, 1881, two days before Good Friday, the quantity of fish delivered by the fish merchants at Grimsby for transit by the defendants' lines to London was much in excess of the ordinary amount, but no consignments were refused by the defendant company, nor special provision made nor steps taken for the sending off the vans of fish in such time as that they should reach Billinsgate market as usual; nor was any notice or warning given to the plaintiff, who accordingly, instead of keeping his fish alive till they could be sent off, stunned them as usual and packed them ready to be sent off.

The plaintiff's fish, in consequence of not being sent off till 3.25 a.m. on April 14, instead of by the 8.40 p.m. train on the 13th, were too late for the Billingsgate market, and the plaintiff suffered loss thereby.

The County Court Judge held that the defendant company had failed to justify the delay which had taken place in delivering the fish consigned to them for carriage, and that they were not protected by the "Risk Note" which the plaintiff had signed; and thereupon directed judgment to be entered for the plaintiff for 1*l.* and costs.

The Queen's Bench Division (Mathew, J., and Cave, J.) reversed the judgment of the County Court Judge.

The plaintiff appealed.

Webster, Q.C. (with him *Cyril Dodd*), for the plaintiff.—The condition is not reasonable, for the terms of it would cover wilful misconduct of, or malicious injury committed by, a servant of the company. Such conditions must be in themselves reasonable, and not merely such as in particular circumstances it may be expedient for an individual to agree to. The mere fact that there is an option given does not make the condition reasonable, and the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), was passed to prevent such a power being exercised by railway companies. Blackburn, J., reviews the authorities in his opinion delivered to the House of Lords in *Peek* v. *The North Staffordshire Railway Company* (1), citing and discussing *McManus* v. *The Lancashire and Yorkshire Railway Company* (2). In *Lewis* v. *The Great Western Railway Company* (3), Bramwell, L.J., appeared to think that an alternative rate made a condition reasonable; but Brett, L.J., and Cotton, L.J., did not go that length; and in *Ashenden* v. *The London, Brighton and South Coast Railway Company* (4), a condition that a railway company would not be liable in any case was held to be unreasonable.

[Lindley, L.J., referred to *Aldridge* v. *The Great Western Railway Company* (5)].

That case is analogous to the present case, but there the first condition, which in some respects resembles the present one, was not considered by the Court, as there was another condition which it was held protected the company. In *Simons* v. *The Great Western Railway Company* (6), a condition that the company would not be responsible for the loss of any package improperly packed, was held unreasonable. But it is possible to contend that even if the condition be reasonable yet still it does not relieve the company here, for there has been a breach of duty which is not covered by the condition. If there were special circumstances which prevented the company from carrying the fish then they should not have received it at all. If the company know they are not in a position

(1) 10 H.L. Cas. 473; 32 Law J. Rep. Q.B. 241.

(2) 4 Hurl. & N. 327; 28 Law J. Rep. Exch. 353.

(3) 47 Law J. Rep. Q.B. 131; Law Rep. 3 Q.B. D. 195.

(4) Law Rep. 5 Ex. D. 190.

(5) 15 Com. B. Rep. N.S. 582; 33 Law J. Rep. C.P. 161.

(6) 18 Com. B. Rep. 805; 26 Law J. Rep. C.P. 25.

to deal with traffic then they must not accept it—*Jarvis* v. *The Caledonian Railway Company* (7) and *M'Connachie* v. *The Great North of Scotland Railway Company* (8).

Gully, Q.C., and *C. A. Russell*, for the defendants.—The Judge of the County Court held there was a delay in delivery, but there is no duty imposed on a carrier to send round to all his customers to announce that he may not be able to forward their goods.

The condition is reasonable, there is an option given, and in such a case a carrier may lawfully protect himself against his own individual negligence. The case of a railway company is an *a fortiori* case, as the Legislature fixes certain rates which it considers reasonable, and the customer can send his goods at those rates. In *Ashenden* v. *The London, Brighton and South Coast Railway Company* (4), there was no option given; but in *Simons* v. *The Great Western Railway Company* (6) the condition that the company would not be liable for damage, however caused, if the goods were carried at a special rate, was held reasonable, and that decision is exactly in point.

[BAGGALLAY, L.J.—Pollock, C.B., dissented from that case in his opinion given in *Peek* v. *The North Staffordshire Railway Company* (9).]

In *McManus* v. *The Lancashire and Yorkshire Railway Company* (2) there was no option; while *Lewis* v. *The Great Western Railway Company* (3) is in favour of the defendants. The condition here would cover everything done in respect of the receiving, forwarding and delivering of the goods, and consequently would cover delay in forwarding them. *Rooth* v. *The North Eastern Railway Company* (10) and *Allday* v. *The Great Western Railway Company* (11) were also cited.

Again, the words "loss of or injury done to" any goods which are contained in section 7 of the Railway and Canal Traffic Act, 1854, do not apply to, nor include damages for, delay in forwarding the goods. Similar words occur in the Carriers Act (11 Geo. 4 and 1 Will. 4. c. 68), s. 1; and it has been held by Parke, B., in *Hearn* v. *The London and South Western Railway Company* (12), that under that section a carrier is not liable for the loss of goods committed to him, or injury to them whilst in his care. *Beal* v. *The South Devon Railway Company* (13), *Nicholson* v. *Willan* (14) and *Gordon* v. *The Great Western Railway Company* (15) were also referred to.

Dodd, in reply.—In every case cited, except *Peek* v. *The North Staffordshire Railway Company* (1), an option was offered by the railway companies; but there was no option here, for it does not necessarily follow that the alternative rate, namely, the maximum charge, is commercially a reasonable charge. If the condition here is one indivisible condition, and one case within it is unreasonable, then the condition as a whole is bad. *Jarvis* v. *The Caledonian Railway Company* (7) and *M'Connachie* v. *The Great North of Scotland Railway Company* (8) seem to shew that where the carrier knows of the existence of something which will prevent the carriage of the goods being carried out in the ordinary way, it is his duty not to enter into a contract to carry them in the ordinary way. The whole object of the Railway and Canal Act, 1854, was to control railway companies in their dealings with the public, and to prevent such an unreasonable condition as the present one being imposed upon them. The question whether or not an option has been offered to the public is one which the Court must take into consideration in dealing with this matter—*Doolan* v. *The Midland Railway Company* (16), *D'Arc* v. *The London and North Western Railway Company* (17), *White* v. *The Great Western Railway Company* (18) and *Lord*

(7) 4 Sess. Cas. vol. ii. 623.
(8) Ibid. vol. iii. 79.
(9) 10 H.L. Cas. at p. 552.
(10) 36 Law J. Rep. Exch. 83; Law Rep. 2 Exch. 173.
(11) 5 B. & S. 903; 34 Law J. Rep. Q.B. 5.
(12) 10 Exch. 792; 24 Law J. Rep. Exch. 180.
(13) 5 Hurl. & N. 877; 29 Law J. Rep. Exch. 441; in error 3 Hurl. & C. 337.
(14) 5 East, 507.
(15) 51 Law J. Rep. Q.B. 58; Law Rep. 8 Q.B. D. 44.
(16) Law Rep. 2 App. Cas. 792, Irish.
(17) Law Rep. 9 C.P. 324.
(18) 26 Law J. Rep. C.P. 158.

Brown v. *Manchester Rail Co., App.*

v. *The Midland Railway Company* (19) were also cited.

Cur. adv. vult.

The following judgments were delivered on Dec. 19 :—

BAGGALLAY, L.J.—In my opinion the decision of this appeal must turn upon the question whether the condition attached to this contract was just and reasonable. It was contended on the part of the appellant that this was not a delay in the transit of fish within the meaning of the condition, but a failure or misconduct on the part of the company, quite distinct and apart from the contract, in not giving due notice of the excess of traffic. I cannot take this view of the case. It appears to me that there is no suggestion of any wilful misconduct on the part of the managers of the company, but that the delay arose from an over supply of the goods on the night in question. Therefore it was not a case outside the contract.

The case must be governed by the contract. Mr. Gully said that this was a delay in the transit which was not covered by the provisions of the Railway and Canal Traffic Act, 1854, but depended upon the common law liability of carriers, from which the defendants were relieved by the terms of the contract. It was also suggested by him that the terms of the contract were divisible, and that although one portion of the condition might be illegal, yet the other, if just and reasonable, might be enforced. It seems to me that this is an indivisible contract, and to strike out that part which is unreasonable would be to make another contract between the parties; for although in the risk note which was sent by the company there is that special condition, yet the acceptance of it by the plaintiff is all in one expression, and it is therefore a single provision.

The question, therefore, is, whether this single contract, which is created by the letters, is a just and reasonable contract. Up to the present time it has never been decided that where two alternative rates are offered, if one of those two is reasonable the other is also to be assumed to be reasonable. Supposing that there was no alternative rate for the carriage of the goods except that provided by this contract, it could not be doubted that the condition which freed the company from all liability would be unreasonable. But where there is an alternative rate of carriage, as in this case, regard must be had to the special circumstances. The merchants here were in the habit of availing themselves of this special mode of sending their fish, and have found it to their advantage to do so; it would be impossible for them to compete with other merchants if they forwarded their goods at the ordinary rate. The question therefore arises whether they had any option. It appears to me that practically they had no option; and I therefore hold that the terms of this contract are not just and reasonable. But I guard myself against holding that a condition—whatever might be the nature of the option and the position of the parties—which exempted the company from liability for acts of gross misconduct however occasioned would not be a just and reasonable condition. It is not necessary, however, to express any opinion on that point. Having regard to the circumstances of this case, I am of opinion there was no option. The appeal must therefore be allowed.

BRETT, L.J.—The question brought before us in this case is one of considerable difficulty which has never yet been decided by any authority which is binding on this Court; our judgment must therefore be given according to our convictions. It is not necessary either to enunciate the facts or to enter into a minute consideration of all the cases cited, for any consideration with regard to them was exhausted during the argument. The first matter for decision in this case is, what is the construction of the condition which has been imposed by the defendant company and accepted by the plaintiff? It was suggested that the condition might be construed so as to avoid certain difficulties which were suggested during the argument; but it seems to me that if we were to accede to that view we should be altering the terms and plain grammatical construction of this condition in order to make it reasonable in the view of those

(19) 36 Law J. Rep. C.P. 170.

who contend that it is a reasonable condition. That, however, would not be a reasonable mode of construction. Looking at the terms of the letter or notice of the company, and its acceptance by the plaintiff, and construing the two together, it seems to me that according to its true construction there is but one indivisible condition by which the company are absolved from all liability for loss or delay in transit or from whatever other cause arising. Upon the true construction of that condition the company would be absolved from liability for any loss or damage to goods arising from any negligence or wilful acts of their servants properly so called; and also from any negligence or wilful acts of those persons who only conduct or carry on business for them; so that they have not in reality undertaken any liability which can be enforced by any process of law in this country. The question therefore is, whether that condition is, under the circumstances of the case, a reasonable condition. It is said that the Court must hold that it is reasonable, because there is an alternative rate—that is to say, because the company are willing to carry goods at a higher rate, and with the liability ordinarily imposed upon them if there were no condition; and such alternative rate is said to prevent the Court from holding that any condition, however large, which the company may impose if the party desires that his goods should be carried at the lower rate, is unreasonable. But that argument was not pressed to its fullest extent. In *Lewis* v. *The Great Western Railway Company* (3) I did venture to differ from what I thought was that extreme view, and after the argument here, and on consideration, I still maintain what I there said—that the mere fact of the company being willing and proposing to a party to carry his goods at the higher rate with the ordinary liability, cannot of itself make any other condition which they impose, and which the other party accepts, a reasonable condition within the meaning of the Railway and Canal Traffic Act, 1854. I accept fully this—that the fact of there being an alternative rate is a matter much to be considered in determining whether conditions which are imposed upon the carriage of goods at a lower rate are reasonable or not. A *bona fide* alternative rate may make the conditions imposed on the carriage of goods at a lower rate reasonable, which conditions would be unreasonable if there were no alternative rate. Both principle and authority are, on that point, in favour of the company. The question as to what will make a condition, however large its terms, a reasonable condition, partly depends upon the view taken of what is called the option or choice which a person has who has goods to be carried by rail, and whether that person has an entirely free choice in a practical and business sense. To my mind the plaintiff here has not. The result of the large powers which have been given by the Legislature to railway companies is that, as a matter of business, they have a monopoly of carriage. The party in such a case as the present must either give up the London market or send his goods by rail. The option therefore which he has is to send his goods at either the higher or the lower rate; but he has not the choice of not sending them at all, for he must send them at one or the other rate if he is to do business at all. What the railway company here propose is this: that the goods will be carried by them at the higher rate and with all the liabilities imposed by the common law, but if carried at the lower rate, then the company will be under no liability at all which could be enforced against them. With regard to the carriage of goods at the lower rate, it is obvious as a matter of business that they will not carry at that rate at a loss; the goods therefore are carried by them for a profitable payment, and yet if this condition is to be held reasonable, they being bailees for hire, and for a profitable hire—for the other party is obliged by what the Legislature has done to send his goods and pay for them—are not even to have the liability which a gratuitous bailee has. The question is, whether the Court ought to say that such a condition is reasonable. I have no doubt whatever that it is wholly unreasonable. I have a strong inclination that the proposition is true that no condition—although there may be an alternative rate—which endeavours to lessen the liability of a railway company lower than

that of a gratuitous bailee can be reasonable. The only obligation of the company, supposing that they are in the position of gratuitous bailees, is to take such care as a reasonable owner would take of his own goods. All that such an owner could do would be to give reasonable instructions to his servants, but no owner could answer that his servants would carry out the instructions carefully; neither would he be answerable for the wilful misconduct of his servants. The only liability which would be imposed on the railway company if they may lower their liability to that of a gratuitous bailee, is to take reasonable care in the choice and number of their servants, and to give them fair and reasonable instructions. They could not be allowed to misconduct themselves so as to do that which may be a wilful want of care of the goods, and give such wilful instructions to their servants as must injure the goods sent or the sender. But this condition which, according to a true construction of it, would cover the case of an absolute want of care in the choice of, as well as absolutely unreasonable and wrong rules for the conduct of, their servants, would also cover a wilful delay by the authorities managing the railway for their own benefit for the carriage of these perishable goods to market. This condition would cover all these things, which it is not unreasonable to imagine might happen in the course of business, and is therefore to my mind unreasonable.

Then it is said that the circumstances of this case are not brought within any one of those matters which would make the condition unreasonable; but I take it that where a condition is one and indivisible, it would be unreasonable with regard to any state of circumstances which it would be reasonable to anticipate in the course of business; and would therefore by the terms of the statute be null and void to all intents and purposes. It is not therefore material to enquire whether or not the condition would be reasonable as applied to any particular state of circumstances of the case, if it would be unreasonable with regard to other circumstances which it might not unreasonably be anticipated would happen in the course of business.

Acting therefore upon the view which I took in the case of *Lewis* v. *The Great Western Railway Company* (3), I think that this condition is unreasonable; it is therefore null and void, and the plaintiff is entitled to recover.

It was also urged that a condition with regard to delay in transit is not within the Railway and Canal Traffic Act, 1854, and that where parties have agreed to such a condition, the Court cannot enquire whether it is reasonable or not, because the parties, having signed it, are bound by the agreement. That argument was based on the wording of section 7 of the Railway and Canal Traffic Act, 1854, which was said to be similar to that of section 1 of the Carriers Act (11 Geo. 4. & 1 Will. 4. c. 68). The words are similar, although the subject-matter is different, but I think that section 7 of the former Act covers a condition relating to a delay in transit as much as one relating to loss by damage or delay in the canal. Supposing it does not, yet in this particular case (and that is why I spoke of the construction of this agreement) you cannot divide a condition which is one and indivisible, and which clearly deals not only with loss by delay in transit, but also with other losses which are admitted to be within the statute, for that would be contrary to the construction of the condition. If it is null and void in part within the meaning of the statute, it seems to me that it is void altogether.

It was also said that this statute was not meant to protect people in the same way as certain statutes protect sailors or young persons in factories; and that people dealing in this way were under no infirmity such as arises from youth or habits of carelessness. But such persons *are* under a similar infirmity on account of the monopoly of the railway companies and the business inability to send goods except by the railway. The Legislature has acted not out of any ill-will to railway companies, but upon the infirmity and want of power of resistance on the part of persons who are practically obliged to send goods by the railway, and have no other means of sending them or of carrying on business at all, and that was the infirmity which this statute was intended

to protect. In my opinion this condition is absolutely null and void, and, according to the true construction of the statute, the plaintiff is entitled to succeed. The present decision does no more than put upon railway companies the obligation, if they desire to be protected, to state distinctly what protection they require, so as to enable the Court to say whether the condition is reasonable or not; and the companies fail if they endeavour to practically override the statute, or to take away the control of the Court, by intentionally using words which would protect them from all liability.

LINDLEY, L.J. (20)—The contract in terms covers—first, loss or damage by delay in transit; secondly, loss or damage from whatever other cause arising. If loss or damage here means loss of the goods or damage to the goods, then, as this action is not brought for any such loss or any such damage, the contract affords no defence to the action, and the plaintiff will be entitled to succeed. It is by no means clear that the contract, properly construed, does extend to any other loss or damage than a loss of the goods or damage to them. However, the case has been argued both in the Court below and before us upon the assumption that the words "loss or damage" in the contract have a wider meaning and extend to pecuniary loss to the plaintiff, although the goods themselves may neither be lost nor injured. Assuming this to be the meaning of the words, then the contract in terms purports to protect the company from all liability to the plaintiff in respect of whatever may happen to his goods from the time they are received by the company, and so long as they are under the company's care. The terms of the contract are so wide as to cover all degrees of negligence and all kinds of misconduct, even wilful misconduct, on the part of the servants and officers of the company for which, but for the contract, the company would by law be liable. In my opinion it would be to depart from the words and true meaning of the parties to the contract, if it were construed restrictively, so as to exclude loss by the misconduct as distinguished from negligence of the company's servants or officers. The course of decisions on contracts more or less similar to the one before us convinces me that the railway company, at all events, really meant to exempt themselves from all liability when they caused the risk note to be prepared and lithographed for use in the form in which it is.

If the contract is thus construed, it covers the loss sustained by the plaintiff under the circumstances stated in the Special Case—loss by delay in starting or by receiving goods when they could not be forwarded is either loss by delay in transit or loss from some other cause. Upon this point the decision of the Court below appears to me to be correct.

The next question is, whether the contract thus construed is binding on the plaintiff, bearing in mind that he had the option of sending his goods on other terms which were free from objection in point of law.

The decisions which preceded and led to the passing of the Railway and Canal Traffic Act, 1854, go far to shew that the contract is not illegal at common law; and I assume it to be legal and binding, unless it is invalid by reason of the statute just mentioned.

The 7th section of the statute is obscurely worded, and has led to much litigation. But after the decision of the House of Lords in *Peek* v. *The North Staffordshire Railway Company* (1), that section must be treated as based upon the assumption that there may be contracts entered into in writing by sane men of business and signed by them, and which would be legal at common law, and which contracts may nevertheless be unreasonable in the opinion of Courts of law. In other words, the Legislature has declared that the test of what is reasonable in these cases is not what sane men of business sign, nor what a jury may consider reasonable, but what a Court or a Judge may consider reasonable. An enactment of this kind is very anomalous; but whilst it stands, it appears to me to prohibit a Court or a Judge from adopting as the test of reasonableness simply what men of business may choose to sign. The Act is based upon the assumption that, practically, men of business

(20) This was a written judgment.

must sign whatever terms railway companies may impose; and the decision of this case and of all like cases must, in my opinion, turn on whether men of business who are offered an alternative of sending their goods at a maximum rate at the company's risk, or at a lower rate wholly at their own risk, and who adopt the latter alternative, are really practically compelled to do so; for if they are, and if what they are thus compelled to agree to is unreasonable, they are within the mischief intended to be remedied by the Act, and are entitled to its protection. On the other hand, if they are not practically compelled to send their goods at the lower rate, the state of things presupposed by the statute will not exist: the mischief to guard against which the statute was passed will not have to be guarded against, and, there being no compulsion one way or the other, the contract cannot be held unreasonable.

In the case now before the Court, the plaintiff was a fish merchant, sending his fish to market, and practically he was compelled to send his goods at the lower rate. It is true he was not compelled to do so by the defendants; but it is plain that unless the plaintiff sent his fish as cheaply as he could he would be undersold in the market by his competitors in trade. The exigencies of trade left him no choice. Practically he was compelled to send his goods at the lower rate in the same sense, though not in the same degree, as he was compelled to send his fish quickly by rail instead of more slowly by sea. Practically, therefore, the option offered him by the railway company was no option at all.

If this view be correct, it will follow that the contract in question must be regarded in the same light as any other contract which practically the plaintiff could not help entering into; and, so regarded, it goes too far and must be pronounced unreasonable. The decision in *Lewis* v. *The Great Western Railway Company* (3) is consistent with this view, and goes as far as, in my opinion, it is proper to go in cases of this description. Lord Bramwell's observations in that case no doubt go much further; but I cannot follow him in the view he takes of the statute, and of the duty imposed by it on the Court. Lord Blackburn's observations in *Peek* v. *The North Staffordshire Railway Company* (21) are not addressed to a case such as this, where the exigencies of trade compel the carrier's customer to send his goods at the lower scale of charge. Lord Blackburn's observations are general, and are addressed to those cases in which the customer is practically free to adopt which alternative he likes. The decision in *Simons* v. *The Great Western Railway Company* (6) is open to the same explanation. It did not appear there, as, in my opinion, it does here, that the plaintiff could not practically carry on his business without sending his goods at the lower rate of charge.

It follows from the foregoing reasoning that, in my opinion, such a contract as the one before us might be reasonable under other circumstances; and I cannot go the length of my brothers Baggallay and Brett, and say that such a contract must be unreasonable in all cases. I should consider it reasonable in all cases in which the customer was not practically compelled to adopt the lower rate. Under such circumstances I should concur with Lords Blackburn and Bramwell, and with the decision in *Simons* v. *The Great Western Railway Company* (6).

It only remains to add that the words of that part of section 7 of 17 & 18 Vict. c. 31, which relates to the reasonableness of conditions and contracts, are wide enough to include conditions and contracts relating to detention and delay as distinguished from loss of or injury to goods; and that the present contract is so drawn that it is impossible to sever some of the words from the others, and to hold it bad in part only and good for the rest.

For the reasons above stated, I am of opinion that the decision of the Court below must be reversed, and judgment be entered for the plaintiff for the agreed damages 1*l.*, and costs of the action and of the appeal.

Appeal allowed.

Solicitors—Rollit & Sons, agents for Rollit & Sons, Hull, for plaintiffs; Cunliffe, Beaumont & Davenport, agents for R. Lingard Monk, Manchester, for defendants.

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(21) 10 H.L. Cas. at p. 511.

[IN THE COURT OF APPEAL.]

1882. Nov. 8. Dec. 21. } HUMPHREYS *v.* GREEN AND ANOTHER.*

Contract—Parol Agreement to devise Interest in Land—Part Performance—Statute of Frauds.

The plaintiff agreed to purchase a farm belonging to his brother J. H., upon the representation that it was worth 2,000*l. and that the rental was* 70*l. a year; but having subsequently discovered that the rental was only* 45*l. and that the farm was not worth* 2,000*l., he insisted upon repudiating the contract. J. H. thereupon verbally promised that if the plaintiff would complete the purchase, he would devise to the plaintiff and his son certain other lands which belonged to him, and would also consent that the purchase-money should be reduced to* 1,800*l. The plaintiff alleged that he completed the purchase relying upon that verbal promise. J. H. made a will in favour of the plaintiff and his son as agreed, but revoked it by a subsequent will. In an action against the estate of J. H., to recover damages for breach of the alleged verbal agreement,*—Held, *that the part performance relied on by the plaintiff —namely, the completion of the purchase—being referable not to any agreement to refrain from repudiating the previous contract of purchase, but to that previous contract itself, did not constitute such a part performance of the alleged verbal agreement as to exclude the operation of the Statute of Frauds.*

Alderson v. *Maddison* (50 Law J. Rep. Exch. 466) *considered.*

Argument of a rule *nisi* for a new trial, granted by the Court of Appeal to the plaintiff on an application by way of appeal from the refusal of the Queen's Bench Division to grant the same.

The facts of the case and the arguments sufficiently appear from the written judgment of Baggallay, L.J.

McIntyre, Q.C., and *A. L. Smith*, for the defendants, shewed cause.

T. W. Wheeler (with him *Sir H. Giffard, Q.C.*), for the plaintiff, in support of the rule.

The following authorities were referred to:—*Alderson* v. *Maddison* (1), *Lester* v. *Foxcroft* (2) and *Hughes* v. *Morris* (3).

Cur. adv. vult.

The following judgments were delivered on the 21st of December:—

BAGGALLAY, L.J.—The plaintiff in this action and one John Humphreys were brothers. John Humphreys died in August, 1880, and the defendants are the executors named in his will, which was dated the 18th of November, 1879, and was proved by the defendants on the 7th of April, 1881.

On the part of the plaintiff it is alleged that John Humphreys, for a consideration which will be mentioned presently, promised to make a will in the plaintiff's favour; but that, after making a will in pursuance of such promise, he subsequently revoked it by the will which has been proved by the defendants, under which the plaintiff takes no benefit. The plaintiff claims damages against the estate of John Humphreys in respect of such alleged breach of contract. Upon the trial, Mr. Justice Manisty gave judgment for the defendants, being of opinion that there was no evidence to go to the jury of any contract binding upon John Humphreys or his estate.

A rule for a new trial, on the ground of misdirection, was refused by the Queen's Bench Division, but upon an application by way of appeal to this Court, a rule *nisi* was granted under the circumstances to which I shall presently allude. Cause has now been shewn before us, and I am of opinion that the rule *nisi* must be discharged.

The plaintiff's case, as presented to us, was as follows: that in June, 1879, his brother John Humphreys, as executor of another brother William Humphreys, was desirous of selling a farm in Wales, known as Gwaen y Magley, and induced

* *Coram* Baggallay, L.J., and Brett, L.J.

(1) 50 Law J. Rep. Exch. 466; Law Rep. 7 Q.B. D. 174.

(2) 1 White & Tudor's L. Cas. in Equity, 5th ed. 828.

(3) 2 De Gex, M. & G. 349, 356; 21 Law J Rep. Chanc. 761, 764.

the plaintiff to enter into an agreement to purchase it at the price of 2,000*l.*, and to pay a deposit of 200*l.*, by a representation that it was worth that sum, and that the rental of it was 70*l.* per annum; but that, having shortly afterwards discovered that the farm was not worth 2,000*l.* and that the rental of it was only 45*l.*, he, on the 11th of August, 1879, wrote to John Humphreys, insisting that the contract should be cancelled and the deposit returned; that John Humphreys thereupon promised him that if he would complete the purchase, he would, on his death, devise by will certain other farms and lands, which were his own property, to the plaintiff and his son, and would consent to a reduction of the purchase-money from 2,000*l.* to 1,800*l.*; that in reliance upon such promise, and in consideration of it, the plaintiff paid the balance of the purchase-money and completed the purchase of the farm; that by a will dated the 20th of August, 1879, John Humphreys devised his own farms and lands as agreed, but afterwards revoked such devise by the will which has been proved.

By his statement of claim the plaintiff not only claimed damages in respect of the alleged breach of contract, but also to have the will of John Humphreys which was proved by the defendants set aside so far as it revoked the will in favour of the plaintiff and his son, and a declaration that he was entitled to a life estate in the farms and lands expressed to be devised by the will of the 20th of August, 1879, with remainder to his son; but the claim, as urged in Court, has been limited to damages for breach of the alleged contract.

The defendants, whilst admitting that a binding agreement for the purchase of Gwaen y Magley was entered into by the plaintiff in June, 1879, and that he subsequently, by the letter of the 11th of August, 1879, attempted to repudiate it, deny that John Humphreys represented to the plaintiff that the farm was worth 2,000*l.*, or that the rental of it was 70*l.*; and they allege that John Humphreys, on receipt of the letter of the 11th of August, 1879, refused to entertain the proposition that the contract should be cancelled. They further admit that John Humphreys did in fact make a will dated the 20th of August, 1879, and thereby purported to devise his own farms and lands to or for the benefit of the plaintiff and the plaintiff's son, and that the purchase of Gwaen y Magley was in fact completed by the plaintiff on the 27th March, 1880; but they deny that any such promise as is alleged by the plaintiff was ever made by John Humphreys, or that the plaintiff completed the purchase of Gwaen y Magley in reliance upon, or in consideration of, any such promise.

In the arguments before us it was admitted on the part of the plaintiff, as it had apparently been admitted before Mr. Justice Manisty and in the Queen's Bench Division, that inasmuch as the contract of a breach of which the plaintiff complained was a contract relating to land, and there had been no memorandum or note thereof in writing within the intent and meaning of the 4th section of the Statute of Frauds, it was necessary for the plaintiff to prove, not only a promise such as that alleged by him, but also a part performance of the contract sufficient to take the case out of the operation of the statute.

In support of the alleged promise reliance was placed by the plaintiff on certain correspondence between the plaintiff and John Humphreys, and particularly on letters dated the 11th and 17th of August, 1879, and on a conversation alleged to have taken place between the plaintiff and John Humphreys on the 1st of September, 1879.

The letter of the 11th of August was from the plaintiff to John Humphreys, and in it, after comments upon the difference between the value of an estate of which the rental is 70*l.* and one of which the rental was only 45*l.*, there is a paragraph in the following terms:—"Under these circumstances I must beg of you to cancel the contract and let me have a cheque for my deposit of 200*l.*" Certain other letters passed between the plaintiff and John Humphreys, in which the latter pressed the former to complete the purchase, and on the 17th of August, 1879, John Humphreys sent to the plaintiff the letter of the 17th of August, 1879, in which was contained a paragraph in the following terms: "I am very desirous of having no misunderstanding or unpleasant-

ness respecting the purchase of Gwaen y Magley, and I think the best way to avoid it is for you to come down to Berriew and talk the matter over, as perhaps I may be able to tell you something which may induce you without further hesitation to complete the purchase, or you may say something to place me in a position to endeavour to find some one to take it off your hands."

The invitation contained in that letter was accepted by the plaintiff, and on the 30th of August he went to the residence of John Humphreys, at Berriew, near Welshpool. In the meantime, however, John Humphreys made his will of the 20th of August. On the 1st of September, an interview took place between the brothers at Berriew, at which no other person was present. The account of what occurred at that interview, as given by the plaintiff in his evidence at the trial, is as follows:—John Humphreys asked the plaintiff whether he had come to any determination with regard to Gwaen y Magley, to which plaintiff replied that he had not. John Humphreys then said, "Well, Edmund, you remember what I promised you," and plaintiff answered that he did remember; and John Humphreys then added, "Well, Edmund, I have been thinking that with Gwaen y Madley and with what I am going to leave you, you will have a nice little property in this county"; and thereupon plaintiff said, "Well, under these circumstances, and taking into consideration your letter of invitation of the 17th, I am quite prepared to complete the contract of Gwaen y Madley, and you may depend upon my fulfilling it to the letter."

The plaintiff, having thus stated the effect of the conversation between himself and John Humphreys, was asked by Mr. Wheeler, his counsel, "What was the promise which you were supposed to remember," and replied that the promise so referred to was made in September, 1877, when he and John Humphreys and their sister were walking in the garden and speaking of the sudden death of a brother, and that John Humphreys then said to him, "Edmund, we have come to the conclusion to make your son our heir, as he bears our name, and I think it will be large enough to enable him to stand his ground in the county," and that he thereupon thanked his brother for his kind intentions. The plaintiff added that he could not speak with certainty as to whether John Humphreys said "your son" or "you and your son."

It will be observed that the promise thus referred to was made nearly two years before the contract was entered into by the plaintiff for the purchase of Gwaen y Magley. It is further to be observed that during the conversation on the 1st of September no reference appears to have been made to the will which had been executed by John Humphreys on the 20th of August, nor to any reduction from the amount of purchase-money for the farm. As regards the former, it does not appear to be material whether the plaintiff was or was not aware at the time when the conversation took place that the will dated the 20th of August had been executed; a promise to devise or leave by will, if any such promise was made, would be as well performed by not revoking a will already made as by subsequently executing one of the same purport, and could be as well broken by revoking a will already made as by failing to make one.

As regards, however, the reduction of the purchase-money, it appears, from the evidence given by the plaintiff at the trial, that on the 2nd of September he went from his brother's residence to Gwaen y Magley, and that, having then formed an unfavourable opinion of the farm, he, on the evening of the 3rd, described to his brother and sister the desolate state of the property, and that thereupon his brother suggested to their sister, who was a co-executrix with John Humphreys of the deceased brother William, that they should take off 200*l.* from the price of the farm.

The plaintiff returned home on the 4th, and, after his return, some further correspondence took place between him and his brother John, to which it does not appear to me to be necessary to refer.

I believe that I have stated in sufficient detail the effect of all the evidence adduced in support of the plaintiff's claim in this action.

In the course of the arguments at the trial, and upon the applications to the

Queen's Bench Division and to this Court, the case of *Alderson* v. *Maddison* (1) was much discussed, and the principles enunciated, or supposed to be enunciated, in the judgment delivered in that case were much relied upon by the counsel for the plaintiff; and it would appear from the shorthand-writer's notes of what took place in this Court upon the application for the rule *nisi*, that it was granted in order that an opportunity might be afforded of considering whether the principles enunciated in the judgment in that case could be put in more strict and formal language.

I was a party to that judgment, as were my late colleague Lord Justice Bramwell, and my present colleague Lord Justice Brett; and, having regard to the object which this Court apparently had in granting the rule, and particularly to the view which appears to have been expressed by Lord Justice Brett that there seemed to him to be something in the phraseology of the judgment in *Alderson* v. *Maddison* (1) which he did not understand, I, at the close of the argument upon the application to make the rule absolute, expressed my desire of having an opportunity of reconsidering the effect of that judgment, and for that purpose our judgment upon the matter under consideration was reserved.

I have since given my best attention and consideration to the case of *Alderson* v. *Maddison* (1), and to the several discussions which have taken place with reference to it, when the subject-matter of this action has been under consideration, and I have arrived at the conclusion that the general principle enunciated in the judgment, as to the circumstances under which a part performance of a parol contract relating to land will be regarded as sufficient to take it out of the operation of the Statute of Frauds, is accurately stated.

That general principle is stated in the following terms (4):—"Now it is a well recognised rule that if in any particular case the acts of part performance of a parol agreement as to an interest in land are to be held sufficient to exclude the operation of the Statute of Frauds, they must be such as are unequivocably referable to the agreement; in other words, there must be a necessary connection between the acts of part performance, and the interest in the land which is the alleged subject-matter of the agreement. It is not sufficient that the acts are consistent with the existence of such an agreement, or that they suggest or indicate the existence of some agreement, unless such agreement has reference to the subject-matter. As was said by Lord Hardwicke in the case of *Gunter* v. *Halsey* (5), they must be such as could have been done with no other view or design than to perform the agreement." I believe that the general principle as enunciated is supported by all the recognised authorities upon the subject. The enunciation of the general principle is followed by illustrations in the following terms:—"Thus payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement. On the other hand, the admission into possession of a stranger is, speaking in general terms, a sufficient part performance, for it is not explicable upon any other supposition than that it has resulted from a contract in respect of the land of which possession has been given. Again, the continuance in possession of a tenant is not in itself a sufficient part performance of a parol agreement for the purchase from the landlord, for it is equally consistent with a right depending upon his tenancy."

It is to the language in which the illustration as to payment of purchase-money is expressed that the criticisms of the Lords Justices upon the occasion of the application for the rule *nisi* would appear to apply; and if I understand the views expressed by them aright, they intimate a doubt whether the general statement that "payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute" should be qualified by the addition of the words, "unless it is shewn that the payment was made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement."

(4) 50 Law J. Rep. Exch. at p. 468; Law Rep. 7 Q.B. D. 178.

(5) Amb. 586.

It is doubtless true, as was suggested by the Court when the rule *nisi* was granted, that if a man is found in possession of an estate with no apparent title in writing, he is a trespasser, unless he is there by virtue of some agreement, and that in such a case enquiry may be made as to what the agreement is; but I do not gather from the authorities that this is the only species of part performance which would be sufficient to take a case out of the operation of the statute, a proposition which might be inferred from some observations appearing upon the notes of the discussion.

During the arguments in *Alderson* v. *Maddison* (1) the case of *Nunn* v. *Fabian* (6) was cited; I was counsel in that case, and well remember it. The facts material to the judgment were as follows:—

A landlord verbally agreed with his occupying tenant to grant him a new or extended lease for twenty-one years, at an increased rent and with the option of purchasing the freehold; this was the parol agreement. The landlord died without executing any lease pursuant to the agreement, but before his death the tenant paid one quarter's rent at the increased rate, which was in fact a part payment of the purchase-money for the interest in the land which he was to acquire, and a receipt in the following terms was signed by the landlord:—

"Received the 14th day of January, 1863, of Mr. J. Nunn, the sum of 20*l.* for balance of rent, due 29th Sept. last, for 60 Western Road, Brighton."

The suit was by the tenant against the devisees in trust of the landlord for specific performance of the parol agreement. The Master of the Rolls had dismissed the plaintiff's bill, and the case came before the Lord Chancellor, Lord Cranworth, by way of appeal. The receipt for the balance of rent did not contain all the necessary elements of the contract; if, therefore, the plaintiff was entitled to a decree for specific performance, it must have been upon the ground of proof of a sufficient part performance to take the case out of the statute, and so Lord Cranworth held. The fact of the plaintiff being in possession of the property was not a sufficient part performance of the parol agreement, for it was equally consistent with his continuing in possession under his previous tenancy, as of his possession being due to some agreement between himself and his landlord. Moreover, Lord Cranworth declined to treat a proved expenditure of money upon the property as a part performance; but he held that there was a clear part performance by payment and acceptance of the Michaelmas rent at the increased rate, being of opinion that the payment of the increased amount could be referable only to some agreement; and upon that ground, and upon that ground alone, he made a decree for specific performance. The decision in *Nunn* v. *Fabian* (6) has been criticised in various quarters, but I am not aware of any subsequent decision which would be inconsistent with it; it certainly has not, so far as I am aware, been overruled by any competent authority. It is quite true that the circumstances of the case were in several respects, to which I need not allude, very strong in favour of the plaintiff from a moral point of view, and attempts have been made to explain the decision upon other grounds than those assigned by the Lord Chancellor, but nothing can be more clear and definite than the reasons assigned by him for the decision.

If *Nunn* v. *Fabian* (6) was rightly decided, and, speaking for myself, I feel bound by it, it would be difficult to distinguish from it a case in which, after a parol agreement for the purchase of a freehold estate at a fixed sum, payment is made by the purchaser of a portion of purchase-money, and a receipt is given in some such form as the following—"Received of A B the sum of 1,000*l.*, being in part payment of the purchase-money for my freehold estate at C;" and I am unable to suggest better words than those used in the judgment in *Alderson* v. *Maddison* (1) to cover such cases as *Nunn* v. *Fabian* (6), and that which I have last suggested. So far as I am responsible for the judgment in *Alderson* v. *Maddison* (1), the language which has been criticised was adopted to cover such cases as *Nunn* v. *Fabian* (6) which have been pressed upon us in argument. I understand that the case of *Alderson* v.

(6) 35 Law J. Rep. Chanc 140; Law Rep. 1 Ch. App. 35.

Maddison (1) is under appeal to the House of Lords; if so, I hope an opportunity will be taken of testing the propriety of the decision in *Nunn* v. *Fabian* (6), and of criticising the passage in the judgment in *Alderson* v. *Maddison* (1).

As regards the case now under consideration, there is, in my opinion, no ground for the suggestion that there was any misdirection on the part of Mr. Justice Manisty when he directed judgment to be entered for the defendants in this action. That learned Judge proceeded on the ground that there was no evidence to go to the jury either of the alleged promise or of part performance; in other words, that there was no evidence to go to the jury of any contract binding upon the estate of John Humphreys. Apart from the admitted fact that the subject-matter of the alleged promise was land or an interest in land, there might have been ground for contending that there was evidence of some such promise to go to the jury, though I agree with Mr. Justice Manisty and with the Judges in the Queen's Bench Division in thinking that the evidence pointed more to the plaintiff having been influenced by the representations made to him by his brother as to a probable disposition of his property than to any definite and concluded agreement between them; but, inasmuch as it was admitted that the contract of which the breach was alleged related to land, and that there was no memorandum or note of it in writing signed by John Humphreys, no action would lie in respect of such breach unless there was evidence of a part performance sufficient to exclude the operation of the statute, and of such part performance I can find no trace. The part performance relied on is the completion of the purchase of Gwaen y Magley; but it cannot be successfully contended that the completion of the purchase was referable only to an agreement that John Humphreys would devise his property in a particular way. Apart from the parol testimony of the plaintiff, which is of course inadmissible for this purpose, the completion of the purchase would appear to be referable to the existing binding contract, and certainly not to any agreement to refrain from repudiating it.

The fallacy which appears to me to pervade the arguments on the part of the plaintiff, based upon the supposed authority of *Alderson* v. *Maddison* (1), consists in this, that they relied upon the parol agreement itself to prove that the alleged acts of part performance were referable to that agreement.

BRETT, L.J.—I do not think that the Court had any doubt as to what must be the result of the judgment in this particular case. We are all agreed that the judgment which has been given must be the judgment of the Court; but a rule *nisi* was granted, and afterwards the form of our judgment was reserved in consequence of the mode in which part of the judgment in *Alderson* v. *Maddison* (1) had been expressed. It is true that that judgment was written by my brother Baggallay, but it was the judgment of the Court, and as his Lordship was to be a party to the present judgment, we desired that he should be the person to explain it. This doctrine of taking cases out of the 4th section of the Statute of Frauds is peculiarly an equity doctrine; the Courts of common law never ventured to set aside that section. As that doctrine depended not on any construction of the statute itself, but upon the authority of the cases decided in equity, the expression of the judgment in *Alderson* v. *Maddison* (1) was naturally referred to a member of the Court who was most conversant with that doctrine. It may be that, in accepting my brother's phraseology, with the deference due to him, we did not quite agree with the words used in that judgment.

I entirely agree with the enunciation in that case of the main rule which is established by the authority of the cases in equity, and, as it seems to me, by nothing else. The illustrations given are all, with the exception of part of one, in conformity with that rule. I entirely agree with the statement that payment of part or even of the whole of the purchase-money is not sufficient to exclude the operation of the statute. But then the judgment goes on, "unless it is shewn that the payment is made in respect of the particular land and the particular interest in the land which is the subject of the parol agreement." It was that part of the phraseology of the

judgment with which, when we came to examine it, we thought we could not agree, for it does not say how it is to be shewn, and therefore leaves it open to the supposition that it may be shewn by parol or otherwise. For my part I think it unnecessary and unwise, knowing that *Alderson* v. *Maddison* (1) is now under appeal to the House of Lords, to attempt to state affirmatively the circumstances which would take a case out of the operation of the 4th section of the Statute of Frauds. I adopt the phraseology of the general rule, that there must be acts of part performance. What those acts must be I think it unwise to state at present, but I have a very strong opinion that payment of part or even of the whole of the purchase-money under any circumstances of which I am aware, are not sufficient to exclude the operation of the statute. In saying that, I venture to doubt the reasons given for the judgment in *Nunn* v. *Fabian* (6), which was a peculiar case, and one in which any Judge who desired to do justice between the parties would, if possible, have given the judgment there given. That was not the case of a payment of part of the purchase-money simply; there was a contract in writing which contained all the terms agreed upon by the parties; the whole of the purchase-money had, I think, been paid, and there was also a receipt in writing signed by the party sought to be charged. It might be said—although I do not say that it was—that the receipt could be sufficiently referred to or identified with the agreement in writing which contained all the terms, although it was not yet signed, so as to identify the payment with the terms which were in writing. I know not how that may be, but I feel a difficulty in putting that decision upon any principle of equity which had previously been determined. If I must say that I differ from that decision, I respectfully say that I do. I cannot go beyond this—that, according to all the cases in equity, payment of part or even of the whole of the purchase-money, if that be all, is not sufficient to exclude the operation of the statute; and that if payment of part or even of the whole of the purchase-money is the only act relied on, it seems to me that no evidence can be given to explain that act so as to make it a sufficient act to take the case out of the 4th section.

Rule discharged.

Solicitors—Wright & Pilley, agents for Ruston, Clark & Ruston, Brentford, for plaintiff; Gregory, Rowcliffes & Co., agents for G. D. Harrison, Welshpool, for defendants.

[IN THE HOUSE OF LORDS.]

1882. July 3, 4, 6. Aug. 1. } GLYN, MILLS, CURRIE AND COMPANY *v.* THE EAST AND WEST INDIA DOCK COMPANY.

Bills of Lading—Execution in Triplicate—Indorsement of One Set—Delivery on Production of Unindorsed Bills—Liability of Warehousemen — Merchant Shipping Act, 1862 (25 *&* 26 *Vict. c.* 63), *ss.* 66–78).

The consignees of a cargo of sugar obtained an advance from a bank, secured by the indorsement and delivery of one set of the bills of lading, which were made out in triplicate. The bills of lading stated on their face that they were executed in triplicate, and ended with the words "the one of which bills being accomplished, the others to stand void." The sugar was deposited by the master with a dock company under the provisions of the Merchant Shipping Act, 1862. *The consignees produced to the dock company one of the other sets of bills unindorsed, and the dock company, having no notice of the indorsement to the bank, delivered the sugar upon delivery orders signed by the consignees*:—Held, *that the dock company were not bound to enquire whether any of the sets had been indorsed, but were justified in delivering to the holder of one set in the absence of notice of the previous indorsement of another.*

This was an appeal from a judgment of the Court of Appeal, which reversed one of Field, J.

The case is reported in the Courts below 49 Law J. Rep. Q.B. 303; 50 ibid. Q.B. 62; Law Rep. 5 Q.B. D. 129; ibid. 6 Q.B. D. 475.

The appellants advanced a sum of 13,000*l.* to Messrs. Cottam, Mortan & Co. upon the security of a cargo of sugar consigned to them. The bills of lading were made out in triplicate, each containing the following words: "In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." The set of bills marked "first" were indorsed by Cottam, Mortan & Co., and delivered to the appellants.

The ship arrived in London on the 27th of May, 1878, and on the following day the cargo was deposited by the master in the respondents' docks. The master at the same time handed to the respondents a copy of his manifest, which named Cottam, Mortan & Co. as consignees. The copy was set out in a printed form, supplied by the respondents, which concluded by authorising them to deliver the cargo "to the consignees as above, or to the holders of the bills of lading."

The words "the consignees as above or to" were struck out before the master signed the form. On the 29th, the master served a notice to stop the sugar till freight was paid. On the 31st, Cottam, Mortan & Co. brought the second set of bills of lading unindorsed, and were entered by the respondents as owners. The stop for freight was subsequently removed, and in July the sugar was delivered to persons holding delivery orders from Cottam, Mortan & Co.

Cottam, Mortan & Co. became bankrupt in August, and the appellants then produced the bills of lading indorsed to them, and demanded the sugar from the respondents, who were unable to comply with the demand.

This action was then brought for the value. Field, J., who tried the case without a jury, gave judgment for the appellants, but it was reversed by the Court of Appeal.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Benjamin, Q.C.* (*Barnes* with them), for the appellants.—As soon as the bill of lading was indorsed and delivered to the appellants, they became the owners of the cargo. They could have brought an action on the contract of affreightment, and were liable to the shipowners for the freight—18 & 19 Vict. c. 111. ss. 1 and 2. As soon as the consignees had indorsed they ceased to be the holders of the bills of lading. The mere fact of their being in possession of one part was no evidence that they had not parted with their title to the goods. *Fearon* v. *Bowers* (1) is the first case on the point how far the shipowner is discharged by delivery to the holder of one part of the bill of lading. There it was held that the master might deliver to the holder of any part at his option. This case was said in the Court below to have been approved by Lord Loughborough in *Lickbarrow* v. *Mason* (2), but it was not approved as to this point by Lord Loughborough. There are, however, *dicta* of Dr. Lushington approving of *Fearon* v. *Bowers* (1) in *The Tigress* (3). The only other *dictum* is that of Lord Westbury in *Barber* v. *Meyerstein* (4), to the effect that the shipowner might be discharged by delivery to an indorsee of one part without notice of an earlier indorsement for value of another part—*Abbott on Shipping* (5). The doctrine laid down in *Fearon* v. *Bowers* (1) cannot be accepted as law now. But the present case, being not between rival indorsees, but between indorsee and consignee, is stronger in the appellants' favour. The meaning of the words "the one of which bills being accomplished, the others to stand void," is, the bill must be rightly accomplished, that is, by delivery to the consignee if he has not assigned, or to his assignee if he has. If the consignee brings only one part of the bill of lading he can be asked to explain where the others are; he must know whether he has indorsed them; and if he has he is not entitled to delivery.

(1) 1 H. Black. 364; 1 Sm. L.C. 8th ed. 782*n*.
(2) 1 Sm. L.C. 753.
(3) Brown & Lush. 30; 32 Law J. Rep. Adm. 97.
(4) 39 Law J. Rep. C.P. 187; Law Rep. 4 H.L. 317.
(5) Pt. 4. ch. 3. prop. 5.

It is contended, therefore, that even as against the shipowners the appellants would have had a good title. But the dock company were not in the same position as the shipowners. First, the erasure of the words "the consignees as above or to" in the copy of the manifest gave them notice not to deliver to the consignees except as holders of the bill of lading. Thus, under the terms of their contract with the master, the respondents were bound to deliver to the appellants. Secondly, they were bound to do so by the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), ss. 66–78, which put the dock company in the position, not of bailees from the consignees, but of custodians for the true owner. *Hollins* v. *Fowler* (6) and the cases there cited consequently do not apply. There is only one case where ostensible ownership is recognised at common law, namely, that of sale in market overt.

[Lord Blackburn referred to *Townsend* v. *Inglis* (7) and *Knowles* v. *Horsfall* (8).]

Sir Hardinge Giffard, Q.C., and *Cohen, Q.C.* (*Pollard* with them), for the respondents.—The dock company were in a better position than the shipowners. After the cargo has been released the bill of lading ceases to be a living instrument, and they hold as bailees. They may treat the ostensible owners as real owners. Here the appellants held out Cottam & Co. as the owners, and cannot therefore complain —*Hollins* v. *Fowler* (6). The indorsees allow the duplicate bills to remain with the consignees for the express purpose of their taking steps for disposing of them, and to prevent their credit from suffering. The practice is to deliver to the person who first presents a bill of lading, whether indorsed or not. The holder ought to present as soon as the ship arrives, in view of possible claims for demurrage. If he neglects to do so, and suffers loss thereby, it is his own fault.

Then, as to the argument that the dock company ought to have enquired of the consignees what they had done with the other bills of lading, see *Jones* v. *Smith* (9). Such enquiries would impair the value of negotiable securities. Besides, little would be gained by making them. It is usual for the consignor to retain one part, and it would be easy to answer that he had done so.

The Solicitor-General (*Sir F. Herschell, Q.C.*), in reply.—The pleadings state that the master delivered to the dock company, and no question is raised as to their being bailees of Cottam & Co.

It is idle to suggest that a merchant's credit would suffer by its being known that he had borrowed on bills of lading, it being every-day practice to do so; and there is no pretence for saying that the appellants held out Cottam & Co. as the owners.

As to the alleged usage to deliver to whoever first produces a bill of lading, no doubt it is a common practice. But many things are done in trade which those who do them know are not quite safe; they trust to their customers. The usage cannot be established unless it be shewn that where a wrong delivery is made the master or dock company has not been held liable.

The meaning of the words, "the one of which being accomplished," &c., is merely that the bills of lading are not for three separate sets of goods, but for one. But "accomplished" means "rightly accomplished" by delivery to the true owner.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—Having had the advantage of seeing in print the opinion of my noble and learned friend Lord Blackburn on this case, with which I agree, I shall content myself with making a very few observations.

Every one claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner, therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner. It is for the benefit of the shipper that the right to take delivery of

(6) 44 Law J. Rep. Q.B. 169; Law Rep. 7 H.L. 757.

(7) Holt's N.P. 278.

(8) 5 B. & Ald. 139.

(9) 1 Hare, 43; 11 Law J. Rep. Chanc. 83.

the goods is made assignable, and it is for the benefit and security of the shipowner that when several bills of lading, all of the same tenor and date, are given as to the same goods, it is provided that "the one of those bills being accomplished, the others are to stand void." It would be neither reasonable nor equitable, nor in accordance with the terms of such a contract, that an assignment, of which the shipowner has no notice, should prevent a *bona fide* delivery under one of the bills of lading, produced to him by the person named on the face of it as entitled to delivery (in the absence of assignment), from being a discharge to the shipowner. Assignment, being a change of title since the contract, is not to be presumed by the shipowner in the absence of notice, any more than a change of title is to be presumed in any other case, when the original party to a contract comes forward and claims its performance, the other party having no notice of anything to displace his right. He has notice, indeed, that an assignment is possible, but he has no notice that it has taken place. There is no proof of any mercantile usage putting the shipowner, in such a case, under an obligation to enquire whether there has, in fact, been an assignment or not; and, in the absence of such usage, I am of opinion that it is for the assignee to give notice of his title to the shipowner, if he desires to make it secure, and not for the shipowner to make any such enquiry. This conclusion is in accordance with the authorities which will be referred to by my noble and learned friend, and also with the principle of such decisions as those of your Lordships' House in *Shaw* v. *Foster* (10) and *The London and County Banking Company* v. *Ratcliffe* (11).

It was admitted in the argument at the bar that the right of the shipowner to deliver to the first person who claimed it by virtue of an indorsed bill of lading (the shipowner having no notice of any better title) could not be denied, although such person might not, in fact (if there had been a prior indorsement of another part of the bill of lading to another person for valuable consideration), have the legal title to the goods. It is clear, therefore, that the shipowner may be discharged by a *bona fide* delivery, under the terms of his contract with the shipper, to a person who is not the true owner; and I think there is no sufficient reason for refusing him the benefit of that contract, when the part of the bill of lading on which he makes a like *bona fide* delivery is not indorsed.

I have spoken of the "shipowner" throughout, because, in my opinion, the position of the dock company, for the purposes of the present question, is not in any respect different from that of the shipowner.

The appeal, therefore, ought, in my opinion, to be dismissed with costs.

EARL CAIRNS.—I also am of opinion that this appeal must fail. There is no necessity for going at length into any of the facts of the case, for on the facts there has really been no dispute; but I think it is desirable to state at the outset that the opinion which I have formed is that the respondents are under no higher liability in this case than the shipowner himself would have been, and, on the other hand, that they are not under any lower or less liability, and that the case may be looked upon, in a general point of view, as if the delivery had here been, not by the dock company, but by the shipowner himself. I think that that is satisfactory, because the opinion which your Lordships will express will be an opinion applicable generally to the case of shipowners, and will not be founded upon any special circumstances connected with the present case.

So also it appears to me that neither the appellants nor the respondents in this case can be said to be guilty of any laches whatever, much less of any want of good faith. There was no laches in law on either side, nor was there any bad faith. It is quite clear that Cottam, Mortan & Co. produced to the dock company, whom I will suppose to be the shipowner, one part of the bill of lading, and on the production of that part of the bill of lading the delivery of the goods took place.

Then that leads me to consider what is the position, with regard to a bill of lading of this kind, of a shipowner at an out-port? A shipowner or his agent at a distant port

(10) 42 Law J. Rep. Chanc. 49; Law Rep. 5 H.L. 321.

(11) 51 Law J. Rep. Chanc. 28; Law Rep. 6 App. Cas. 722.

undertakes to carry certain goods; he receives the goods upon a contract of affreightment; he, or his servant, the master of the ship, gives a bill of lading. I will suppose, in the first place, that he gives a bill of lading consisting of only one part. Now the contract in a bill of lading of that kind is, that the shipowner will deliver to the consignee, or to his order, or to his assigns, the goods which are undertaken to be carried. Of course, in a contract of that kind, it is obvious that questions of some difficulty and some embarrassment may arise. The assumption is that the person who ships the goods, or the consignee, will not necessarily be the person to whom the delivery is to be made. The delivery is to be made to him or, in the alternative, to his order or to his assigns. Questions, it is obvious, therefore, may arise: Has the consignee ordered the delivery to be made to any other person? Has he assigned the contract or the property in the goods? If he has, to whom has he assigned it? Are there more assigns than one, and, if so, in what order of assignment do they stand?

Now, if there were only one part of the bill of lading, the process, as it appears to me, would be an extremely simple one. The bill of lading would be the title-deed, and whoever came to the shipowner, or to the master of the ship, and demanded delivery of the goods, in whatever right he claimed, whether he claimed as the original consignee, or whether he claimed as a person coming by order of the consignee, or whether he claimed as the assign of the contract or of the property, in any of those cases all that the master of the ship (who is not a lawyer, and has not, perhaps, a lawyer at his side) would have to say is, "Where is your title-deed? Produce your title-deed." If he had not a title-deed, the master would be entitled to say, "I will not deliver these goods to you." If, on the other hand, he had the bill of lading, and if there was no fraud, and no notice of any different title brought home to the master, all that the master would have to do would be to deliver to the person having that title-deed, and then he would be free from any responsibility.

But the confusion, the difficulty and embarrassment have arisen from there not being what I have supposed, one title-deed, but there being more than one, in this case three parts of the title-deed, that is to say, of the bill of lading. Now, I ask the question, For whose benefit is it that there are those three parts? Certainly not for the benefit of the shipowner or for the benefit of the master. To them the presence of three parts of the bill of lading is simply an embarrassment. It is for the benefit of the shipper or of the consignee. I do not stop to enquire whether to them it is a benefit, or whether at this time of day (many of the reasons, if not all the reasons, for having bills of lading in parts being very much modified) it would not be better for every one that there should be only one part; that is a question for the mercantile world to consider. It is quite sufficient for me to say that it is certainly not for the benefit or for the convenience of the shipowner or of the master that there are three parts of the bill of lading.

Then what has the shipowner to do? The shipowner has to protect himself from that which is liable to cause difficulty or embarrassment to him, and the way in which, as it appears to me, he does protect himself is by stating that, although "the master or purser" "hath affirmed to three bills of lading"—that is to say, has signed three bills of lading, "all of the same tenor and date"—yet, notwithstanding that fact, "one of those bills of lading being accomplished, the others shall stand void," which I understand to mean, that if upon one of them the shipowner acts in good faith, he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others. If one is produced to him in good faith, he is to act upon that and not to embarrass himself by considering what has become of the other bills of lading. That appears to me to be the plain and natural interpretation of these words, having regard to the purpose for which they are introduced. I put it to the learned counsel who argued the case whether he could suggest any other explanation of these words which would give them a rational meaning, but I could not learn from the bar that there was any other explanation that could be suggested.

Then, that being the case, there has

occurred here exactly one of those instances in which the shipowner requires protection. He has had one of these bills of lading produced to him. I use the term "shipowner" because for this purpose I assume that the dock company is in the position of the shipowner. He has had in good faith one of the parts of the bill of lading presented to him; he has had no notice of any title at variance with that; he has acted upon the bill of lading so produced, and it appears to me that if he, or those who stand in his place, are not to be protected, the final clause might as well be struck out of the bill of lading.

Now it is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading that it has been signed in more parts than one, will be to require that all the parts are brought in—that is to say, that all the title-deeds are brought in. I know that that is the practice with regard to other title-deeds; and it strikes me with some surprise that any one would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert, and to take care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that, if they suffer, they suffer in consequence of their own act.

Whether that be so or not, it seems to me that in this case the dock company, standing in the position of the shipowner, require to be protected; that they have done that which it was their positive duty to do, and that the judgment of the Court below ought to be affirmed.

LORD O'HAGAN.—I also have had the advantage of reading the opinion of my noble and learned friend (Lord Blackburn), and its exposition of the law presents the view which, after serious consideration, I have adopted in common, I believe, with all your Lordships.

I cannot say that I have not had some hesitation in the adoption of it. The conflict of decision between able Judges of equal authority and equally divided; the diversities of reasoning even between those who in the result have agreed; the want of any recent evidence as to the usages of commercial men in these countries with reference to bills of lading, and especially such dealings with them as are the subject of our consideration, made me doubtful for a time; but I am satisfied upon the whole that the ruling of the Appellate Court was right, and ought to be upheld.

The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created and the duties imposed by it; and amongst them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the shipowner or the master. On the payment of the freight, and the removal of the stop order, it seems to me that they were bound as he would have been to deliver them to the person making presentment of the bill of lading. I think, in the absence of express decision, the weight of authority having relation to it sustains the judgment of the Court below; I think that usage, as far as we have any means of ascertaining it, is inconsistent with the plaintiffs' claim; and I think, finally, that principle and policy and the necessities of mercantile affairs are quite in favour of the action of the defendants.

As to authority, there is none which deals with the precise state of facts before us. The case of *Fearon* v. *Bowers* (1) was different from this, as there the person yielding up the goods was the captain of the vessel, and not the warehouseman, and he had to choose between two claimants—the consignee and the in-

dorsee—whereas there was only one claimant known to the defendants, and they had no notice of any other. I concur in the view of Lord Tenterden, that the law should not commit a discretion to the captain of a ship so unreasonably large and so capable of being put to evil uses. But that case could scarcely have been entertained at all, if the lesser power to hand goods to the holder of a bill of lading, *bona fide* and without knowledge of any adverse title, had not been assumed to be warranted by usage and by law. I do not think the approval of that case in *Lickbarrow* v. *Mason* (2) by Lord Loughborough and Mr. Justice Buller can be held to have established it in all its dangerous extent. The circumstances they were considering do not necessitate the minute examination or the complete rejection or adoption of its doctrine. But this, at least, may be said, that, unless the holder of a bill of lading was then understood to be entitled to receive the goods of which it guaranteed the delivery, we can scarcely conceive that the larger proposition would not have been at once repudiated. And in the case of *The Tigress* (3), before Dr. Lushington, when he refers to the case of *Fearon* v. *Bowers* (1), he does not expressly adopt it, in its fulness, as he did not need to do for the purpose of his judgment, but confined himself to approval of it, so far as it may be applied in the conditions of the case before him. He says of *Fearon* v. *Bowers* (1): "This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of his bill of lading. It is clear, therefore, that the master would at least have been justified in delivering to the plaintiffs, as holders of the first bill of lading presented, and it must be remembered that the bills of lading contain a proviso that, the first being accomplished, the others shall stand void." Plainly, Dr. Lushington considered the first presentment sufficient to entitle the holder to the delivery of the goods, and held that the delivery on such presentment was the "accomplishment" within the proper meaning of the instrument on which the others should "stand void." And accordingly the case is simply headed, "A master is justified in delivering the goods to the holder of the first bill of lading presented," which is the case of the defendants, who stand in the master's place. It seems to me that, taking these cases together, they constitute a reasonable body of authority in support of the judgment of the Court below.

Then, as to the practice in such matters, we have no parol testimony about it, nor any proof at the particular trial of this case; but we have the statement of Chief Justice Lee a long time ago, that a usage existed then which would have fully warranted the course of the defendants; we have his direction of a verdict founded on the proof of it; we have Lord Tenterden suggesting the limitation of the rule so acted on by the Chief Justice, but not denying its existence, or disapproving of it, save as to its excessive operation; and we have the uncontradicted assertion of a living Judge of great experience in mercantile cases, that it is still the "undoubted practice" to deliver "without enquiry" to the holder of a bill of lading.

And lastly, that principle and policy are in favour of such a practice appears to me reasonably plain, when we consider how impossible it would be for a master in a multitude of cases to institute satisfactory enquiry as to the transactions, *dehors* the part produced to him, which might qualify or destroy the right to the possession of the goods. The fact that so very few complaints of misdelivery are recorded during a century and more, either on the score of error or of fraud, demonstrates how little practical evil has come of the usage; whilst if it had not prevailed, the prompt and unfettered action required by the needs of commerce might have been much restrained in very many instances.

It is always painful to decide, when the decision must necessarily injure one of two blameless parties; but in this case the plaintiffs, who had the property, which secured the advance, undoubtedly vested in them by the indorsement of the bill of lading, have never lost their title to that property or the right to recover it, if wrongfully taken from them. If they had acted as the bank did in *Barber* v. *Meyerstein* (4), there could have been no risk of loss. They might have taken other precautions (such as getting all the three parts of the bill of lading) with a like result, and they are not now precluded from seeking redress

from any one who may have illegally obtained possession of their goods. But the defendants, who have done nothing *mala fide*, who have acted, as I conceive, according to usage and within their right, should not be made answerable for an error for the consequences of which they are not, in my opinion, legally or morally responsible.

I think that the appeal should be dismissed with costs.

LORD BLACKBURN.—This is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts.

There is, since the decision of *Lickbarrow* v. *Mason* (2), now nearly a hundred years ago, no doubt that before there was any statute affecting the matter, the bill of lading was a transferable document of title, at least to the extent, as was said by Lord Hatherley in *Barber* v. *Meyerstein* (4), that "when the vessel is at sea and the cargo has not arrived, the parting with the bill of lading is the parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself." And the very object of making the bill of lading in parts would be baffled, unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had. And the consequence of making a document of title in parts is, that it is possible that one part may come into the hands of one person who *bona fide* gave value for it, under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee or pawnee, and another part may come into the hands of another person, who with equal *bona fides* gave value for it, under the belief that he thereby acquired a similar interest. This cannot well happen unless there is a fraud on the part of those who pass the two parts to different persons, such as would in most cases bring them within the grasp of the criminal law, and from the nature of the transaction such a fraud must be speedily detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our Courts where the rights of the two holders have had to be considered. The last of those was *Barber* v. *Meyerstein* (4) in this House; and, so far as that decision extends, the law must be taken to be settled.

I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least, since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only, which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out.

So long as this practice continues, it is of vast importance not to unsettle the principles which have been already settled; and when a new case has to be decided, it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear, in many respects, a close resemblance to those in *Barber* v. *Meyerstein* (4), but they are not quite the same; and the question on the solution of which, in my opinion, the decision in the present case ought to depend, did not arise in *Barber* v. *Meyerstein* (4), though Lord Westbury did in that case mention it when he says, "There can be no doubt, therefore, that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property, and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner, having no notice of the first dealing with the bill

of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party; but although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods." That point did not arise, and Lord Westbury did not express any opinion on it. He only mentions it so as to shew that it was not decided either way.

In the present case, Cottam & Co., on the 15th of May, 1878, applied in writing to Glyn & Co., bankers in London, for an advance, on the security of certain bills of lading. From the terms of the application it is plain that the bankers were to have a property, with power of sale in the goods represented by the bills of lading, so far as was necessary to secure their advance, and that, subject thereto, Cottam & Co. were to remain owners of all the rest of the interest in the goods, and might do, as owners, everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by Lord Justice Brett—I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right.

Cottam & Co. delivered to the bankers as part of their security a bill of lading for twenty hogsheads of sugar by the *Mary Jones*, shipped by Elliott, in Jamaica, deliverable to Cottam & Co., or to their assigns, indorsed in blank by Cottam & Co. This bill of lading bore on the face of it, distinctly printed, the word "first," and at the end had the usual clause, "In witness whereof the master of the ship hath affirmed three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." There could be no doubt, therefore, that the bankers had distinct notice that there were two other parts of the bill of lading. It appears in *Barber* v. *Meyerstein* (4) that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had insisted on having all three parts of the bill of lading delivered to them, and so, no doubt, might Glyn & Co. have done here, but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty, and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud than the risk of offending a good customer by making enquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this be, it appears that Glyn & Co. made no enquiry, and were content to take the one part, and as, in fact, neither of the other parts had been transferred, the security which Glyn & Co. had was not impeached by such a prior transfer. And as the *Mary Jones* was then at sea, the question mainly discussed in *Barber* v. *Meyerstein* (4) does not arise in this case.

The *Mary Jones* arrived on the 27th of May, and next day the master reported her at the Customs, and the goods were there, for customs purposes, entered by Cottam & Co. as owners. All this was quite right, and did not require the production of any bill of lading; it could and ought to have been done as well if the other parts of the bill of lading had been delivered to Glyn & Co., or had remained locked up in the desk of the shipper Elliott in Jamaica.

The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Act, 1862, sections 66 to 78. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after the report of the ship, which would not in this case be till the 31st of May. But the master apparently being in a hurry, on the 28th of May prepared and signed a notice to the East and West India Docks to "detain all the

undermentioned goods which shall be landed in your docks, now on board the ship *Mary Jones* from Jamaica, whereof I am master, until the freight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to receive the directions of James Shepherd & Co. The whole cargo as per bills of lading." This stop was lodged with the dock company on the 29th of May.

The dock company, it appears, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest. And in this case the copy manifest was signed and lodged on the 28th of May. It is not necessary to enquire what would have happened if, before the seventy-two hours had expired, a duly authorised person had tendered the freight and demanded delivery, for no such thing occurred. And I think as soon as the seventy-two hours had elapsed the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then. The counsel for the respondents wished your Lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam & Co. were a party. I do not see any evidence of this; and, looking at the manner in which the admissions were made so as to apply not only to the *Mary Jones* but to two other ships mentioned in the sixth and eleventh paragraphs of the statement of defence, I should, if necessary, draw the inference that it was not the fact.

Then, on the 31st of May, on which the seventy-two hours had expired, Cottam & Co. brought down and shewed to the dock company a bill of lading with the word "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn & Co. It was not indorsed. The clerk of the dock company entered in the books of the company that Cottam & Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to shew that he had seen it and returned it to Cottam & Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the stop for freight was removed to the order of Cottam & Co., unless, in the meantime, they had got notice that another bill of lading was, as the witness says, out.

It appeared in *Barber* v. *Meyerstein* (4) that in the case of Abraham, whose honesty they seemed to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn & Co. have done in the present case. They did not do so. And the stop for freight having been removed, the dock company, though not till the month of July, delivered the goods to the order of Cottam & Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been indorsed to Glyn & Co., but having from the form of the bill itself noticed that there were two other bills of lading, either of which Cottam & Co., if dishonest enough, might have indorsed, and delivered for value to some other party.

The real question, I think, is, whether the dock company were, under such circumstances, justified in or rather excused for delivering to Cottam & Co.'s order, though, if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co., it would have been a misdelivery for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute, subject to a duty imposed by the statute to deliver them to the person to whom the shipowner was bound to deliver them. And, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them. So that I think the very point which has to be decided is that raised by Lord Westbury—namely, what will excuse or justify the master in delivering?

The case of *Barber* v. *Meyerstein* (4) settles that the mere fact that there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in the hands of the mort-

gagor or pledgor in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors Acts have a good title; but there is not in this case, any more than there was in *Barber* v. *Meyerstein* (4), any evidence to raise such a question.

But the master is not in the position of a purchaser from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading, in this case Cottam & Co., or their assigns—that is, assigns of the bill of lading, not assigns of the goods. And I quite assent to what was said in the argument, that this means to Cottam & Co., if they have not assigned the bill of lading, or the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear—he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfil his contract if he delivered them to any one else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished, the others to stand void.

In *Fearon* v. *Bowers* (1), decided in 1753, Chief Justice Lee is reported to have ruled "that it appeared by the evidence that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." Lord Tenterden says (I quote from the fifth edition, the last published in his lifetime, part 3, chapter 9, section 24): "But perhaps this rule might, upon further consideration, be held to put too much power in the master's hands." It is singular enough that one hundred and twenty-nine years should have elapsed without its having been necessary for any Court to say whether this rule was good law. It was suggested on the argument with great probability that, especially after the caution given immediately after the passage I have read in *Abbott on Shipping*, part 3, chapter 9, section 25, masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow, *a fortiori*, that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law; and I do not think it can be law, for the reason given by Lord Tenterden, it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other indorsement, I think he must deliver at his peril to the rightful holder or interplead.

But where the person who produces a bill of lading is one who, either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill, would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that, therefore, it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

It is not merely that, as Lord Justice Bramwell says, "it is the undoubted practice to deliver without enquiry to any one who produces a bill of lading"—that is, when no other is brought forward, and that the evidence given in *Fearon* v. *Bowers*

(1) must have proved that much, though it seems also to have proved more—but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on unless bills of lading were made in only one part. I cannot say, on this, anything in addition to what Lord Justice Baggallay says, and I quite assent to his reasoning there; I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is, that the shipowner stipulates that he shall not be liable on this contract if he *bona fide*, and without notice or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading, designating him—either as being the person named in the bill if it has not been indorsed, or if there be a genuine indorsement as being assign—as the person to whom the goods are to be delivered. In that case, as against the shipowner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James 1, in *Watts* v. *Ognell* (12). "That depends," says Mr. Justice Willes in *De Nichols* v. *Saunders* (13), "upon a rule of general jurisprudence, not confined to *choses in action*, though it seems to have been lost sight of in some recent cases, namely, that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from the obligation." The equity of this is obvious. It was acted upon in *Townsend* v. *Inglis* (7), where goods lodged in the docks by Reid & Co. were by them sold to Townsend, and a delivery order was given by Reid & Co. to Townsend. Townsend paid for the goods to Reid & Co.'s brokers, who misappropriated the money. Then Reid & Co. countermanded the order, and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reid & Co. and the dock company. Chief Justice Gibbs, a very great commercial lawyer, left to the jury the question as to whether Townsend was, on the evidence as to previous dealings, justified in paying the broker, which the jury found he was, and the plaintiff had a verdict against Reid & Co.; but he directed a verdict for the dock company, saying, "Though the skins were the property of the plaintiffs from the completion of the bargain, the company had made no transfer, and had no notice of their possessory title when they delivered the skins to Reid & Co." And in *Knowles* v. *Horsfall* (8) Chief Justice Abbott treats this as indisputable. Goods, part of which were in a warehouse, had been sold by Dixon to the plaintiff. Chief Justice Abbott says as to the parcel in the warehouse: "If the plaintiff had given notice of the sale to the warehouse keeper, the latter would not have been justified in delivering them to any other order than that of the plaintiff; but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there." I know of no case in which this principle has been departed from intentionally; and though it is very likely that it may have been sometimes lost sight of, I do not know to what cases Mr. Justice Willes alludes.

The sum involved in this case is not large; but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous. Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is therefore of great importance, and requires careful consideration. And that being so, I have felt some diffidence in differing from the two learned Judges who had below come to a different result. Mr. Justice Field seems to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord Westbury did not arise. Lord Justice Brett thinks that the master cannot be excused as against the first assignee of one part of the bill, who has the legal

(12) Cro. Jac. 192.

(13) 39 Law J. Rep. C.P. 297; Law Rep. 5 C.P. 594.

right to the property, for delivering under any circumstances to one who produces another bill of lading bearing a genuine indorsement, unless he would be excused in all circumstances—in other words, unless *Fearon* v. *Bowers* (1) is good law to its full extent. In this I cannot agree. I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. And I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it, or as yet claimed under it. At all events, he would not be safe in such a case in delivering without further enquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him.

And I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Act, 1862, section 66, &c., is under an obligation, cast upon him by the statute, to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master.

And I find, as a fact, that this was the position of the respondents here.

And, on this *ratio decidendi*, I think that the appeal should be dismissed, with costs.

Lord Watson. — I am of the same opinion, and I shall only say a word or two in explanation of my own views, because I have had the opportunity of considering the elaborate judgment of my noble and learned friend (Lord Blackburn), in which I entirely concur.

It appears to me that the goods in question were placed in the custody of the respondents under the provisions of the Merchant Shipping Act of 1862; and I agree with your Lordships that, in the circumstances of this case, the duty of the dock company, in regard to their delivery, differed in no respect from that of the shipowner.

The nature and extent of the obligation undertaken by the shipowner to deliver the goods at the end of the voyage must depend upon the terms of the bills of lading, which contain his contract with the shipper; and every assignee of a bill of lading has notice of, and must be bound by, those stipulations, which have been introduced into the contract, for his own protection, by the shipowner. In the present case, the master, for the convenience of the shipper, subscribed to three bills of lading of the same tenor and date, by which he undertook to deliver the goods, at the port of London, to Cottam & Co. or their assigns, and each bill of lading bore the usual affirmation by the master that he had signed three in all, "the one of which bills being accomplished, the others to stand void."

That is a stipulation between the shipper and the shipowner, and is plainly intended to give some measure of protection to the latter, after he has delivered the goods upon one of the bills of lading, against subsequent demands for delivery, at the instance of the holders of the other bills of the set. It is, in my opinion, inconsistent with any reasonable construction of the stipulation, that the shipowner should be held liable in all cases to deliver to the true owner of the goods, because in that case it would give him no protection. The stipulation can have no intelligible meaning or effect, if it does not under some circumstances enable the shipowner to resist a claim for second delivery, preferred by the holder of a bill of lading, who has, by virtue of it, the right of property in the goods. On the other hand, it is obvious that the stipulation is meant exclusively for the protection of the shipowner, and is not intended to confer upon him the right to select the person to whom he shall deliver, or to affect the rights *inter se* of the holders of the bills of lading. That being so, I think that the natural and reasonable construction of the language of the contract is that the shipowner is to be exonerated by delivery upon one of the

bills of lading, although it does not represent the property in the goods, with this qualification, that, *bona fides* being an implied term in every mercantile contract, the delivery must be made in good faith, and without knowledge or notice of any right or claim preferable to that of the person to whom he so delivers.

LORD FITZGERALD.—I also have had the advantage of reading the judgment of the noble and learned Lord (Lord Blackburn). I had previously arrived at the same result, though not entirely on the same grounds, and I concur in the decision which has now been announced.

I entirely concur in the condemnation of the law laid down in *Fearon* v. *Bowers* (1) (if it was so laid down there), that in case of presentation to the captain of two or more parts of the bill of lading by parties claiming to be holders, and adversely to each other, the captain was not bound to look into the merits of the particular claims, but had a right to deliver to which of the claimants he thought proper. Such a rule would go far to enable the captain to violate his contract and his duty, and to "accomplish" his obligation by delivery to one who he may have had reason to believe was not the real owner of the goods.

Before the close of the argument Earl Cairns suggested for your Lordships' consideration that the practice of having so many parts of the bill of lading all in the nature of originals was introduced for some purpose of convenience to the consignor or consignee, and that the concluding passage, "the one of which being accomplished, the others to stand void," was probably intended for the protection of the shipowner. He further suggested that in carrying into effect that object, the true interpretation should be that if the master, acting in entire good faith, delivered the cargo on one part of the bill of lading either to the consignee named in it as such, or to an indorsee of one part, he would have "accomplished" the bill of lading so far as it is a contract for carriage and delivery, and be protected, even though another part of the bill of lading should prove to be outstanding in the hands of a prior indorsee for value, but of which the master had no notice.

It is singular that on this point there seems to have been hitherto no direct decision, though the present form of bills of lading has been in use, and the practice of having several parts of the bill of lading has been followed, for considerably more than a century.

In *Fearon* v. *Bowers* (1), tried in 1753, there were three parts and the same form; and in *Wright* v. *Campbell* (14), in 1767, there were two parts, and the form the same. *Fearon* v. *Bowers* (1) may be considered to bear on the question of construction, for Chief Justice Lee is there represented to have said, "All the captain had to do was to deliver on one of the bills of lading."

In the absence of any authority to the contrary, I have come to the conclusion that, so far as the bill of lading is a contract for carriage and delivery, the noble and learned Earl suggested the true interpretation of "one of which being accomplished, the others to stand void."

I should have had some difficulty in assenting to the proposition, either generally or as applicable to this particular case, that a delivery which, if made by the master, would justify or excuse him, would equally justify or excuse the warehouseman. The position of the warehouseman when the stop order had been removed seems to me to be different, and possibly his liability more extensive. If we had to determine that question, it would be necessary to consider carefully the position of the warehouseman, and to have regard to the Merchant Shipping Amendment Act (25 & 26 Vict. c. 63), ss. 66 to 78, and in this particular case to his obligation under the memorandum at foot of the manifest. I refrain from pursuing this topic further, as I do not consider it to be a necessary part of your Lordships' decision, nor does it, in my opinion, affect the result.

A loss has been sustained by the wrongful act of Cottam & Co., which must be ultimately borne by one of three parties. Williams & Co. are not before us, and I say nothing as to whether or not they may

(14) 4 Burr. 2047.

be ultimately subject to any liability; but as between the plaintiffs and the defendants in this suit it seems to me that the plaintiffs who, by their omissions and want of proper caution, and by their misplaced confidence in Cottam & Co., have enabled Cottam & Co. to commit that wrong, ought, in reason and justice, to bear the loss.

The plaintiffs omitted to get up from Cottam & Co. the second and third parts of the bill of lading, or to make any enquiry about them. They were not bound to do so, nor did that omission affect their legal title, but it left them open to a risk from which they are now to suffer loss. The insecurity created by that omission might have been rectified by notice of their title to the master, or by notice to the defendants at any time before the actual delivery to Williams & Co. The plaintiffs used no proper caution, and took no action of any kind in relation to the goods until after the misdelivery to Williams & Co., and the discovery of the insolvency of Cottam & Co.; and if we could put the question to them, "Why did you pursue so incautious a course?" their reply probably would be, "We trusted to the integrity of Cottam & Co., and we left the entry and warehousing of the goods, the payment of freight and all matters of detail to Cottam & Co." It cannot be truly said that, as between the plaintiffs and defendants, the plaintiffs are innocent sufferers by the act of a third party.

The result has been the misdelivery of the goods, which the plaintiffs charge as an act of wrong by the defendants rendering them liable in this suit. Having regard to the plaintiffs' legal title, it was no doubt a misdelivery; but the defendants are excused by law from the consequences of an error into which they have been led by the plaintiffs.

In *Lickbarrow* v. *Mason* (2) Mr. Justice Buller, in delivering his opinion in this House, observes "that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy and as certain as possible;" and I may amplify his language by interpolating after "property" the words "and the advance and security of capital."

It will be observed that, in this present decision of your Lordships, nothing has been expressed adverse to that proposition. We give full effect to the bill of lading as a symbol of title to the property comprised in it, and to its indorsement as a transfer of that title as full and effectual as if accompanied by a delivery of actual possession.

We do no more than lay down a rule of construction, and apply a well-established principle of law to this particular case, and we hope it may serve as a landmark for the future.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors—Murray, Hutchins & Stirling, for appellants; Freshfields & Williams, for respondents.

1882.
Nov. 27.
Dec. 20.

CHICHESTER *v.* HILL AND SON.

Negotiable Instrument—Stolen Bond—Conviction of Thief on Prosecution of Owner—Owner's Right to recover—Bona fide Holder for Value—24 & 25 Vict. c. 96. s. 100.

The owner of a negotiable instrument which has been stolen has no title to it as against a bona fide holder for value, although he has prosecuted the thief to conviction.

By 24 & 25 Vict. c. 96. s. 100, "If any person guilty of . . . . knowingly receiving any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property . . . . and convicted thereof, in such case the property shall be restored to the owner or his representative. And in every case in this section aforesaid, the Court . . . . shall have power to . . . . order the restitution of the said property in a summary manner. Provided, that if it shall appear before any award or order made that any . . . . negotiable instrument shall have been bona fide taken or received by transfer or delivery

by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanour, been stolen, . . . in such case the Court shall not award or order the restitution of such security."

A New Zealand Government Bond (which is a negotiable instrument), the property of C., was stolen from his house. A person was subsequently convicted, on the prosecution of C., for receiving the said bond well knowing it to have been stolen. The bond having passed into the hands of H., a bona fide holder for value, C. brought an action against H. to recover it:—

Held, *that the proviso in the above section not only prevented a summary order being made for the restitution of a negotiable instrument, but was an answer to an action brought to recover such instrument.*

This was a Special Case stated for the opinion of the Court, the material allegations in which were as follows:—

The plaintiff is the rector of Dewsteignton, in Devonshire, where he resides, and the defendants are stock and share brokers, carrying on business in the City of London.

In or about the month of July, 1880, the plaintiff's dwelling-house was entered and (*inter alia*) a New Zealand Five per cent. Consolidated Government Bond for 1,000*l.*, and numbered 1713, the absolute property of the plaintiff, was then feloniously stolen from his said house.

In November, 1880, one Walter Selwyn deposited with the Westminster Branch of the Imperial Bank (Limited) the said bond, and obtained thereon an advance of 800*l.* from the said bank.

On or about the 16th day of November, 1881, the said Imperial Bank (Limited) delivered to Messrs. Oates & Cockburn (jobbers in stocks and shares) the above-mentioned bond No. 1713 in part performance of a contract for sale.

On the 26th day of November, 1881, the said Walter Selwyn having been indicted by the Director of Public Prosecutions, within the meaning of section 7 of the Prosecution of Offences Act, 1879 (1), for having feloniously received the said bond well knowing the same to have been stolen, was convicted thereof at the Central Criminal Court on that day.

On the 30th day of November, 1881, H. L. Scott & Son obtained from the said Messrs. Oates & Cockburn the said bond No. 1713.

In fulfilment of a contract of sale the said H. L. Scott & Son tendered to the defendants on the said 30th day of November, 1881 (*inter alia*), a certain New Zealand Government Bond for 1,000*l.*, which is numbered 1713, and is the bond so stolen from the plaintiff, and the defendants then accepted and took delivery of such bond in part completion of their said contract of purchase, and paid the purchase price thereof.

The said bond was at the date and under the circumstances above-mentioned *bona fide* taken or received by the defendants by delivery thereof to them for a just and valuable consideration without any notice or reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, or taken or otherwise improperly obtained. No writ or order of restitution was applied for or has been obtained by the plaintiff.

The defendants are still in possession of such bond, and while the same was in their possession a demand for delivery thereof up to the plaintiff as being his property was duly made by the plaintiff's solicitors upon the defendants upon the 30th day of December, 1881, who refused, and still refuse, to deliver the same to the plaintiff, and upon such refusal this action was brought.

The said bonds of the Government of New Zealand are valuable securities and negotiable instruments, and are so universally dealt with and treated.

The question for the opinion of the Court is: "Is the plaintiff entitled to have such bond restored to him by the defendants?"

(1) By section 7 of the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), it is enacted (*inter alia*) that "The prosecution of an offender by the Director of Public Prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or enforcing any right whatsoever, have the same effect as if such person had been bound over to prosecute and had prosecuted the offender."

Chichester v. *Hill.*

If the Court shall be of opinion in the affirmative judgment shall be given for the plaintiff in the action for delivery up to him of the said bond, together with, as damages, for the wrongful detention thereof, interest at five per cent. per annum, from the date of such demand until the date of such delivery, on the nominal value thereof, and with costs of the action.

If the Court shall be of opinion in the negative, judgment shall be entered for the defendants in the action, with costs.

Sir Hardinge Giffard, Q.C. (with him *Pollard* and *Arbuthnot*), for the plaintiff.—By the first part of section 100 of 24 & 25 Vict. c. 96, "the property shall be restored to the owner or his representative." If those words are not qualified by the proviso at the end of the section, the plaintiff is entitled to recover in this case. The proviso says only that the particular mode of recovery pointed out in the second part of the section shall not be applicable to negotiable instruments. That cannot affect the right to recover them in any other way.

[FIELD, J.—Your argument must go the length of saying that the owner could recover a five-pound note or five sovereigns, if they could be identified.]

Yes. The proviso certainly does not in terms limit in any way the general words of the earlier part of the section, which says broadly that the property shall be restored. *Prima facie* a statute is to be understood according to the ordinary and natural meaning of its words. The heading of the section—"As to the restitution and recovery of stolen property"—shews that a distinction was intended to be taken between the right to a summary order of restitution and the right of action. According to *Scattergood* v. *Sylvester* (2), the conviction creates a title. That decision in effect says that the now repealed statute 21 Hen. 8. c. 11, which is in effect identical with 24 & 25 Vict. c. 96. s. 100, except that there is no proviso as to negotiable instruments, overrode the common law doctrine as to a sale in market overt and attached to the conviction a new right of property. That case was decided under 7 & 8 Geo. 4. c. 29. s. 57, which is identical with 24 & 25 Vict. c. 96. s. 100. That case followed *Horwood* v. *Smith* (3), in which it was assumed both by Lord Kenyon and by Mr. Justice Buller that the property would have revested in the plaintiff upon the conviction of the thief.

[WILLIAMS, J.—It is too late to question those cases; but I am satisfied that it was not the meaning of the statute of Hen. 8 to revest property sold in market overt in the original owner on the conviction of the thief.]

He also cited *The Queen* v. *Lord Mayor of London* (4) and *Walker* v. *Matthews* (5).

C. Russell, Q.C. (with him *H. Tindal Atkinson*).—The authorities appear to have very little to do with this case. It is submitted that there cannot be a right of action where there is no power to order restitution. The case of *Scattergood* v. *Sylvester* (2), which was relied upon by the other side, is the case of a chattel other than a negotiable security, and has no application here. That case only decides that the order of the Court for restitution is not a condition precedent to the right of action. Lord Selborne lays down the rule that should be applied in construing this section in *The Caledonian Railway Company* v. *The North British Railway Company* (6). He says, "The more literal construction ought not to prevail, if (as the Court below has thought) it is opposed to the intention of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

Sir Hardinge Giffard, in reply.

FIELD, J. (after stating the facts and the question set out in the Special Case).—That question depends on the construction of section 100 of 24 & 25 Vict. c. 96. But in order to construe that section it is necessary to look at the previous legislation upon the subject. At common law, the larceny of a chattel did not alter the

(2) 15 Q.B. Rep. 506; 19 Law J. Rep. Q.B. 447.

(3) 2 Term Rep. (Durn. & E.) 750.

(4) Law Rep. 4 Q.B. 371.

(5) 51 Law J. Rep. Q.B. 243; Law Rep. 8 Q.B. D. 109.

(6) Law Rep. 6 App. Cas. 122 (Scotch).

ownership: the owner was entitled to recover it, if he could. But there was this curious provision, that unless the thief was attainted by appeal of felony at the suit of the owner on fresh pursuit, the property was forfeited to the Crown. If the thief was attainted of felony, the owner then had his property restored to him; and that was the only mode of recovering his property at that time. An indictment of the thief at common law did not enable the owner to get back his property. To remedy that state of things he was enabled by 21 Hen. 8. c. 11, to get back his property whether the conviction was by indictment or attainder. At common law the property in stolen goods was divested from the true owner by a sale in market overt. But, notwithstanding that, it was held, under the Act of Hen. 8, in the case of *Horwood* v. *Smith* (3), that the property revested in the owner upon the conviction of the thief, though in the hands of an innocent purchaser in market overt. By 7 & 8 Geo. 4. c. 29, negotiable instruments are for the first time made the subject of larceny. It became, therefore, necessary to alter the provision in the Act of Hen. 8. That was done by section 57 of the same Act. Upon that section, the case of *Scattergood* v. *Sylvester* (2) was decided. That case followed *Horwood* v. *Smith* (3), the Judges holding that goods which have been stolen revest in the original owner upon conviction of the felon, and can be recovered from the purchaser of them in market overt, although no order for restitution has been made; in other words, that an order for restitution is not a condition precedent to the recovery of the goods. Sir Hardinge Giffard contends in the present case that 24 & 25 Vict. c. 96. s. 100, consists of two quite distinct parts, the first declaring that the owner of stolen property is on conviction entitled to have it back, the second giving merely a cumulative remedy by enabling the Judge at the trial to make an order of restitution; and, therefore, that the owner of this bond is entitled to have it back under the express words of the first part of the section. I will only refer to one more case, that of *The Queen* v. *Stanton* (7). In that case a prisoner was convicted of stealing a Bank of England note, the property of the prosecutrix. The note had been paid to a firm of bankers, into whose hands it had passed, and had been cancelled by the Bank of England. The prosecutrix applied for an order that the note should be delivered up to her. Mr. Justice Vaughan, after consulting with Mr. Justice Williams, refused to make an order, on the ground that the note was no longer property, it having been cancelled. In the present case it is not disputed that, on the morning of the conviction, Messrs. Oates & Cockburn were the owners of this bond; the plaintiff, therefore, has to make out that the conviction restored the property to him. The language of the statute is as follows: "If any person guilty of . . . . knowingly receiving any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative."

The case of *Scattergood* v. *Sylvester* (2) was decided on that branch of the section. What it decides is that where the owner of cattle that have been stolen has prosecuted the thief to conviction, but has not obtained an order of restitution, he is entitled to have the cattle restored to him in an action against a purchaser in market overt. The section then goes on to say, "And in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanour, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." So far the section is merely a repetition of the old legislation of the 21 Hen. 8. c. 11. But it continues: "Provided, that if it shall appear before any award or order made that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bona fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or with-

(7) 7 Cr. & Ph. 431.

out any reasonable cause to suspect that the same had, by any felony or misdemeanour, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case the Court shall not award or order the restitution of such security." The question is whether the defendants do not come exactly within those words. No order of restitution was applied for at the trial of Selwyn; but if such order had been applied for, it would unquestionably have been competent to the defendants to prove the facts set out in the Special Case, and no order could then have been made.

But Sir Hardinge Giffard says, It is immaterial whether an order for restitution could have been made; I am entitled under the first part of this section, as construed in *Scattergood* v. *Sylvester* (2). He endeavoured to give a reason why there should be a right of action when the power to make an order for restitution was expressly taken away; but he could really give no reason for it. It is clear that no order of restitution could have been made in this case. That being so, it is to be remembered that it is a well-known rule of construction that you are to give effect to what appears to be the intention of the Legislature, looking at the whole section. What, then, was the intention here? The plain intention is to protect the *bona fide* holder of valuable securities by the same Act by which Parliament for the first time made them the subject of larceny. If the contention for the plaintiff is right, persons in the position of the defendants might go down to the Old Bailey and satisfy the Court that they were *bona fide* holders within the section, and no order could be made against them; yet the very next morning a demand might be made upon them for the instrument to be given up, and they would have no defence to an action if they refused to part with it. If that is so, it is impossible to give any real effect to the proviso in this section. In my judgment, the Legislature intended to protect persons dealing in these securities, the negotiability of which is so important in the business transactions of the present day. They intended to enact substantively, with regard to these negotiable instruments, that where a good title like this comes in, it shall not be divested upon the conviction of the thief.

The difficulty in the way of this construction is the case of *Scattergood* v. *Sylvester* (2) and the old case of *Horwood* v. *Smith* (3): because many of the arguments against the construction contended for by the plaintiff in this case apply with equal force to the construction held to be the right one in those cases. That is a difficulty that pressed on my mind during the argument, and to a certain extent still does so; but it is not equal to the difficulty of taking away the protection that I believe the statute intended to afford to the *bona fide* holder. Sir Hardinge Giffard says that if we construe the section as we are doing we shall be making law. Of course we cannot do that. But the rules of construction are elastic in this respect. We must not add to the words of the section, nor must we take away any words; but we may alter the collocation of the words, in order to give effect to the meaning of the whole section. I think that the proviso in the section we are construing is not merely applicable to the words that it immediately follows, so as only to prevent a summary order being made against *bona fide* holders of negotiable instruments; I think it is intended to cut down the general right of property given by the first part of the section, and to protect the *bona fide* holder against all proceedings. In so deciding, it seems to me that we are deciding both according to law, and according to what is just between the parties, though, no doubt, it is a hard case on both sides.

WILLIAMS, J.—I am of the same opinion. It seems to me that by this section the title of the *bona fide* holder of a stolen instrument is protected against that of the person from whom it was stolen. As to the construction that has been put upon the statute of Hen. 8, I may say that I do not think it ever was the intention of that statute to affect the title acquired by a purchaser in market overt. And, upon searching, I find that that was the opinion of all the Judges when the Act was first passed. But a practice sprang up at the Old Bailey of disregarding that title, and the practice became too inveterate to be disregarded by the Judges. So that I am not at all

pressed by the construction that has been put upon the statute of Hen. 8. I think it is clear that the title of the *bona fide* holder for value was intended to be protected in the public interest.

Judgment for the defendants.

Solicitors—Freshfields & Williams, for the plaintiff; Lindsay, Mason & Greenfield, for defendants.

1882. Nov. 29. } HENRY AND OTHERS (*petitioners*) *v.* ARMITAGE (*respondent*).

Municipal Elections Act (38 & 39 *Vict.* c. 40), *s.* 1, *sub-s.* 2—*Nomination Paper—Misnomer—Omission of Date—"Situation of the Property in respect of which the Burgess subscribing is enrolled on the Burgess Roll."*

The provision in section 1, *sub-section* 2, *of the Municipal Elections Act*, 1875, *that "the nomination paper shall . . . . be in the form No.* 2 *set forth in the first schedule" to that Act, is mandatory and not directory, and requires the strictest particularity; and a burgess subscribing a nomination paper, if qualified as a burgess in respect of a successive occupation, is bound to put after his name the description of all properties constituting his qualification as successive occupier, and not only a description of the property occupied by him at the time of subscribing such nomination paper.*

This was a Special Case stated pursuant to an order of Williams, J., dated the 20th of December, 1881, and the following are the important facts in the same:—

At an election holden on the 1st of November, 1881, for the Pallion Ward, in the borough of Sunderland, in the county of Durham, William Moore Skinner and the respondent, John Armitage, respectively were candidates for the office of councillor, and the defendant was declared duly elected under the following circumstances: The said William Moore Skinner and Henry Armitage were the only candidates nominated. The usual nomination papers were delivered to the town clerk at least seven days before the day of election, and the said town clerk gave notice to the said William Moore Skinner that he had been nominated as a candidate. The first of the nomination papers was in this form:—

"Nomination Paper.—Borough of Sunderland.

"Election of Councillor for Pallion Ward in the said borough, to be held on 1st day of Nov., 1881.

"We the undersigned being respectively enrolled burgesses for Pallion Ward in the said borough, hereby nominate the following person as candidate at the said election:—

Surname	Other names	Abode	Description
Skinner	*Wm.* Moore	No. 16 Belle Vue Crescent, Tunstall Lane	Solicitor

"(Signed)

"638. 1. John Young, of *6 Bell Vue Crescent. Reg. No. 638.

"2. William Cuggy, of *No. 25 Potts Street. 241.

"We the undersigned being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

"Dated the twenty-~~sixth~~ second day of Oct., 1881.

"(Signed)

"1. George Robson Wayman, of *8 Belle Vue Road. Reg. No. 649.

"2. Thomas T. Baker, of *15 Belle Vue Road. Reg. No. 646.

"3. David Hastings, of *Holmlands. Reg. No. 652.

"4. Joseph Simpson, of *25 Hume St. Reg. No. 317.

"5. Thomas Harbottle, of *17 Hume St. No. 311.

"6. John Thomas Brignall, of *Willow Pond Terrace. No. 291.

"7. G. McHenry, of *21 Washington St. No. 190.

Henry v. *Armitage*.

"8. James Stephenson, of *25 Bell St. No. 153.

"* The number on the Burgess Roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the Burgess Roll.

"N.B.—Only one person must be nominated by this paper."

This nomination paper was endorsed as follows:—

"Delivered by Mr. Skinner, the candidate, at 4.47 p.m., this Saturday the 22nd Oct., 1881. Notice of nomination given him at same time, F. M. B. Objections by Mr. John Armitage, annexed, allowed. Wm. Wilson, Mayor, 24 Oct., 1881."

F. M. B. are the initials of the town clerk to whom the nomination paper was delivered.

To this nomination objection was made in due statutory form by John Armitage, of Pallion Farm, the reasons for such objection being stated to be that—first, the nomination paper did not state the "surname and other names of the person nominated" as required by section 1, sub-section 2, of 38 & 39 Vict. c. 40 (1); and, secondly, the "situation of the property in respect of which" John Young, the proposer in the said nomination paper, is "enrolled on the Burgess Roll," had not been set out in the said nomination paper as required by the note to schedule 1, form 2, of that Act.

The second of the said nomination papers was in this form:—

"Nomination Paper. Borough of Sunderland.

"Election of Councillor for the Pallion Ward in the said borough, to be held on 1st day of Nov., 1881.

"We the undersigned being respectively enrolled burgesses for Pallion Ward in the said borough, hereby nominate the following person as a candidate at the said election:—

Surname	Other names	Abode	Description
Skinner	William Moore	Belle Vue Crescent	Solicitor

"(Signed)

"1. Thomas Ray, of *25 St. Luke's Road.

"2. John Lynn, of *21 St. Luke's Road.

"We the undersigned being respectively enrolled burgesses for the said ward, do hereby assent to the nomination of the above person as a candidate at the said election.

"Dated this day of , 188 .

"(Signed)

"210. 1. Wm. R. Robson, of *52-53 Washington St.

"178. 2. John Lanandan, of *2 Washington St.

"50. 3. George Wate, of *No. 1 East Moor Road.

"189. 4. John Mitchell, of *20 Washington St.

"277. 5. John Henry, of *No. 1 North Rutland St.

"24 43. 24. 6. James Bainbridge, of *No. 14 St. Luke's Road.

"319. 7. Henry Riddell, of *No. 27 Hume St.

"~~314~~ 315. 8. James Paxton, of *21½ Hume St.

"* The number on the Burgess Roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the Burgess Roll.

"N.B.—Only one person must be nominated by this paper."

(1) 38 & 39 Vict. c. 40. s. 1. sub-s. 2: "At any such election every candidate shall be nominated in writing; the writing shall be subscribed by two enrolled burgesses of such borough or ward as proposer and seconder, and by eight other enrolled burgesses of such borough or ward as assenting to the nomination. Each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more. Every person nominated shall be enrolled on the burgess roll of the borough, or a person whose name is inserted in the separate list at the end of the burgess roll, as provided by section three of the Act thirty-two and thirty-three Victoria, chapter fifty-five, and shall be otherwise qualified to be elected. The nomination paper shall state the surname and other names of the person nominated, with his place of abode and description, and shall be in the form No. 2 set forth in the first schedule to this Act, or to the like effect. And the town clerk shall provide nomination papers, and shall supply any enrolled burgess with as many nomination papers as may be required, and shall, at the request of any such person, fill up a nomination paper in the manner prescribed by this Act."

Henry v. *Armitage.*

To this nomination paper formal objection was duly taken by Mr. John Armitage on the grounds that—first, the nomination paper was "not dated as required by schedule 1, form 2, of 38 & 39 Vict. c. 40;" and, secondly, that the "situation of the property in respect of which John Lynn, the seconder of the said nomination paper, is enrolled on the Burgess Roll," had not been "set out in the said nomination paper" as required by the note to schedule 1, form 2, of the said Act.

The entry of the name and qualification of the said John Young in the burgess roll was as follows:—

"638. Young, John, 6 Belle Vue Crescent; houses in succession, 6 Belle Vue Crescent and Linden Terrace."

The entry of the name and qualification of the said John Lynn in the burgess roll was as follows:—

"21. Lynn, John, Monkwearmouth; workshops in succession, Saint Luke's Road and Ropery Road."

The mayor allowed the objections, and, there being no other candidate, declared the said John Armitage duly elected. This election was petitioned against and a Special Case ordered to be stated.

The question for the consideration of the Court was, Whether the mayor was right in the circumstances above-mentioned in deciding that the said William Moore Skinner was not duly nominated.

MacClymont, for the petitioners.—The contention that "Wm." is not equivalent to "William" can hardly be seriously supported. "Wm." always means "William" and never means anything else. Could it be said that the omission to dot an "i" would invalidate the paper? But the point has been decided in *The Queen* v. *Bradley* (2).

Then, as to the description of the property: The Act does not require a copy of the burgess roll. Sub-section 2 of section 1 of 38 & 39 Vict. c. 40 (1) does not require the direction in the schedule to be followed literally. It is enough if the voting paper contains entries to the like effect. These directions are directory, not imperative. In *Soper* v. *The Mayor of Basingstoke* (3) it was decided that the directions in the schedule need not be literally followed if they are substantially complied with. *Clarke* v. *Gothard* (4) will be relied on by the other side; but the reasoning of the Judges in that case shews that all they supposed necessary was a substantial compliance with the directions in the schedule. The nominator must give his address at the place in respect of which he is entitled to be enrolled. The case of a person qualified in respect of houses occupied by him in succession was not a case contemplated by those who framed the schedule, and all that was meant was that the address should be given for the purpose of identification. The word "of" shews that the place of occupation at the time of signing is the address to be given. In any case this is a mere mistake which can mislead no one.

Atherley Jones, for the respondent.—In *Soper* v. *The Mayor of Basingstoke* (3) the question was not whether the situation of the property was correctly set forth, but whether an inaccurate description of that situation which could not mislead any one rendered the nomination void. Here there is no description of the situation of the property at all. *Clarke* v. *Gothard* (4) is in favour of the respondent, as it is distinctly held there that the provision as to the number is mandatory. Lopes, J., there asks, "if the insertion of the number in the burgess roll of the burgess subscribing may be dispensed with, why may not the situation of the property in respect of which he is enrolled on the burgess roll be omitted and his mere ordinary signature be sufficient?" *The Queen* v. *Bradley* (2) is cited in *Mather* v. *Brown* (5), but does not seem to have been followed. The date of the nomination is important, as from it the time runs within which the town clerk has to perform his duties.

MacClymont, in reply.

FIELD, J. (on Dec. 20).—This is a question raised by Special Case as to the

(2) 3 E. & E. 634; 30 Law J. Rep. Q.B. 180, *nom. The Queen* v. *Plenty.*

(3) 46 Law J. Rep. C.P. 422; Law Rep. 2 C.P. D. 440.

(4) 49 Law J. Rep. C.P. 474; Law Rep. 5 C.P. D. 253.

(5) 45 Law J. Rep. C.P. 547; Law Rep. 1 C.P. D. 596.

meaning of section 1, sub-section 2, of the Municipal Elections Act, 1875 (1), which provides a scheme for the nomination of candidates for municipal offices. Such nomination was not necessary before the Ballot Act of 1872. By the Municipal Elections Act, 1875, it is provided that nine days before the election to a municipal office the town clerk shall issue a notice in the form given in schedule 1 to that Act, form 2; that every candidate shall be nominated in writing, and that the nomination paper shall be in the form set forth in schedule 1, form 2, or to the like effect. This nomination paper shall state the surname and other names of the person nominated. There are other requirements, but the important objection taken to this nomination is that the words, "shall be in form 2, set forth in the 1st schedule to this Act, or to the like effect," are highly mandatory, and enjoin the greatest particularity, whereas, in fact, this nomination paper does not state the situation of the property in respect of which the subscribing burgess is enrolled on the burgess roll. Form No. 2, in schedule 1, is as follows: [His Lordship then read the form.] Opposite each A. B. and C. D., after the word "of," there is placed an asterisk, and at the foot of the form there is a note in these words:—"The number on the Burgess Roll of the burgess subscribing, with the situation of the property in respect of which he is enrolled on the Burgess Roll." In this case the proposer in the first nomination paper was: "John Young," who, it may be, misled by the word "of," after the asterisk put his address merely and his register number. But it so happened that Young's qualification was not an entire single occupation, but what is known as a "successive occupation," and by omitting to put down his entire qualification and naming both properties which he had occupied in succession, he had, it is said, failed to describe the situation of the property in respect of which he was enrolled on the burgess roll.

It appears to me that this is evidently an incorrect statement of such situation. It was contended for the petitioners, that if this is an incorrect statement the nomination is not invalidated, because the words "shall be in form 2, set forth in the 1st schedule," are only directory; but I am unable to see that that is so; nor can I alter the decision of the mayor, who decided that this did render the nomination void. There is no certain rule to guide the decision of the Court in these cases, and in some cases words of a similar import have been held to be directory; but in them the intention of the Legislature that they should be directory is, I think, very clear. Here I can see no such intention. One might think that the number in the burgess roll would have been sufficient, but the Legislature has seen fit to say that the situation of the qualifying property must be stated in the nomination paper. But, besides these principles to be deduced from the words of the Act, we have a decision in the case of *Gothard* v. *Clarke* (4), where the omission of the date was held to vitiate the nomination. In that case, although this point was not actually decided, it was alluded to, by way of illustration, by Mr. Justice Lopes, in a manner that seemed to treat it as a less arguable point than the question of date. He there says, "I think the decision of the mayor was right. . . . If the insertion of the number in the burgess roll of the burgess subscribing may be dispensed with, why may not the situation of the property in respect of which he is enrolled on the burgess roll be omitted? . . . in this way the whole note to the schedule would be frittered away, and the security provided by the Legislature for the identification of the subscribing burgesses be destroyed." I cannot reverse the decision of the mayor in this case, and must, therefore, answer the question submitted to me in favour of the respondent.

Appeal dismissed with costs.

Solicitors—T. Balfour Allan, for petitioners; Johnson & Weatheralls, agents for Bowey & Brewis, Sunderland, for respondent.

[IN THE HOUSE OF LORDS.]

1882. July 11, 14, 15. Aug. 1. } THE INMAN STEAMSHIP COMPANY (LIMITED) *v.* BISCHOFF AND OTHERS.

Marine Insurance—Time Policy on Freight—Loss—Option to Charterer to Abate Freight if Ship Unseaworthy.

A ship was chartered by the Admiralty from the appellants. The appellants covenanted that the ship should be seaworthy during her employment, and the charterers agreed to pay freight as long as she should efficiently perform the services required. The charter also contained a clause authorising the charterers, if the ship became incapable, from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, to retain arrears of pay, put the ship out of pay, or make an abatement. The appellants insured with the respondents for three months on freight outstanding. At the end of one month the ship struck on a rock and became unseaworthy, and the charterers refused to pay freight from that date:—Held, *that the loss sustained by the appellants was not a loss of freight, but was to be regarded as a mulct inflicted after freight had been actually earned; and that the risk of such loss was not covered by an ordinary policy on freight outstanding, but required to be specially insured against.*

This was an appeal from a judgment of the Court of Appeal reversing one of Brett, L.J. The case is reported in the Courts below, 50 Law J. Rep. Q.B. 440; Law Rep. 6 Q.B. D. 648.

The action was brought by the present appellants upon a time policy of insurance of freight of their ship *City of Paris*. The facts, which are fully stated in the Lord Chancellor's judgment, are shortly as follows:—The ship had been chartered by the Commissioners of the Admiralty to convey troops to South Africa. On her way out she struck upon a rock in Simon's Bay and became unseaworthy. The commissioners, acting under a discretionary power in the charter-party, declined to pay freight from the date of the ship striking on the rock. The question was, whether the appellants had suffered a loss of freight through peril of the sea. Brett, L.J., held that they had; the Court of Appeal were of the contrary opinion.

Benjamin, Q.C., and *D. French*, for the appellants.—The practice as to time-charters is that freight runs on during the whole time, even if the ship is inefficient—*Havelock* v. *Geddes* (1). In the charter-party here provision was made against its doing so. The insurers had notice of the charter-party, and must be taken to have known the special as well as the general clauses, if such knowledge were material, which it is not. It is contended that perils of the sea put the ship in such a state that the Government were able to refuse freight and did refuse it.

[LORD BLACKBURN.—You have to make out that the Government were justified in refusing freight for the period between the time of striking on the rock and the removal of the stores.]

She was not then efficiently performing her contract, but was a mere warehouse in harbour.

[LORD BLACKBURN referred to *Beatson* v. *Shanck* (2).]

Brett, L.J., held that the Government were justified in refusing freight on the principle of *Jackson* v. *The Union Marine Insurance Company* (3).

[LORD BLACKBURN.—That was a voyage policy, not a time policy.]

The charter-party is incorporated with the policy, and the covenant to pay freight is limited to the time during which the ship remains efficient. The covenant to keep the ship efficient cannot therefore be treated as an independent covenant giving the right to a cross action. The inefficiency of the ship must be a defence to an action for freight.

Cohen, Q.C., and *Barnes* (*C. Russell, Q.C.*, with them), for the respondents.—Under the charter-party freight would run on in spite of inefficiency unless the Government did some act to put an end to it. The exercise by the Government of its option was the cause of the loss of freight, not the perils of the sea.

(1) 10 East, 555.
(2) 3 East, 233.
(3) 44 Law J. Rep. C.P. 27; Law Rep. 10 C.P. 125.

Inman Steamship Co. v. *Bischoff, H.L.*

The following authorities were cited :— *Geipel* v. *Smith* (4), *Hadley* v. *Clarke* (5), *Ripley* v. *Scaife* (6), *The Mercantile Steamship Company* v. *Tyser* (7), *De Vaux* v. *Salvador* (8), *Ionides* v. *The Universal Marine Insurance Company* (9), *Hadkinson* v. *Robinson* (10), *McSwiney* v. *The Royal Exchange Assurance Corporation* (11), *Taylor* v. *Dunbar* (12), *Philpott* v. *Swann* (13), *Everth* v. *Smith* (14), *Anderson* v. *Wallis* (15) and *Arnould's Marine Insurance* (16).

Benjamin, Q.C., in reply.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE).—The question in this appeal is, whether a loss of freight by the exercise of a power of mulct or abatement reserved by charter-party to the charterers, which power in this case arose and was exercised by reason of the ship being temporarily rendered inefficient for the service on which she was engaged by perils insured against, is a loss for which the insurers are liable, under an ordinary time policy "on freight outstanding." It has been held by the Court of Appeal that they are not so liable, on the ground that the perils insured against were not the proximate cause of the loss.

Although the charter-party is not mentioned in the policy, nor is the freight described as chartered freight, an insurance on freight must necessarily have reference to some contract of affreightment, under which, during the time covered by that policy, freight might be earned; and to ascertain what the freight insured was, in case of loss, the actual contract of affreightment must necessarily be regarded. In this case the insurers had express notice, by the letter of the 19th of February, 1879, in which the order for the insurance was given, that the *City of Paris*, the ship mentioned in the policy, was an Inman steamer, then about to proceed on a voyage to Natal on Government charter. There were, at that time, hostilities in progress between this country and the Chief of Zululand, and the Government charter was for the use of the ship as a transport to convey troops and stores. That charter had reference to the general regulations for Her Majesty's transport service, and the special terms contained in it were in substance similar to those which had been long in use in Government charters for similar purposes, as appears from the case of *Beatson* v. *Shanck* (2). Under these circumstances it appears to me that the question arising upon the policy ought to be determined in the same way as if the charter-party had been seen by the insurers and referred to in the policy; though not, of course, so as to extend the contract of the underwriters, by any unnecessary implication, to anything not properly covered by the express terms of the policy.

The charter-party (dated the 20th of February, 1879) was for the service and employment of the ship as a transport, on monthly hire, for the term of three calendar months certain, and thenceforward until the Board of Admiralty should give notice of discharge; such notice to be given when the ship was in port within the United Kingdom. The shipowners contracted to keep the ship in every respect seaworthy and fit for the service in which she was engaged; and the Board of Admiralty agreed to pay for the hire and freight of the ship at the rate of 25*s.* per ton per calendar month, during such time as the ship should be continued in Her Majesty's employ, and should duly and efficiently perform that service, upon certificates, and by monthly instalments, with certain reserves, in the manner therein mentioned, one month's freight being paid in advance. This agreement, however, of the Board of Admiralty was subject to a proviso, thus expressed: "That if, at any time or times

(4) 41 Law J. Rep. Q.B. 153; Law Rep. 7 Q.B. 404.
(5) 8 Term Rep. 259.
(6) 5 B. & C. 167.
(7) Law Rep. 7 Q.B. D. 73.
(8) 4 Ad. & E. 420.
(9) 14 Com. B. Rep. N.S. 259; 32 Law J. Rep. C.P. 170.
(10) 3 Bos. & P. 388.
(11) 14 Q.B. Rep. 634; 18 Law J. Rep. Q.B. 193.
(12) 38 Law J. Rep. C.P. 178; Law Rep. 4 C.P. 206.
(13) 11 Com. B. Rep. N.S. 270; 30 Law J. Rep. C.P. 358.
(14) 2 M. & S. 278.
(15) 2 M. & S. 240.
(16) 5th ed. p. 715.

thereafter, it should be made to appear to the commissioners that any delay had been caused or had accrued by breach of orders or neglect of duty, or that the said ship had become incapable, from any defect, deficiency, or breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it should and might be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they should adjudge fit and reasonable." There is nothing else which I think material in the charter-party. Upon the construction of this charter-party, I am of opinion that it was not a condition precedent of the contract of the Board of Admiralty to pay the monthly hire and freight of the ship, that she should "duly and efficiently perform the service" for which she was engaged—*Boone* v. *Eyre* (17) and *Havelock* v. *Geddes* (1). I am also of opinion that the ship could not be discharged from that service (without the consent of the shipowner) elsewhere than within some port of the United Kingdom; and that the power reserved to the commissioners to "put the ship out of pay," for any of the causes mentioned, had reference only to a retention of the monthly payments, which ought otherwise to have been made, so that no exercise of that power could result in a loss of freight. The power, therefore, upon the exercise of which the present question depends, is that of making "such abatement by way of mulct out of the hire or freight of the said ship" as the commissioners should adjudge fit and reasonable; being the same power which, in the case of *Beatson* v. *Shanck* (2), already referred to, was adjudged by the Court of Queen's Bench to be valid in law. This, according to the terms of the charter-party, was a power depending upon a judgment to be exercised, not by any officer or officers in charge of troops or stores on board the ship, but by the commissioners for executing the office of Lord High Admiral.

The facts which are material are these: The ship proceeded with troops and stores to Simon's Bay, and there, on the 21st of March, 1879, she struck upon a rock, receiving such serious injury that she was rendered unseaworthy and incapable of efficiently performing the service for which she was engaged until she had received extensive repairs, which were not completed (so as to make her again seaworthy and fit to sail or to perform the service contracted for) until the 23rd of May following, which was after the expiration of the time covered by the insurance. The freight down to the 21st of March, 1879, when she struck on the rock, was duly paid. On the 17th of April, 1879, Captain Adean, the senior naval officer in Simon's Bay, instead of granting the usual certificate on which monthly payments were to be made according to contract, noted, on the form provided for that purpose, that the ship had been "inefficient since 21st March, 1879, having touched the Roman Rock and sustained much damage"; also, that the *City of Paris* was discharged from Her Majesty's service 17th April, 1879, having been retained so long on account of removal of Government stores, &c." The troops and stores on board had, in fact, remained in the ship until they could conveniently be transferred to other vessels, an operation which was not completed by the local agents of the Government until the 17th of April, 1879.

The agents of the Government having declined to continue the employment of the ship, she returned to England in July, 1879; and a correspondence between her owners and the Board of Admiralty or their solicitors, which had been commenced when she was on her voyage homeward, was continued till the 2nd of August, 1879. The owners did not profess to be able to insist upon any legal claim, but they asked for equitable consideration from Her Majesty's Government; and the Board of Admiralty ultimately decided to make them some allowance in respect of the expenses of the voyage homeward, but declined to pay freight for the period subsequent to the 21st of March, 1879.

Having regard to the construction and legal effect of the charter-party, it appears to me that the acts of Captain Adean at

(17) 1 H. Black, 273*n*.

Simon's Bay, and the form of certificate signed by him on the 17th of April, may be laid out of the case, inasmuch as the charter-party did not authorise the Board of Admiralty, and still less authorised their local agents, to discharge the ship from the service in which she was engaged, until she had returned to the United Kingdom; and the power of making an abatement by way of mulct out of freight was reserved only to the Board themselves, and cannot be regarded as having been finally exercised by them until after the ship's return to the United Kingdom. If the shipowners had voluntarily consented to a variation of the terms of the charter-party, involving a relinquishment of their claim to freight (which does not appear to have been the case), this could not have thrown upon the insurers any liability to which they would not otherwise have been subject—*Everth* v. *Smith* (14) and *Philpott* v. *Swann* (13).

The result is, that, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charter-party; but to have been subsequently, in July, 1879, defeated under the power of abatement by way of mulct reserved by the contract to the Board of Admiralty. It has not been without doubt, or (I must add) without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately and immediately resulting from the perils of the seas insured against, as to make it payable under the terms of the policy by the insurers.

The general principle of *causa proxima, non remota spectatur*, is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent from the observations of Chief Baron Pollock in *Montoya* v. *The London Assurance Company* (18); of Chief Justice Erle in *Ionides* v. *The Universal Marine Assurance Company* (9), and from *Bondrett* v. *Hentigg* (19). Nor do I think that the question can entirely depend upon the difference between a condition precedent (without which the right to freight would never accrue) and a condition subsequent, by which it might be defeated. The observations of Baron Bramwell at the conclusion of the judgment in *Jackson* v. *The Union Marine Insurance Company* (3), and what took place during the argument in that case, as stated by Baron Cleasby, appear to me to be adverse to so narrow a view. If, in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers or their agents to determine the contract and their liability to further freight on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea, for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels. But between such a case, and that of a subsequent mulct under a special power, such as that contained in this charter-party, after freight had been earned, which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson* (10), *Taylor* v. *Dunbar* (12) and *McSwiney* v. *The Royal Exchange Assurance Corporation* (11) seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, under such circumstances, of such a special power, is different from the risk of loss by perils of the seas, and ought to have been insured against in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined,

(18) 6 Exch. Rep. 458; 20 Law J. Rep. Exch. 254.

(19) Holt N.P. 149.

it seems to be a real distinction, and to justify the judgment of the Court below.

Upon the whole, therefore, I am unable to differ from the opinion which is entertained by others of your Lordships who heard this appeal, and I must move your Lordships to affirm the judgment appealed from, and to dismiss the appeal, with costs.

LORD BLACKBURN.—This is an action on a time policy in the ordinary form entered into in the name of Joyce, Shore & Co., who were brokers for the plaintiffs "for and during the space of three calendar months, commencing the risk on the 20th day of February, 1879, and ending on the 19th of May, 1879, both days inclusive," "on the *City of Paris* steamship." The subject-matter of insurance is specified as "on freight outstanding," the perils are the usual perils, including those of the sea. The defendants are underwriters who had subscribed this policy.

The question is, whether, under the circumstances after stated, there has been any loss of freight against which the underwriters are bound by their contract to indemnify the plaintiffs.

The adventure in respect of which the plaintiffs intended to make this assurance was under a charter-party under seal, made on the 20th of February, 1879, between the Commissioners of the Admiralty (for and on behalf of Her Majesty) of the one part, and Charles F. Ellis (for and on behalf of the now plaintiffs, owners of the *City of Paris*) of the other, by which the owners let and the commissioners hired and took on freight the *City of Paris* "for service and employment as a transport on monthly hire, for the space of three calendar months certain, and thenceforward until the commissioners" shall cause notice to be given to the plaintiffs or the master in charge of the ship "that she is discharged from Her Majesty's service, such notice to be given when the said ship is in port in the United Kingdom." The first month's pay was paid in advance. Before the underwriters agreed to the insurance they were informed that the *City of Paris* was the Inman steamer about to proceed on a voyage to Natal on Government charter, and they might if they pleased have seen that charter, so that there would have been no ground for setting up any defence on the ground of non-disclosure or concealment, and no such defence was set up. But though the underwriters knew that this was the adventure upon which the ship was bound, and that there was such a charter-party, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy is to be read as if the charter-party was set out in it so as to affect its construction. The construction of the policy remains that the underwriters are to make good any loss occasioned to the subject-matter of the insurance in this policy described as "freight outstanding." "Freight," says Lord Tenterden, *Flint* v. *Flemyng* (20), "as used in the policy of insurance, imports the benefit derived from the employment of the ship,"—so that description covers the monthly hire of the ship for time. But as soon as it is ascertained that the policy attached on the hire under a particular charter-party, the charter-party must be read in order to see how the subject-matter was affected by the misfortune which happened. Under one charter-party a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the assured's right to recover the hire of the vessel whilst she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second I do not see how it could properly be denied that there was such a loss. But the construction of the charter-party may be such, and this is the case now at bar, that it is a nice question whether the pecuniary loss which the assured have sustained in consequence of a peril of the sea is one which does or does not occasion a loss of the hire. If it does not occasion such a loss, though the consequence may be one which might have been insured against by an apt description

(20) 1 B. & Ad. 48.

(for there are always underwriters to be found who, if satisfied as to the premium, will underwrite any risk), the underwriters on freight have not insured against it. Whether the individuals who subscribed this policy would have refused to insure at all on such a risk as being too speculative for them, or would have been willing to insure on an increased premium, or would have been willing to insure without any increase of premium, I cannot tell. If what has happened is not a loss of freight within the meaning of the policy, they have a right to refuse to indemnify against it.

The construction, therefore, of this charter-party is all-important. I will now read what I think the material parts of it, slightly abridging them, and then state the facts proved, as to which I think there is now no dispute. I may first observe that I do not think it makes any difference in the construction of the charter-party that the charterers here are acting on behalf of Her Majesty, nor that the regulations of Her Majesty's transport service are incorporated in and form part of the charter-party, and that two cases, that of *Beatson* v. *Shanck* (2) and *Havelock* v. *Geddes* (1), are very material authorities as to the principles on which this charter-party should be construed.

After the passage which I have already read, the charter-party proceeds: "And the shipowner covenants with the commissioners in manner following—that is to say, that the said ship shall at all times during the continuance of this charter be in every respect seaworthy and properly equipped and found at the cost of the said owners; and that the said ship shall proceed to such ports or places (with or without convoy at the option of the commissioners) as the commissioners or any officer authorised by them shall from time to time order and direct, and so from time to time during the continuance of the said ship in Her Majesty's service; and that in the performance of all services required to be performed under the regulations aforesaid, the said master and his crew with his boats shall be aiding and assisting to the utmost of their power; and that the master of the ship shall obey all orders and instructions which he may receive from the commissioners, or any officer authorised by them, and the master shall in all respects comply with the said regulations for Her Majesty's transport service. In consideration of which covenants and conditions it is agreed by the said commissioners for and on behalf of Her Majesty in manner following—that is to say: That the shipowner shall be allowed and paid for the hire and freight of the said ship at the rate of twenty-five shillings per ton per calendar month for the number of tons above-mentioned" (that is, 3,081 tons), "during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged. That the shipowner shall, on signing and sealing hereof, be entitled to receive a bill for one calendar month's freight upon account, and in part payment, according to the rate and tonnage aforesaid: provided it be certified by the inspecting officer that the said ship is ready to proceed on Her Majesty's service. And after the said ship shall have been in the said service two calendar months from the commencement of the said service, and the shipowner shall have produced to the said commissioners a certificate in the required form, the shipowner shall be entitled to receive a further bill for a moiety of one month's freight upon account as aforesaid; and after the said ship shall have been in the said service three calendar months, a further bill for another moiety of one month's freight upon account; and each month after, during the ship's continuance in the said service, if such certificate as aforesaid shall have been produced, the said second named party shall be entitled to receive a further bill for one month's freight on account, and shall be paid the balance of freight on the passing in office of the requisite accounts and documents after the discharge of the said ship, all which aforesaid payments shall be made in England. Provided always, and it is hereby agreed and declared, that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders or neglect of duty, or that the said ship became incapable, from any defect, deficiency, breach of orders or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case

it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months, as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire of the freight of the said ship as they shall adjudge fit and reasonable."

I do not think any other part of the charter-party is important.

The facts proved and admitted are, that the *City of Paris* began her service on the 18th of February, 1879, and the owners were paid a month's hire in advance. She sailed with troops and stores for the Cape, and when entering Simon's Bay, on the 21st of March, 1879, she struck upon a rock, and sustained such injuries as rendered her incapable of performing efficiently the services of a transport till they were repaired. The troops were taken out and sent on to Natal; the stores were left in her till they also were taken out on the 17th of April. The date at which the bill for a moiety of the third month's pay would have become payable was the 18th of April, 1879, and on the 17th of April, 1879, a certificate was given on the regular printed form used in the transport office, the portions filled in in writing being indicated by italics:—"Monthly certificate of the efficiency of a transport. I certify that the *City of Paris*, transport No. 11, of 1,974 tons register, Mr. John Harry M. Fulton, master, is at this date in Her Majesty's service, fit in all respects for the service on which she is employed, and complete, according to her charter-party and the transport regulations, in hull, spars, stores, machinery and boilers and crew (including a competent clerk), and that the master has, since the date of the last certificate, conducted himself properly, been obedient in command, and complied with the regulations and instructions furnished for his guidance. Dated at Simon's Bay, the 17th day of April, 1879. E. S. Adean, Captain and Senior Naval Officer. *City of Paris* was discharged from H.M. service 17th of April, 1879, having been retained so long on account of the removal of Government stores, &c. Inefficient since 21st of March, 1879, having touched the Roman Rock and sustained much damage. Date on which the preceding certificate was granted, 17th March, 1879." And on the same day this memorandum was handed to the master: "Memorandum 17th of April, 1879. The hired transport, No. 11, being now cleared of all Government stores and fittings, you are acquainted that the *City of Paris* is this day discharged from Her Majesty's service. Dated on board Her Majesty's ship *Tenedos*, in Simon's Bay, this 17th day of April, 1879. E. S. Adean, Captain and Senior Officer. To the Master of the hired transport No. 11, *City of Paris*."

The ship was repaired as speedily as possible, and was made efficient. It is not quite clear on the evidence whether this was on the 15th of May, 1879, four days before the policy expired by efflux of time, or some days later, and I do not think it material. She was tendered to the Government, but refused, and she came home. Then the owners, on the 16th of June, 1879, applied to the Director of Transports, who referred their claim to the Solicitor of the Treasury, who reported that they had no legal claim beyond the 21st of March, 1879. The Commissioners of the Admiralty paid the owners for the hire of the ship up to that day, and, as a matter of grace, paid for the coal consumed in bringing the *City of Paris* home from Simon's Bay. The owners say, and it seems quite clear say truly, that had it not been for the accident, which was a peril of the sea, they would have received pay from the 21st of March, 1879, till the 20th of May, 1879, when the policy expired by efflux of time, and that they did not receive it at all. And they claim against the underwriters on freight to be indemnified against this in proportion to their subscriptions. Lord Justice Brett was of this opinion, and the plaintiffs before him had judgment against the underwriters on their respective subscriptions. The Court of Appeal reversed this judgment.

It is obvious that the pecuniary damage (a word which I use in preference to loss, to avoid prejudging the question) to the assured was precisely the same whether the hire for these two months was, in consequence of the peril of the sea, never earned, or whether the commissioners had, in consequence of the peril of the sea, a right to make abatement by way of mulct to such amount as in their judgment was

fit and reasonable, and to deduct that from the pay, and thought it fit and reasonable to deduct the whole. But the difference to the underwriters is considerable. In the first case the hire is clearly lost by the peril insured against. In the other, I think it cannot properly be said that the hire has been lost at all, though the assured have had an equivalent mulct levied out of it.

The Courts below have not entered into the question of what was the construction of the charter-party in any detail, Lord Bramwell, in the Court of Appeal, rather putting the judgment on the maxim *causa proxima, non causa remota spectatur*, which is, no doubt, perfectly good law, and saying something about *causa causans* and *causa sine qua non*. I must own that I have always sympathised with Lord Colonsay in *Rankin* v. *Potter* (21), where he says: "Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes;" which, I think, he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the fact it is best to keep clear of such philosophical mazes. And, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight.

It seems to me clear that neither Captain Adean at the Cape, nor the commissioners at home, nor any one else, had power to discharge the *City of Paris* before the three months certain for which she was hired. Had she totally perished, so that she never could have been employed at all again, the hire would have ceased from the time of her destruction, but here use was made of her as a store ship till the 17th of April, and after she was repaired she was capable of performing the work of a transport efficiently.

In *Havelock* v. *Geddes* (1), where by the terms of the charter-party the defendants had bound themselves to pay a monthly hire, and the shipowners had, as here, covenanted, without any exception of the perils of the sea, to keep the vessel efficient, Lord Ellenborough says, at p. 566, "The question, then, is whether, because the plaintiff has undertaken to keep the vessel tight, &c., the defendants have a right to deduct anything out of the freight they are to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired. And we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain, they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter-party is, that whilst those repairs are going on, the ship is to be considered in the defendants' service, and the defendants liable to continue their payments." No question as to insurance arose in that case, but it seems to me clear that, if Havelock had insured his freight, he could not have recovered anything in respect of the perils of the sea causing the necessity for those repairs, for no part of the freight was thereby lost; any damage occasioned by the ship would be borne by the underwriters on ship; any extra expenses to which he was put in consequence of his covenant would have to be insured by a special description.

It is, however, argued that in this charter-party the words in the covenant to pay the freight "during such time as the said ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged," amount to such a stipulation as Lord Ellenborough refers to.

In *Maude and Pollock on Shipping* (3rd ed. p. 235), it is said, I think quite accurately, "It is often difficult in construing charter-parties to ascertain whether particular stipulations amount to conditions precedent. This is to be determined by seeking for the intention of the parties as apparent on the instrument and from the surrounding circumstances, and by applying the ordinary rules of construction to each particular case. It does not depend on any formal arrangement of the words, but on the reason and sense of the thing

(21) 42 Law J. Rep. C.P. 169; Law Rep. 6 H.L. Cas. 160.

as it is collected from the whole contract. Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract, will be construed not to be a condition precedent. It must, however, be recollected that this rule, although a very useful one, is only a rule of construction, or means of discovering the intention of the parties, to be applied where the words will bear either sense. For it is clear that the Courts will not make contracts for the parties, and that if they use language which distinctly shews that they intend such a stipulation to be a condition precedent, it will be so construed. Constructions, however, leading to absurd and unreasonable results will be avoided, if this can be done without violence to the terms used, because, where the intention is not clearly expressed, the parties are not to be presumed to have meant to make an absurd or unreasonable contract." In this case the Government did receive some benefit from the employment of the ship between the 21st of March and the 17th of April, though she was disabled from duly and efficiently performing the service for which she was engaged, and cases may easily be supposed in which they might have received more. I am, therefore, strongly inclined to think that the words relied on, even if they stood alone, would not amount to a condition precedent. But it is not necessary to decide the point, for the words are materially qualified and their effect altered by what follows, which shews that the charterers were relying on the stipulation construed in *Beatson* v. *Shanck* (2). There in a transport charter the provision, as stated in the report, was that "upon the loss of time, breach of orders, or neglect of duty by the said master, or from the ship's inability to execute or proceed on the service on which she might be employed, being made to appear, the said commissioners should have free liberty, and be permitted to mulct or make such abatement out of the freight and pay of the ship as should be by them adjudged fit and reasonable."

The words in the charter-party now before us are slightly different, and there is introduced a power to the commissioners to "retain in arrear the pay of the ship for two months, as aforesaid, and to put the ship out of pay," which, as I think, must be construed as enabling them, not to discharge the ship, but to withhold the giving of the monthly bills previously stipulated for for two months, during which time the commissioners would have time to consider how they should use the power to make abatement by way of mulct out of the pay. I think that *Beatson* v. *Shanck* (2) puts the proper construction upon this clause. If any of the specified cases, including inability from any cause whatever to perform efficiently the service contracted for, arises, the parties have agreed that the commissioners may make such abatement by way of mulct as the commissioners shall adjudge fit and reasonable. All that a Court of law can enquire into is whether there was such a case as to give the commissioners jurisdiction; if there was, even if they make an abatement which, in the opinion of the Court, was neither fit nor reasonable, the Court cannot interfere. And I think that the commissioners may properly take into consideration many things, besides the mere inability, so that it is not at all clear that the resolution to pay nothing for the period from the 21st of March to the 17th of April, though the ship was then retained in the service, and actually used, might not be reasonable and fit, though it certainly seemed to me at first to be an inequitable resolution. But can it be said that the making such an abatement by way of mulct or fine, not necessarily because of the peril of the sea, is a loss of the freight, though power is given to retain and levy it out of the freight? I think not, any more than the power conferred on the Admiralty Court to give damages against the ship for a collision occasioning damage to another ship, and enforce the payment by means of a proceeding *in rem* against the ship, is a loss of the ship. That was *De Vaux* v. *Salvador* (8). The prejudice which the owner of the ship sustains in the last case is a consequence of the peril of the sea, the collision, and it may be and every day is insured by a running down or collision

clause now in common use, but it is not a loss of the ship. It may be doubted if the prejudice which the shipowners in this case sustained from the abatement by way of mulct is so direct and immediate a consequence, for it may have been imposed, or, at least, its amount increased, for many other reasons. And it might be difficult, though I think possible, to frame a clause to cover it; but I think that it should be insured, if at all, under a clause framed for the purpose, as it is not a loss of freight. I therefore think that the judgment of the Court of Appeal is right, and should be affirmed.

LORD WATSON.—The terms of the policy of the 22nd of February, 1879, appear to me to be sufficient to include freight to be earned under a time charter. And, seeing that the respondents when they accepted the insurance had notice that the *City of Paris* was under a contract of charter-party, I am of opinion that the policy attached to the freight therein stipulated, whether they did or did not choose to inform themselves of the particulars of the contract; and, consequently, that the respondents became liable for such part of that freight as might be lost through any of the risks insured against during the period covered by the policy.

The *City of Paris* commenced her services under the charter-party on the 18th of February, 1879, one month's freight being paid in advance; and, upon the 21st of March, whilst conveying troops from this country to Natal, she struck upon a rock in Simon's Bay, and sustained such damage that she could not proceed on her voyage until substantial repairs had been made. These repairs were not completed so as to admit of the vessel putting to sea, until a few days before the policy came to an end, on the 19th of May, 1879. Meantime the troops and stores which she carried were transferred to other vessels, an operation which lasted from the 21st of March to the 17th of April, and on the latter date the senior naval officer in command at Simon's Bay formally intimated to her captain that the *City of Paris* "is this day discharged from Her Majesty's service."

There are two facts in the present case which have not been disputed. The first of these is, that the injury sustained by the vessel in Simon's Bay, and her consequent detention there whilst undergoing necessary repairs, were due to perils of the seas, within the meaning of the policy. The second is, that the Commissioners of the Admiralty, who were the charterers, have not paid, and refuse to pay, freight subsequent to the 21st of March, 1879. Accordingly the only question which arises for decision is, whether the freight which the vessel, in the absence of any casualty, would have earned between the 21st of March and the 19th of May, 1879, is lost freight for which the insurers are liable. In order to appreciate the merits of that question, it is necessary to consider very carefully the terms of the charter-party.

The engagement of the vessel was for an indefinite period, three calendar months being the minimum. Notice of discharge was only to be given when the ship was in a port in the United Kingdom, and the owners were bound to keep her "staunch and substantial both above water and beneath, and in every respect seaworthy," at all times during the continuance of her charter. These stipulations seem to indicate that it was in the contemplation of both parties that the owners should from time to time, during the currency of the charter-party, make such repairs upon the ship as were necessary to her efficiency as a transport.

The clauses of the charter-party which bear upon the payment of freight are somewhat peculiar, and it is necessary to notice them specially, because the decision of the present case appears to me to depend upon the effect to be given to them. Freight is made payable at a monthly tonnage rate during the time the ship is in Her Majesty's employ, and "shall duly and efficiently perform the service for which she is hereby engaged." The first month's freight is to be paid in advance. At the end of the second month the owner, on producing a certificate in due form, is entitled to a bill for a moiety of a month's freight; and at the end of the third month —upon the production of a similar certificate—he becomes entitled to a bill for

another moiety. At the end of the fourth, and each succeeding month, a bill for one month's freight is receivable on a certificate being produced. The result of this arrangement is this—that, after the expiry of the first three months of the vessel's engagement, the charterers have always from one to two months' freight already earned in their hands; and it is provided that the owner "shall be paid the balance of freight on the passing in office of the requisite accounts and documents after the discharge of the said ship." Then follows the provision that, if at any time it shall be made to appear to the commissioners that any delay has been caused by breach of orders, or that the ship became incapable, from any cause whatsoever, to perform efficiently the service contracted for, it shall be lawful for them "to retain in arrear the pay of the ship for two months, as aforesaid, and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable."

If the facts of the present case were such as to bring it within the principle of *Jackson* v. *The Union Marine Insurance Company* (3), that would afford an easy solution of the only question in issue. In that event the Commissioners of the Admiralty would have been, at common law, entitled to rescind the contract of charter-party, in respect that the sea risk encountered by the *City of Paris* in Simon's Bay had made the object which the contracting parties had in view commercially impossible of attainment. But there is really no analogy between the case of a charter for a single voyage, with a particular cargo, and that of a charter indefinite as to time, place and cargo; and, moreover, it appears to me that, on a fair interpretation of this charter-party, it was mutually contemplated that the ship might be injured by perils of the sea, and that, whenever that occurred, she was to be repaired.

In my opinion, neither the Commissioners of the Admiralty nor their officials at Simon's Bay had a legal right to terminate the contract and to discharge the *City of Paris* from Her Majesty's service upon the 17th of April, 1879. It is, however, unnecessary to consider whether any liability would have attached to the insurers if the commissioners had insisted upon their right to discharge the vessel upon the 17th of April, and had declined to pay freight upon that footing alone. The commissioners ultimately disallowed all claim for freight after the 21st of March, but allowed the cost of coals consumed on the homeward voyage; and the case was presented to your Lordships, on both sides of the bar, according to my understanding of the argument, as if the commissioners had not discharged the vessel at Simon's Bay, but had disallowed freight from and after the 21st of March, in consequence of her inefficiency to perform the service for which she had been engaged. In this aspect of the case it could hardly be maintained that the commissioners were not empowered, by the terms of the charter-party, to refuse payment of freight subsequent to the 21st of March, 1879; but, when that is conceded, the question still remains whether the payments so withheld constitute lost freight within the meaning of the charter-party.

The appellants, in the first place, maintain that, by the terms of the charter-party, the due and efficient performance of the service for which the vessel was engaged formed a condition precedent to the earning of freight. I am unable so to read the contract. The language of the leading clause with respect to freight does not appear to me to be fairly susceptible of that construction, and any such construction is quite inconsistent with the clause which follows, giving power to the commissioners to make an abatement by way of mulct out of the hire or freight of the ship. Reading the two clauses together I think it is clear that freight was to run during the whole period of the vessel's engagement; but that the commissioners, in the event of delay occurring, or of the vessel becoming inefficient, were to have the power of declining to issue monthly pay-bills—which I take to be what is meant by putting the ship out of pay—and of retaining the freight, deducting from its amount, on final settlement, any sum which they, in their discretion, might

fix, as a reasonable mulct, in respect of such delay or inefficiency.

If I am right in my construction of the charter-party the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risks insured by the policy: and if it had been expressly stipulated in the charter-party that freight should cease to be payable so long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight through the perils insured against. But that is not the present case. The abatement of freight is not, in my opinion, necessarily dependent upon the fact that the vessel has been disabled by sea risks. It is entirely dependent upon the discretion of the Commissioners of the Admiralty, who are not limited, in the exercise of that discretion, to considerations arising out of the casualty which has occasioned delay. They may quite legitimately take into account, in determining whether they will or will not inflict a mulct, the conduct of her owners under a totally different contract of charter-party, and many other considerations equally foreign to the ship or freight insured. In these circumstances, whilst I am conscious that the question is one of great nicety, I am unable to regard a disallowance of freight, which may be legitimately made on such considerations, as lost freight in the proper sense of that term. It appears to me that the deduction from freight, which the commissioners are empowered to make, is in truth and substance a penalty imposed upon the shipowner, which they are entitled to levy out of the freight retained in their hands.

I am, accordingly, of opinion that the judgment of the Court of Appeal ought to be affirmed.

Lord Fitzgerald.—I have had the advantage of reading the judgments of my noble and learned friends, which have my entire concurrence. The charter-party is in some parts rather obscure and difficult of interpretation. It is obvious why it was provided that the notice of discharge should be given in a port in the United Kingdom, for if it were otherwise the ship might have been discharged at some very remote place, and left to bear the heavy cost of an unproductive voyage home. No notice of discharge was given according to this provision of the contract, and as the time for giving it would not be reached until after the expiration of the "three months certain," it does not require further consideration in the present action.

As the charter was not limited in time and might continue for a considerable period, it seems plain that its duration was not to be determined by any necessity arising for repairs, unless, at least, the repairs proved to be of so extensive a character and likely to occupy so much time as practically to put an end to the objects of the charter, and thus entitle the charterers to abandon the undertaking.

The proviso in the charter, which has been so much commented on, and which is the foundation of your Lordships' judgment, seems to me to have conferred on the commissioners large powers of a judicial character, to be exercised according to judicial discretion. They do not seem, either by themselves or their officers, to have directly and formally exercised those powers. It is not pretended that they determined to retain in arrear the pay of the ship for two months, and to put the ship out of pay; nor did they formally and directly adjudge and declare that it would be fit and reasonable to make any abatement, by way of mulct, out of the hire or freight of the ship. The only act formally done on the part of the commissioners, if the officer doing them had authority to bind the commissioners, appears from the two documents of the 17th of April, 1879, Nos. 8 and 9 in the appendix. In No. 8 are to be found two statements, that the ship had been "inefficient since 21st March, 1879, having touched the Roman Rock, and sustained much damage," and that the "*City of Paris* was discharged from H.M. service 17th April, 1879, having been retained so long on account of the removal of Government stores, &c.," and No. 9 is a notice to the master that the ship "being now cleared of all Government stores" is "this day discharged from Her Majesty's service." I have not been able to discover that Captain Adean had autho-

rity to discharge the ship from the service. Under such circumstances, I should have had some difficulty in coming to the conclusion that the commissioners had legally exercised the powers conferred on them by the contract of affreightment, and had adjudged it to be fit and reasonable "that there should be a mulct out of the freight." It seems, however, to have been assumed on both sides that the commissioners did, in some form or other, exercise their powers, and did eventually adjudge it to be fit and reasonable to make, and did "make an abatement by way of mulct out of the hire or freight," equivalent to the two months' freight which otherwise had been earned. It is on this the plaintiffs seek to maintain the present action.

I concur in the opinion that there has been no loss of freight within the terms of the policy. The freight was earned, but the plaintiffs have been deprived of it by the commissioners in the exercise of the discretionary powers which the contract of affreightment vested in the commissioners. That was a risk against which the insurers did not insure. If, however, there was a loss of freight, it would remain to be considered whether "peril of the sea" was the immediate cause of the loss. The maxim "*in jure non remota causa sed proxima spectatur*" applies especially to marine insurances, so that in order to entitle the claimants to recover here, the loss must be a direct and not the remote consequence of the peril of the sea. The touching on the Roman Rock was a peril of the sea, and probably but for that the ship would have completed her undertaking and earned her two months' freight; but it does not follow that the touching on the rock and subsequent injury were the *causa causans*. The freight was not necessarily and directly lost by that calamity, and the consequent necessity for repairs. The plaintiffs were deprived of the right to their freight, if they were so deprived, by the action of the commissioners, or their officers, under the special provisions of the charter-party. The loss was not by the perils of the sea, but was occasioned by the contract.

I concur in the opinion of Lord Justice Bramwell in this case, that the loss was not the necessary and proximate effect of the perils of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Gregory, Rowcliffes & Co., agents for Hill, Dickinson & Lightbound, for appellants; Waltons, Bubb & Walton, for respondents.

[IN THE COURT OF APPEAL.]

1882. Dec. 16, 20. LA COMPAGNIE FINANCIÈRE ET COMMERCIALE DU PACIFIQUE *v.* THE PERUVIAN GUANO COMPANY (LIMITED).*

Practice—Discovery—Insufficient Affidavit of Documents—Further Affidavit—Documents Relating to any Matter in Question in the Action—Order XXXI. rule 12.

An affidavit of documents is insufficient and a further affidavit will be ordered where it appears from the affidavit of documents itself or from the documents therein referred to, or from any admission in the pleadings of the party who makes the affidavit, that there are or have been in his possession or power other documents "relating to any matter in question in the action" within the meaning of Order XXXI. rule 12; *and a document "relating to any matter in question in the action" is one which it is not unreasonable to suppose contains information which may, directly or indirectly, enable the party who claims the further affidavit either to advance his own case or to damage that of his adversary.*

Appeal of defendants from a decision of the Divisional Court affirming an order of Pearson, J., for limited affidavit as to documents.

The plaintiffs in the action claimed specific performance of an agreement entered into with the defendants for the delivery of certain stocks of guano, their property, which was in their hands; there

* *Coram* Baggallay, L.J., and Brett, L.J.

was a claim also for damages for delay in not performing the agreement, and also for an injunction.

The defendants were agents under a contract made with the republic of Peru, whereby the republic assigned all guano to the defendants for sale in England, and also in various countries in Europe. An action of detinue was brought by the plaintiffs against the defendants, in which the plaintiffs alleged that they had become the assignees of the republic of Peru for all guano which was in the possession of the defendants. Pending this action, the plaintiffs commenced the present action, in which they alleged that the parties had entered into negotiations for the settlement of the first action and for the delivery of the guano, and that such negotiations terminated in a verbal agreement on the 6th of October, 1881, which was subsequently embodied in writing and sent to the defendants to London to sign, but that the defendants declined to sign it and to carry out the arrangement. The defence set up by the defendants was—first, that the persons who negotiated the arrangement were not authorised to do so on behalf of the respective companies; and, secondly, that the matter never went beyond negotiation, and continued negotiation up to and subsequent to the 6th of October.

The defendants obtained an order under Order XXXI. rule 12, for an affidavit of documents. The plaintiffs, by their manager, made an affidavit of documents in the usual form, in which they disclosed, *inter alia*, the minute book of the proceedings of the plaintiff company. The defendants claimed discovery of the following documents, which were disclosed in the minute book: first, drafts of arrangements between the Peruvian Guano Company and the plaintiff company, and between the plaintiff company and Messrs. Dreyfus & Co., referred to in the board minutes of the plaintiff company dated the 28th of September, 1881; secondly, the letter and two telegrams received by the plaintiff company from Mr. Adam, referred to in the board minutes of the plaintiff company dated the 2nd of November, 1881; thirdly, two further drafts relating to the form of communication to be made, and the letter from M. de Germiny to M. Homberg, respectively referred to in the board minutes dated the 3rd of November, 1881; fourthly, a letter addressed to Mr. Adam, referred to in the board minutes dated the 8th of November, 1881; and, fifthly, several letters written from London by Mr. Adam to the plaintiff company or directors thereof, and the several letters and telegrams sent by the plaintiff company or directors thereof to Mr. Adam, as referred to in the board minutes dated the 16th of November, 1881.

The minute with regard to documents No. 2 was in French, to the following effect: "The president reads a letter and two despatches received from Mr. Adam, at this moment in London, which expose to the company the new difficulties which the Peruvian Guano Company raise, who seem no longer willing to execute their arrangements."

The defendants took out a summons for a further affidavit of documents. The Master refused to make an order; but Pearson, J., at chambers, made an order for a further affidavit as to the documents No. 1, and refused the application as to the remainder. On appeal to the Divisional Court, Stephen, J. (Field, J., *dissentiente*), was of opinion that the order of Pearson, J., ought to be upheld.

The defendants appealed.

Shiress Will (with him *Webster, Q.C.*), for the defendants.—The affidavit of documents is insufficient, for it discloses a minute dated the 2nd of November, which refers to a letter and two telegrams, and yet that letter and these telegrams are not disclosed; whereas, if the minute is relevant, the documents referred to in it must also of necessity be relevant. The rule in this matter is laid down in *Jones* v. *The Monte Video Gas Company* (1), where it was decided that, if documents referred to in pleadings or an affidavit are not disclosed, a further affidavit will be ordered. On this ground, and under that authority, the defendants claim to have a further affidavit of these documents.

C. Russell, Q.C., and *Pollard*, for the plaintiffs.—These documents which are

(1) 49 Law J. Rep. Q.B. 627; Law Rep. 5 Q.B. D. 556.

sought to be discovered are not material or relevant, for there was a definite agreement in October, and after that date only negotiations, which ultimately fell through. The documents No. 2 merely contain an exposition of the new difficulties raised by the defendant company, who did not want to carry out the arrangements made; the breach (if any) of the alleged agreement was at that time an accomplished fact. These documents are not, therefore, material or relevant. It may be suggested that this is an untrue rendering of this matter; but the defendants, if dissatisfied, can interrogate the plaintiff company—*Jones* v. *The Monte Video Gas Company* (1). Moreover, the affidavit of documents does not allege that the documents are material; and they could only be material if the minute was falsified. If the documents amount merely to an offer to compromise the action, they need not be produced.

Will, in reply.—The words of Order XXXI. rule 12—"documents relating to any matter in question in the action"—would include letters which contain suggestions for a compromise. The Court will make an order for production where it can be inferred from something that does appear in the affidavit that the documents are material. *Saull* v. *Browne* (2), *Noel* v. *Noel* (3) and *The Attorney-General* v. *Emerson* (4) were also referred to.

BAGGALLAY, L.J.—This action was brought in respect of an alleged breach of an alleged contract; the defence is that there was no contract, and therefore no breach, and that what took place amounted merely to negotiations. The question, therefore, in this action, is whether there was a contract or merely negotiations. The defendants obtained from the plaintiffs, under Order XXXI. rule 12, an affidavit of documents in the usual form; but, being dissatisfied with it, made an application for a further affidavit as to certain documents, which may be described as Nos. 1, 2, 3, 4 and 5. The application was granted by Mr. Justice Pearson as to No. 1, but was refused as to the rest.

(2) Law Rep. 17 Eq. 402.

(3) 1 De Gex, J. & S. 468; 32 Law J. Rep. Chanc. 676.

(4) Reported since *ante*, p. 67.

The case of *Jones* v. *The Monte Video Gas Company* (1), although it has no particular bearing on the present case, gave certain tests, which are binding on this Court, and which are applicable to cases of this sort. It was there held that an affidavit of documents is conclusive against the parties, unless it can be shewn in one of three ways that the documents which are in the possession or power of the person making the affidavit are material, or, in the words of Order XXXI. rule 12, relate to any matter in question in the action. In *Jones* v. *The Monte Video Gas Company* (1) it was decided that it cannot be shewn by a contentious affidavit that the affidavit of documents is insufficient. The only circumstances under which a further affidavit will be ordered are where it appears from the affidavit itself, or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, that he has other documents in his possession or power. The present application is based on the second of those three tests. It was contended on behalf of the defendants that an examination of the minutes which have been set forth in the affidavit will shew that the documents numbered 2, 3, 4 and 5, or some of them, "relate to the matters in question in the action." The question here turns on the meaning of these latter words contained in Order XXXI. rule 12; and similar words are used in the form of affidavit as to documents given in the schedule to the Rules of Court (5). From time to time certain suggestions have been made as to how it is to be decided whether it appears according to the various tests suggested in *Jones* v. *The Monte Video Gas Company* (1), that documents which are in the possession or power of a party relate to any matter in question in the action. A definition has been suggested by Lord Justice Brett, with which I agree, and which in general terms amounts to this—that a document relating to any matter in question in the action is one which it is not unreasonable to suppose contains matters which may either advance the party's own case or damage that of his adversary. I propose

(5) See Sched. App. B. Form 9.

to apply this test to the documents as to which the present question has arisen. With regard to one of the documents—No. 3—an objection was based on the ground that it did not appear that the documents to which alone it could refer were still in the possession or power of the plaintiffs. With that exception I am bound to say, exercising the best judgment that I can, that I cannot agree with the view taken by Mr. Justice Pearson or by Mr. Justice Stephen in the Court below. Applying the test to which I have referred, it does appear from the minutes set forth in the affidavit already made that the plaintiffs have documents relating to any matter in question in the action which it is not unreasonable to suppose contain information which may either advance the defendants' own case or damage that of their adversaries. It is unnecessary to go through all the documents, for the same observations are applicable to all of them.

The document described as No. 2 is an entry of a minute under date the 2nd of November, to the effect that the president read a letter and two telegrams, which shewed that new difficulties had arisen; but the direct inference which I draw is that the letter and telegraphic despatches may have a bearing on the matters in question in the action. If the view I take be correct, those documents ought to be produced. As regards the other documents, one cannot but see that they relate to a matter in question in the action. The result is, that all the documents, with the exception of No. 3, ought to be produced. The appeal must therefore be allowed.

BRETT, L.J.—In this case the defendants took out a summons under Order XXXI. rule 12, requiring the plaintiffs to make an affidavit of the documents in their possession or power relating to any matters in question in the action. Thereupon the plaintiffs made an affidavit setting out many documents which they admitted were in their possession and did in some sense relate to the matters in dispute; and in form stated that they were all the documents which related to the matters in question in the action. That of course is an affirmative affidavit, and one which would necessarily imply that they had no other material documents in their control, and that, although they had other documents in their possession, yet they did not relate to the matters in question in the action. The defendants took out a further summons, calling upon the plaintiffs to shew cause why they should not make a further affidavit; and upon this second summons the defendants must shew, either from the affidavit itself, or from the documents therein referred to, or from any admissions in the plaintiffs' pleadings, that the plaintiffs have not set out in the first affidavit all the documents which they ought to have set out. There was a contention before the case of *Jones* v. *The Monte Video Gas Company* (1) as to the sources to which the Court might apply itself in order to determine whether the party against whom the application is made has set out all the documents which he ought to have set out. But it was held in *Jones* v. *The Monte Video Gas Company* (1) that the Court cannot look into a contentious affidavit to see whether the affidavit of documents is insufficient. So that if it does not appear from one of the three ways referred to that the affidavit is insufficient, the person who makes the affidavit in answer cannot say, "although the opposite party has sworn that he has no other documents in his possession or power, yet I make an affidavit that I believe, and have good grounds for believing, that he has other documents, and a further affidavit ought therefore to be made."

It was said in *Jones* v. *The Monte Video Gas Company* (1) that the Court could not look into such an affidavit, and that in order to justify a second affiedavit the Court must be satisfied from one of the sources stated in that case that the first affidavit is insufficient. That decision did not enter upon the question as to the nature of the documents, but only as to the sources to which the Court must apply itself, or be confined, in order to see whether the affidavit is sufficient.

The question here, which is not as to the sources to which the Court must look, but as to the nature of the documents which the person who makes the affidavit of documents ought to set out, is not, therefore, governed by the case of *Jones* v. *The Monte*

Video Gas Company (1). The nature of the documents is contained in Order XXXI. rule 12, which says, "documents which are or have been in his possession or power, relating to any matter in question in the action"; and it follows from the case of *Jones* v. *The Monte Video Gas Company* (1) that it must be shewn from one of the sources there named that the other party to the action has failed in his first affidavit to set out some documents, which are or have been in his possession or power, relating to any matter in question in the action.

The Court, in the case cited, stated their desire to make the rule as to the sources to which the Court could apply itself as elastic and wide as it could be made, and that, I think, is the view of the Court, both as to the source of information and also as to the nature of the documents. We should, therefore, desire to make the rule as large as we can with propriety. I think, from the use of the term "relating to any matter in question," that it is clear that the rule is not confined to documents which would be evidence for or against a party in the action; and this appears from the practice in insurance cases, and also in other cases. The definition which I am about to give is an attempt to define the meaning of the words in Order XXXI. rule 12. It seems to me that any document must be properly held to relate to matters in question in the action which not only would be evidence, but which it is not unreasonable to suppose does contain information which may, either directly or indirectly, enable a party who claims a further affidavit either to advance his own case or to damage the case of his adversary. Such a document must be set out. I used the expression "directly or indirectly" because it seems to me that a document may be properly said to be material if it is one which would naturally lead a party to a chain of enquiry which would lead him to one of those results. Every document in a party's possession or control which comes within that definition must be set out; and when he has made the affidavit of documents, the question which arises on the second summons is, whether from one of the sources mentioned in *Jones* v. *The Monte Video Gas Company* (1) it can be shewn that all the documents which ought to have been set out have not been set out. In order to determine whether certain documents are within the description, one must look at the questions in the action, and one must look quite as much at the defendant's case as at the statement of claim, because if it is a defendant who claims a second affidavit he must shew that the documents are such as may reasonably be expected to contain information which will advance his own case or damage that of his adversary. In the present action the plaintiffs contend that there was an agreement and a breach on a particular day. I quite agree that the documents referred to in the minutes are documents which could not affect the plaintiffs' case, if the plaintiffs' case be true that there was a concluded agreement at a certain date and a breach at a certain other date. But the defendants' case is that there never was any concluded agreement, and therefore that there could have been no breach; and that from the beginning to the end of the whole transaction, and up to the bringing of the action, the matter was only in negotiation. If the defendants can shew that there are documents in the possession or power of the plaintiffs which tend not unreasonably to support that view, such documents ought to have been set out by the plaintiffs in their original affidavit, and must now be set out in another affidavit. That drives us to consider the question whether the documents are such as may contain matter which may support the defendants' case; now a new proposition may be part of a continued negotiation, and therefore it may support the defendants' case.

I think that Mr. Justice Pearson gave too narrow a construction to the rule, and did not sufficiently consider what was the defendants' case in this matter. The other documents, with the exception of No. 3, are in the same category as No. 2; and unless it can be said that they are attempts to negotiate a settlement, I should be clearly of opinion that no further affidavit could be made as to them, for the documents in such a case never could be material. I have come to the conclusion that it is not unreasonable to suppose that

these documents are not negotiations for a settlement, but that they may contain information which may tend to shew, as contended by the defendants, that there were continuing negotiations, and would therefore come within the same category as No. 2. This may be a wrong view; but, if so, the documents would be rejected at the trial. The real question which ought to govern this is, "Do the documents contain information which may support the defendants' case?" It seems to me that they do. A further affidavit must therefore be made as regards them. But this does not determine the question whether a party can have inspection if an affidavit is sworn that these documents are negotiations for a settlement. With regard to the documents No. 3, it is impossible to say that a party ought in his first affidavit to have set out documents which are not in his possession or control, and the defendants have failed to shew that those are documents which ought to have been set out in the first affidavit; no further affidavit ought to be ordered as regards those documents.

I do not agree with the judgment of Mr. Justice Stephen, nor with the grounds of the judgment of Mr. Justice Field; but, for the reasons given, I am of opinion that the appeal ought to be allowed.

Appeal allowed.

Solicitors—Freshfields & Williams, for plaintiffs; C. & S. Harrison & Co., for defendants.

[IN THE COURT OF APPEAL.]

1882. Dec. 13, 14, 15, 18. } *In re* BLYTH AND FANSHAWE.*

Practice — Costs — Shorthand Notes of Evidence at Reference—Unusual Expenses —Solicitor and Client—Duty of Solicitor to point out unusual Expenses to Client— Discretion of Master on Taxation between Party and Party and Solicitor and Client.

It is the duty of a solicitor, who in the course of an action is about to incur unusual expenses—such as the costs of shorthand notes of evidence given at a reference —to point out to his client that the additional expenses so incurred will not be allowed to him, even if successful in the action, on taxation between party and party; and, in default of so doing, the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client.

In re Smith (13 Mee. & W. 477; 2 Dowl. & L. 379) *followed.*

Per LINDLEY, L.J.—*Although a Master has a discretion on taxation of costs as between party and party, and the same discretion on taxation as between solicitor and client, it by no means follows that what is reasonable in the former case is also reasonable in the latter.*

Appeal from a decision of Lord Coleridge, C.J., refusing to order the Master to review his taxation.

The appellants acted as solicitors for the plaintiff in an action—*Wells* v. *The Mitcham Gas Light Company* (1)—brought to recover 1,500*l.* on a building contract; the defendants set up a counter-claim for 5,000*l.* odd. The action with all matters in difference was referred to an arbitrator, who, after thirty meetings, made his award in favour of Wells for 518*l.*, and also awarded to him the costs of the reference. The plaintiff attended the reference with one counsel only. During the reference a shorthand-writer was engaged by the appellants to take notes of the proceedings; but the affidavits used in the present appeal were in conflict as to whether Wells had authorised the appellants to employ the shorthand-writer, but it appeared that the shorthand notes had been used by the arbitrator, by the counsel for Wells, and also from time to time by Wells himself. There was a further conflict on the affidavits as to whether it had been pointed out to Wells and whether he knew that he would have to pay these costs himself even if successful in the action. The costs of the shorthand notes were disallowed upon taxation as between party and party—see *Wells* v. *The Mitcham*

* *Coram* Baggallay, L.J., and Lindley, L.J.

(1) 48 Law J. Rep. Exch. 75; Law Rep. 4 Ex. D. 1.

In re Blyth, App.

Gas Light Company (1). Upon taxation between the solicitors and Wells, the Master disallowed the costs of the shorthand notes, and also the costs of certain expert witnesses. On behalf of the appellants it was stated that it was absolutely necessary that scientific witnesses should be called on behalf of Wells, and that they should qualify themselves to give evidence. The charges of two of the witnesses, Penny and Spice, who were paid by the appellants, amounted to 92*l.* 13*s.* 3*d.* and 44*l.* 12*s.* respectively; but on taxation the Master only allowed 21*l.* to each. As regards another witness, Barber, whose charges amounted to 54*l.* 5*s.*, it appeared that he had been employed by Wells himself, who had paid him 41*l.* 10*s.* during the progress of the reference, and that upon being pressed he, by letter, requested the appellants to pay the balance of 12*l.* 15*s.* due for the purposes of taxation between party and party. The Master on taxation between solicitor and client disallowed this latter sum.

Lord Coleridge, C.J., on appeal, affirmed the order of the Master.

The solicitors appealed.

A. L. Smith (with him *E. Clarke, Q.C.*), for the appellants.—First, as to the shorthand notes; it must be taken under the circumstances that Wells authorised his solicitors to employ the shorthand-writer, and that he knew that the shorthand notes had been bespoken, for he himself as well as the arbitrator and his counsel made use of them. Even if Wells did not authorise the appellants to employ the shorthand-writer, yet the use of the shorthand notes is cogent evidence of ratification. Again, it is within the scope of the authority of a solicitor to incur such expenses as may be necessary for the due prosecution of the cause of the client. The appellants, therefore, had an implied authority to incur these expenses. There is no express decision on this point as to costs between solicitor and client, but the general rule is that as between party and party such costs are not allowable without an order; but the order will be made as a matter of course if the shorthand notes are used and are really essential to the proper hearing of the case—*The Lee Conservancy Board* v. *Button* (2), *Daniell's Chancery Practice* (3), *Watson v. The Great Western Railway Company* (4) and *In re Chapman* (5). Next, as to the costs of the expert witnesses. The costs of these witnesses ought to be allowed, inasmuch as their evidence was absolutely necessary; and Wells, moreover, was distinctly informed that the full charges of those witnesses would not be allowed on taxation as between party and party. The appellants were distinctly authorised by Wells to engage these witnesses. As regards the expert witness Barber, he was engaged by Wells himself, who paid a portion of his expenses, and at whose express request the appellants paid the balance due. These costs ought therefore to be allowed.

Mackley v. *Chillingworth* (6), *Turnbull* v. *Janson* (7), Rules of Supreme Court (Costs), Special Allowances, rule 8, were also referred to.

Holl, Q.C., and *Fraser Macleod* (with them *H. Kisch*), for the respondent.—The authorities cited on behalf of the appellants fall within the ordinary principle, that the Court will, in their discretion, make an order for the costs of shorthand notes if they think them necessary. It is only in exceptional cases that the Court will allow the additional expense of shorthand notes of the evidence; the tendency of the Court is to discourage such additional expense—*Kelly* v. *Byles* (8) and *Earl de la Warr* v. *Miles* (9). The circumstances here do not justify the expression that this is a case in which such expenses were necessary. A precisely similar application to the present one was made in *Croomes* v. *Gore* (10), where it was held that the successful party to a reference was not entitled to the

(2) Law Rep. 12 Ch. D. 383, 398.
(3) 7th ed. vol. ii. p. 1298.
(4) 50 Law J. Rep. C.P. 302; Law Rep. 6 Q.B. D. 163.
(5) 51 Law J. Rep. Q.B. 337; Law Rep. 9 Q.B. D. 254; affirmed *Ante*, p. 75; Law Rep. 10 Q.B. D. 54.
(6) 46 Law J. Rep. C.P. 484; Law Rep. 2 C.P. D. 273.
(7) 47 Law J. Rep. C.P. 374; Law Rep. 3 C.P. D. 264.
(8) 49 Law J. Rep. Chanc. 181; Law Rep. 13 Ch. D. 682, 693.
(9) Law Rep. 19 Ch. D. 80, 81.
(10) 1 Hurl. & N. 14; 25 Law J. Rep. Exch. 267.

In re Blyth, App.

costs of the shorthand notes of the evidence. No doubt an observation is there made that the costs of a junior counsel or of a solicitor's clerk to take notes would be a reasonable charge, but copies of the notes taken would not be allowed. The question as to the propriety of allowing the shorthand notes is a matter entirely within the discretion of the Master, who has exercised his discretion; it is not the practice to interfere with that discretion except in the case of gross abuse—*Marcus* v. *The General Steam Navigation Company, Limited* (11). These costs were also disallowed as between party and party in *Wells* v. *The Mitcham Gas Light Company* (1), so that the Divisional Court also has exercised a discretion in the matter. Again, a solicitor who is about to incur any unusual expense is bound to explain to his client that the expense so incurred will not be recovered from the opposite side in any event of the action—*In re Smith* (12). That principle was adopted by Jessel, M.R., in the case of *In re Snell* (13). Next, as to the witnesses. This is a matter entirely within the discretion of the Master; and that discretion will not be questioned except in cases where he has not exercised his discretion, or where he has acted upon a wrong principle. Under rule 8 of the Rules of the Supreme Court (Costs) the Master is to allow such reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses—*Turnbull* v. *Janson* (7) and *Mackley* v. *Chillingworth* (6). It is within the discretion of the Master on taxation between party and party to allow or disallow such costs, and the Master would adopt the same principle in the absence of any special agreement on taxation between solicitor and client. Neither the affidavits nor the correspondence disclose any authority by Wells to his solicitors to incur these expenses. The Master has allowed what he thought proper, and his discretion ought not to be interfered with.

A. L. Smith replied.

(11) 35 Law Times, N.S. 353.
(12) 13 Mee. & W. 477; 2 Dowl. & L. 379; 14 Law J. Rep. Exch. 63.
(13) Law Rep. 5 Ch. D. 815, 826.

BAGGALLAY, L.J.—I take it to be a general and important rule to be observed in all these cases that if unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully upon the subject, and to point out to him that the additional expense incurred may not be allowed to him on the eventual taxation, whatever may be the result of the trial. The application of this rule stands upon a different footing in the two cases. As regards the shorthand notes there is no doubt a considerable conflict of evidence; but, dealing with the question as one of evidence given between the parties, I must also consider that given by them on other matters; and on the first part of the case I give credit to the statements made on behalf of the appellants that authority was given to them by Wells to engage a shorthand-writer to take notes.

As to the second part of the case, I do not think that it has been established by the appellants that they made any communication to Wells to the effect that whatever was the result of the action he would have to bear the whole or a larger proportion of the costs of the shorthand notes. The view taken by Lord Coleridge as regards that part of the case is therefore correct.

I take a different view, however, as to the expenses of the expert witnesses. A statement was made in the affidavit of Fanshawe that it was absolutely necessary in the interests of Wells that scientific witnesses should be called on his behalf and should qualify themselves to give evidence; and that Wells was made aware that the full fees which would have to be paid by him to such witnesses for qualifying and attending to give evidence would not be allowed on taxation between party and party. No doubt that statement was in opposition to one made by Wells to the effect that he never had been told by any member of the appellant firm either directly or indirectly that these full charges would not be allowed on taxation between party and party, but this latter statement is contradicted not only by Fanshawe, but also by the expert witnesses themselves, and also by the surrounding circumstances of the case. The witness Barber said, and

it has not been contradicted, that he was engaged by Wells himself; all these matters must therefore have been present to the mind of Wells when he made his affidavit. So far as regards the expert witnesses generally, this bill of costs must be sent back to the Master for review. As to the expenses of Barber we have this fact, that Wells was aware what was the balance due to this witness, and that 40*l.* had been paid on account of fees due to him, and thereupon he writes to the appellants to settle with Barber the balance of account. This was ample authority to the appellants, even if no previous authority had been given, to settle the account, and in obedience to that letter they paid the balance. This item must, therefore, go back to the Master for review, with a direction to allow the sum paid by the appellants to Barber in pursuance of the directions given by Wells. As each party has had a partial success, there will be no costs given to either side, either in the Queen's Bench Division or in this Court.

LINDLEY, L.J.—I am of the same opinion. First, as to the shorthand notes. It was the duty of the solicitors to give Wells advice, and to protect him against unnecessary expenses, and to point out to him that if he employed shorthand-writers their expenses would not be allowed on taxation as between party and party. That being so, the question is whether the solicitors discharged that duty. In my opinion, it is impossible to allow these costs, although Wells authorised the notes to be taken, for it has not been proved that the appellants pointed out to him that if he succeeded in the action those costs would not be allowed to him on taxation between party and party.

As regards the costs of the expert witnesses, the evidence, which is not directly in favour either of the appellants or of the respondent, shews that Wells thoroughly understood the nature of the transaction. The solicitors, therefore, have discharged their duty. Next, as regards the witness Barber, he was employed by Wells himself, and the balance of his account was paid him by the appellants at the request of Wells. That part of the transaction, therefore, has nothing to do with costs as between solicitor and client, for the debt was discharged at the request of Wells. Lord Coleridge refused to send back the items as to the experts, on the ground that the fees had been allowed to a certain extent on taxation as between party and party, so far as was just and reasonable, and that having been so allowed there was no reason for making any further allowance, for the Master had the same discretion as to these costs as between party and party as between solicitor and client. It seems to me that, although the Master has a discretion on taxation as between party and party, and the same discretion as between solicitor and client, it by no means follows that what is reasonable as between party and party is reasonable as between solicitor and client. I think the rule is well explained in *Smith's Chancery Practice* (14) as follows:—"There are two distinct modes of taxing costs: the first as between party and party; the second as between solicitor and client. The latter is also modified: first, where the costs are payable personally by a third party, or out of his fund; secondly, where they are payable out of a fund in which the client has only a partial interest; and thirdly, where the costs are payable by the client himself, or out of his own fund." Then (at p. 1084) "On a taxation between a solicitor and his own client, or of costs as between solicitor and client, to come out of a fund belonging solely to the client, the solicitor is not only entitled to be paid for such proceedings as he took necessarily, and in the exercise of a sound discretion, but also for proceedings not in themselves necessary, but which the client directed to be taken, if a full explanation had been given to him of the true state of the case"—that is to say, if the solicitor has advised his client that he will not be entitled to get them as between party and party. The solicitor must advise and protect his client, even against himself, if necessary; but it is a mistake to say that only what is necessary and reasonable to be allowed as between party and party is also reasonable as between solicitor and client. It might be reasonable to allow in the latter case what it is reasonable to allow in the former, but the converse is

(14) 7th ed. vol. i. p. 1081.

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not true, and that is the error in the judgment of the Court below. The order must therefore be varied, and the bill referred back to the Master as to the allowances to the experts, together with a direction to allow all the costs which have been paid to Barber. There will be no costs either in this Court or in the Court below.

Order varied accordingly.

Solicitors—Wilkins, Blyth & Dutton, for appellants; G. S. Tinkler, for respondent.

[IN THE COURT OF APPEAL.]

1882. Nov. 3, 4, 6. THE QUEEN (*on the prosecution of the Penarth Local Board*) *v.* THE LOCAL GOVERNMENT BOARD AND GEORGE TAYLOR.

Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257 *and* 268—*Paving Streets—Apportionment of Expenses—Notice of Demand of Payment—Decision of Local Authority—Appeal by Party Aggrieved—Time for Appeal—Memorial to Local Government Board—Grounds of Appeal—Prohibition.*

[For the report of the above case, see 52 Law J. Rep. M.C. 4.]

1882. Dec. 19. WINYARD (*appellant*) *v.* TOOGOOD (*respondent*). HANCE (*appellant*) *v.* FORTNUM (*respondent*).

Elementary Education Act, 1876 (39 *&* 40 *Vict. c.* 79), *s.* 11, *sub-s.* 1—*Child "prohibited from being taken into full time Employment"—Attendance Order.*

[For the report of the above case, see 52 Law J. Rep. M.C. 25.]

[IN THE COURT OF APPEAL.]

1882. June 20. ALLUM *v.* DICKINSON.*

Landlord and Tenant—Covenant to pay Rates, Taxes and Charges—Rate for Paving New Street — 18 *&* 19 *Vict. c.* 120. *s.* 105—25 *&* 26 *Vict. c.* 102. *s.* 96.

The defendant became tenant of a house under a lease by which he covenanted to pay "the sewers and main drainage rates . . . and other district rates and assessments whatsoever, whether Parliamentary, parochial or otherwise, which now are, or which at any time during the said term shall be taxed, rated, charged, assessed or imposed upon the said demised premises, or any part thereof, or upon or payable by the occupier or tenant in respect thereof." The local authority paved a new street and apportioned the total expense of so doing on the owners of the houses forming the new street, of which the demised premises formed part. The plaintiffs, on whom the lessor's interest in the premises had devolved, were compelled to pay the apportioned amount:—Held, *that the charge in question was clearly for work done for the permanent improvement of the property, and therefore for the interest of the landlord, as distinguished from a rate made for temporary or current expenditure for the interest of the tenant or occupier; and therefore that the plaintiffs could not recover the amount from the defendant.*

This was an appeal from a Divisional Court of the Queen's Bench Division on a Special Case. The plaintiffs were the executors and trustees under the will of G. Hearn, deceased.

The defendant was the tenant of premises at Highbury New Park, in the parish of St. Mary, Islington, demised to him by G. Hearn by deed dated the 11th of December, 1872. The deed contained a covenant by the defendant to pay the rent reserved by the deed, and also "the sewers and main drainage rates, tithe-rent charges, board of health, metropolitan and other district rates and assessments whatsoever, whether Parliamentary, parochial

* *Coram* Jessel, M.R.; Lindley, L.J., and Bowen, L.J.

Allum v. *Dickinson, App.*

or otherwise, which now are or which at any time during the said term shall be taxed, rated, charged, assessed or imposed upon the said demised premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof (except the property or income)."

In 1881, the vestry of the parish of St. Mary, Islington, under the authority of the Metropolis Management Acts, paved a new street and apportioned the total expense of so doing on the owners of the several houses and land forming the new street, of which the demised premises formed part.

The proportion of such expenses apportioned to the demised premises was 78*l.* 8*s.* 8*d.*, which sum the plaintiffs, as the representatives of G. Hearn, deceased, were required and obliged to pay in pursuance of notice from the vestry clerk of the said parish.

The question for the Court was whether the plaintiffs were entitled to recover such sum of 78*l.* 8*s.* 8*d.* from the defendant under his covenant.

The Divisional Court (Mathew, J., and Cave, J.) directed judgment to be entered for the defendant, being of opinion that the sum in question was a charge made once for all, and clearly for works for the permanent improvement of the property, and therefore for the interest of the landlord, as distinguished from a rate made for temporary or current expenditure for the interest of the tenant or occupier.

The plaintiffs appealed.

R. T. Reid, for the appellants, referred to 18 & 19 Vict. c. 120. s. 105; 25 & 26 Vict. c. 102. s. 96, and *Hartley* v. *Hudson* (1).

F. O. Crump and *H. F. Manisty*, for the respondent, were not called upon.

JESSEL, M.R., said—I think the decision of the Court below is right. I do not think it was in the contemplation of the parties that under these general words a tenant at rack-rent was expected to pay a charge of this character. It is a charge for a permanent improvement, and is naturally payable by the owner rather than by the occupier. *Prima facie* the covenant by the lessee is to pay annual charges, but this is a charge payable once for all and not of yearly recurrence. Then, coming to the actual words themselves [his Lordship read the covenant], and looking at the Metropolis Local Management Acts, these costs and expenses are certainly not charged upon the premises or imposed upon the tenant or occupier. All that the Acts do is to make it a charge payable by the owner, and a demand against him which can be enforced by summary procedure. This is quite plain from the 96th section of the Amendment Act, which makes it a charge on the owner, but makes it also recoverable from the occupier, who can deduct it from his rent.

LINDLEY, L.J., said—I am of the same opinion. This is not a rate, charge or assessment imposed on the premises or on the occupier or tenant. The Acts throw it on the landlord, although it is true that payment of it can also be enforced against the occupier.

BOWEN, L.J., concurred.

Solicitors—Billing & Kent, for appellants; W. F. Nokes, for respondent.

1882. Dec. 5. } HARBOTTLE (*appellant*) *v.* TERRY (*respondent*).

Fishing—Salmon Fishery Acts—36 & 37 *Vict. c.* 71. *s.* 22—*Licence—Tributary—Reservoir fed by Stream.*

[For the report of the above case, see 52 Law J. Rep. M.C. 31.]

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(1) 48 Law J. Rep. Q.B. 751; Law Rep. 4 Q.B. D. 367.

1882. Nov. 20. } D'HORMUSJEE AND COMPANY, AND ISAACS AND COMPANY, *v.* GREY.

Costs—Security from a Foreign Plaintiff—Joint Action—Order XVI. rule 1.

Where plaintiffs join in an action, and one is unsuccessful, the successful plaintiff is chargeable with the costs of joining the unsuccessful plaintiff; and in an action in which an Englishman and a foreigner are plaintiffs the defendant cannot require the foreigner to give security for costs.

Appeal from an order of Cave, J., reversing a Master's order for security for costs from the plaintiffs D'Hormusjee & Co. The plaintiffs D'Hormusjee & Co. are merchants in Bombay, and the plaintiffs Isaacs & Co. are merchants in London.

The statement of claim alleged in the 2nd and 3rd paragraphs that the plaintiffs delivered to the defendant, as a common carrier, 246 bales of cotton, which the defendant undertook to convey safely and securely to St. Katherine Dock, and that the bales were damaged. The 4th paragraph was as follows: "In the alternative the plaintiffs repeat the 2nd and 3rd paragraphs of the statement of claim, substituting for the word 'plaintiffs' the words 'the said Messrs. D'Hormusjee & Co.'; and in the further alternative again repeat them, substituting for the word 'plaintiffs' the words 'the said Messrs. Isaacs & Co.'"

Bucknill, for the defendant.—The old rule that security for costs was not required of a foreigner who sued jointly with an English plaintiff does not apply when the plaintiffs sue alternatively under Order XVI. rule 1, as in this case. Both this rule and the Common Law Procedure Act, 1860, s. 19, save the right of the defendant to costs occasioned by joining a plaintiff who ought not to be joined. This action is in effect two actions brought by different plaintiffs.

Barnes, for the plaintiffs.—Where one of the plaintiffs resides within the jurisdiction, security for costs cannot be required of another who is a foreigner. He cited *Sykes* v. *Sykes* (1)—in which case the insolvency of the plaintiff within the jurisdiction was held immaterial—and *Umfreville* v. *Johnson* (2).

Bucknill, in reply.

DENMAN, J.—I am of opinion that the decision of Mr. Justice Cave must be supported. The statement in the fourth paragraph of the statement of claim wholly emanates from the plaintiffs. It says, "in the alternative the plaintiffs repeat," and so on, after alleging a bargain with them jointly. I was impressed with the argument that an order securing D'Hormusjee's responsibility for costs if he failed would not be unjust; but where two plaintiffs join in bringing an action, and one fails, the successful plaintiff is chargeable with the costs incurred by joining the unsuccessful party. In *Umfreville* v. *Johnson* (2) this was held to be so when an injunction was claimed by two owners of adjoining properties. This was before the Judicature Acts, and I do not think that Order XVI. rule 1, makes any difference. It was argued that the words at the end of the rule giving the unsuccessful defendant his costs, only apply when the parties are suing for a joint cause of action, and not to the case of several claims in the same action. This would be to put a construction on the end of the rule different to that which the beginning of the rule bears. I cannot see that this case is in any respect different from those to which the general rule as to joint plaintiffs applies.

MANISTY, J. — I am of the same opinion. The language of Order XVI. rule 1, is, I think, plain, irrespectively of authority. There is a clear distinction between a joint action and a joint cause of action. Both the Englishman and the foreigner are plaintiffs. If the foreigner fails and the Englishman succeeds, judgment will be for the Englishman with costs, but the defendant will be entitled to credit for the costs occasioned by the plaintiffs joining the unsuccessful foreigner.

Order affirmed.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; J. A. & H. E. Farnfield, for the defendant.

(1) 38 Law J. Rep. C.P. 281; Law Rep. 4 C.P. 645.

(2) 44 Law J. Rep. Chanc. 752; Law Rep. 10 Chanc. 580.

[IN THE HOUSE OF LORDS.]

1882. May 15, 16. July 6, 7. Aug. 1.

GOODMAN AND ANOTHER *v.* THE MAYOR AND FREE BURGESSES OF THE BOROUGH OF SALTASH.

Prescription—Several Fishery owned by Corporation—Immemorial User by Free Inhabitants — Presumption of Charitable Trust or Condition in Grant—Profit à prendre in alieno solo.

An incorporated borough had enjoyed immemorially a several oyster fishery in a navigable tidal river, qualified by an usage, also immemorial, for free inhabitants of ancient tenements in the borough to dredge for oysters without stint from Candlemas to Easter Eve in each year. The corporation claimed a several fishery discharged from the usage in favour of the inhabitants: — Held (*dissentiente* LORD BLACKBURN)—*first, that, inasmuch as the claim of the corporation rested on prescriptive enjoyment, the whole user ought to be taken into account, and that the right to a several fishery could not be maintained, unless it were consistent with the user by the free inhabitants. Secondly, that the claim of the free inhabitants was not to a profit à prendre in alieno solo, but was a claim to which the law could and would give effect by presuming a grant to the corporation, subject to a condition or charitable trust in favour of the free inhabitants.*

The defendants in this case appealed from a judgment of the Court of Appeal affirming one of the Common Pleas Division. The case is reported in the Courts below 49 Law J. Rep. C.P. 565, where the Special Case by which the facts were found is set out; 50 ibid. C.P. 508; Law Rep. 5 C.P. D. 431; 7 Q.B. D. 106.

The material facts were shortly as follows:—

The action was one of trespass brought by the Corporation of Saltash against two free inhabitants of ancient tenements in the borough for a trespass committed in a certain part of the river Tamar, where the corporation claimed a several oyster fishery. The corporation claimed the several fishery by prescription confirmed by a charter of Reginald de Vantort and by several Royal Charters of Inspeximus.

The free inhabitants of ancient tenements within the borough had, from time immemorial without interruption and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* from the 2nd of February to Easter Eve in every year. The acts complained of were done in the exercise of this privilege.

The Tamar was at the *locus in quo* navigable and tidal.

The usage in favour of the free inhabitants tended to the destruction of the oyster fishery, and if continued would destroy the same.

The appellants claimed the right to dredge for oysters, and to carry away the same without stint for sale or otherwise between the 2nd of February and Easter Eve in each year both inclusive—first, as subjects of the realm; secondly, as free inhabitants of ancient tenements in the borough; and, thirdly, as free inhabitants of the borough.

The case was first argued on the 15th and 16th of May before the Lord Chancellor (Lord Selborne), Lord Blackburn and Lord Watson, but was ordered to be re-argued before a fuller house.

M. J. Muir McKenzie (*R. K. Lopes* with him), for the appellants.—There is now no contention for the appellants that a custom for the public to fish in a several fishery can be supported; but it is argued that, either there is no grant of a several oyster fishery to the corporation; or, if there is, that a legal origin of a limited right in the corporation, subject to an user by the inhabitants of the borough, can be inferred and ought to be inferred; that the inhabitants acquire a right through the corporation, which holds in trust for them.

The title of the respondents rests upon possession and user, and that is qualified from time immemorial by the user of the inhabitants. Unless a legal origin can be found in a grant, subject to a condition of permitting the user by the appellants, then there is no evidence of a several fishery at all, for the enjoyment has been continuously interrupted.

The *onus* of proving such a several fishery is on the respondents, since, *prima facie*, the fishing would be free to all the

Queen's subjects—*The Mayor of Orford* v. *Richardson* (1), *Rogers* v. *Allen* (2) and *Seymour* v. *Lord Courtenay* (3).

The case is not within the principle of the decision in *Lord Rivers* v. *Adams* (4). Here the appellants and respondents are not strangers to one another; the appellants claim through the corporation, which prescribes for their benefit—*Willingale* v. *Maitland* (5), *Chilton* v. *The Corporation of London* (6), *Mellor* v. *Spateman* (7), *White* v. *Coleman* (8), the case of *The City of Coventry* (9), *Wright* v. *Hobert* (10), *Beadsworth* v. *Torkington* (11), *Johnson* v. *Barnes* (12) and *Earl De la Warr* v. *Miles* (13).

Charles, Q.C. (*C. Hall, Q.C.*, and *J. V. Austin* with him), for the respondents.—This is a claim to a *profit à prendre in solo alieno*, and is within the decision in *Lord Rivers* v. *Adams* (4). It is found as a fact that the usage tends to the destruction of the subject-matter.

[LORD BLACKBURN.—That would be true of the common law right if there were no several fishery.]

Mannall v. *Fisher* (14), *The Mayor of Orford* v. *Richardson* (1), *Bland* v. *Lipscombe* (15), *The Attorney-General* v. *Mathias* (16) and *Clayton* v. *Corby* (17). Common of pasture cannot be claimed without stint—*Mellor* v. *Spateman* (7).

(1) 4 Term Rep. 437; 2 H. Black. 182.
(2) 1 Campb. 309.
(3) 5 Burr. 2814.
(4) 48 Law J. Rep. Exch. 47; Law Rep. 3 Ex. D. 361.
(5) 36 Law J. Rep. Chanc. 64; Law Rep. 3 Eq. 103.
(6) 47 Law J. Rep. Chanc. 433; Law Rep. 7 Ch. D. 735.
(7) 1 Wms. Saund. (6th ed.) 339, note 3 p. 340 C; note p. 346 F.
(8) Freeman, 135.
(9) Year Book, 15 Edw. 4. p. 29.
(10) 9 Mod. 65.
(11) 1 Q.B. Rep. 782.
(12) 41 Law J. Rep. C.P. 250; 42 ibid. 259; Law Rep. 7 C.P. 592; ibid. 8 C.P. 527.
(13) 50 Law J. Rep. Chanc. 754; Law Rep. 17 Ch. D. 535.
(14) 5 Com. B. Rep. N.S. 856.
(15) 4 E. & B. 713*n*.
(16) 4 Kay & J. 579; 27 Law J. Rep. Chanc. 761.
(17) 5 Q.B. Rep. 415; 14 Law J. Rep. Q.B. 364.

[LORD BLACKBURN referred to *Hinks* v. *Clerk* (18).

If there could be a prescription by the inhabitants through the corporation, such cannot be inferred from the evidence here—*The Mayor of London* v. *Low* (19).

Muir McKenzie, in reply.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE) (on Aug. 1).—This appeal, which has been twice argued before your Lordships, is from an order of the Court of Appeal affirming a judgment of the Common Pleas Division upon a Special Case in an action of trespass brought by the Corporation of Saltash against the appellants. The alleged trespass consisted in taking oysters from a part of the river Tamar (being a navigable tidal river or arm of the sea), in which the corporation claims a several oyster fishery; and the questions to be determined are—first, whether, upon the facts appearing by the Special Case, the right of the corporation to a several fishery is established; and, secondly, if this be so, whether the free inhabitants of ancient tenements in the borough of Saltash (to which class the appellants belong) are entitled to participate in the benefit of such several fishery by dredging for oysters in the *locus in quo* during the period from Candlemas to Easter in every year.

The respondents have been successful in both the Courts below. But in the Common Pleas Division the case was treated as depending upon the question whether the free inhabitants of ancient messuages in Saltash could be presumed to be separately incorporated so as to be capable of prescribing for a *profit à prendre in alieno solo;* and it was held, I think rightly, on the same grounds as in *Lord Rivers* v. *Adams* (4) and *Chilton* v. *The Corporation of London* (6), that such an incorporation ought not, under the circumstances, to be presumed. In the Court of Appeal the opinions of the learned Judges were divided: Lord Justice Baggallay thinking that the respondents had failed to establish such a right, exclusive of the appellants, as was necessary to maintain the action; while Lord Justice Brett and Lord Justice

(18) 2 Lev. 252.
(19) 49 Law J. Rep. Q.B. 144.

Cotton thought that the title of the respondents was sufficiently proved, and that the right of fishing claimed by the free inhabitants of ancient messuages within the borough could not have any lawful foundation, unless at the mere will and pleasure of the respondents.

The "burgesses of Essa" (now called Saltash) were a corporation from time immemorial, and, as such, enjoyed various customs, liberties and rights. Some of these were confirmed by an ancient charter of Reginald de Vantort, in whose lordship (held under the duchy of Cornwall) Essa was included, and by subsequent *inspeximus* charters of Richard 2, Edward 4, Henry 8, Queen Elizabeth, Charles 2, and George 3. Queen Elizabeth's charter, after reciting that the burgesses of Essa, from time whereof the memory of man was not to the contrary, had peaceably held and enjoyed the rights specified, "and divers other customs, liberties, immunities, exemptions and jurisdictions, as well by prescription as by reason and pretext of the aforesaid charter, grants and confirmations of old time made," reconstituted the corporation under its present name, and granted to it anew its former rights and liberties. The charter of Charles 2 altered the constitution of the municipal body and the manner of electing burgesses; and those alterations were confirmed by George 3. No mention is made in any of these charters of any several fishery; and I think they do not advance the case of the corporation, except so far as they recognise its title to other prescriptive rights besides those which they specify, and which must (of course) be otherwise ascertained. The proper mode of ascertaining what these are is by evidence of user, and it does appear, by a lease executed by the corporation in 1680 on certain trusts for the payment of its debts, and by a series of later leases, under which rents have been paid to and received by the corporation, commencing in 1774 and continued till a quite recent date, that the right to fish for oysters in the *locus in quo* was exercised by the corporation and its lessees for nearly two hundred years before the commencement of this action, without any other qualification than that usage in favour of the free inhabitants of ancient tenements within the borough, on which the appellants rely. If that usage can be reconciled with the existence and the enjoyment by the corporation of a several oyster fishery, the right of the corporation to such several fishery is established.

The 9th paragraph of the Special Case is in these words: [His Lordship read them.] The 16th paragraph, which is addressed to the question of the reasonableness or unreasonableness of this usage, will hereafter be considered. For the present I think it convenient to deal with the facts and with the inferences to be drawn from them (liberty to draw such inferences being reserved by the Special Case) as if the usage (supposing it to be otherwise good in law) were not open to objection on the score of unreasonableness.

According, therefore, to this statement in paragraph 9, that class of inhabitants to which the appellants belong has fished, in the manner of which the lawfulness is now for the first time called in question, openly and as of right, in every year from the time of King Henry 2 (or earlier) down to the date of the alleged trespass for which this action was brought, including all those years during which the fishery was under lease from the corporation. Those leases were in every instance (as far as appears) made to inhabitants of Saltash to whom the usage in question could not have been unknown, and although no express exception was made in any of them in favour of the right of the free inhabitants of ancient tenements to fish from Candlemas to Easter, they did always so fish without interruption either from the corporation or from its lessees. Such a usage, so definite and so limited in its character both as to persons and as to time, cannot (in my opinion) be regarded as a series of trespasses acquiesced in through mere neglect or indifference by the corporation and the lessees. The terms of the Special Case, the total absence of any ground for inferring that it was under any by-law, or otherwise by leave or licence of the corporation, and the leases, with which any such leave or licence would have been inconsistent, satisfy me that it was not "precario" any more than it was "clam" or "vi." The Special Case, no doubt, does not find that such fishery was

"of right" (which would have been to prejudge the question of law left for the opinion of the Court), but only that it was under a claim of right. But an open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law.

That in such a case a lawful origin ought to be presumed, if it is reasonably possible, is established by many authorities, among which I think it sufficient to mention *Cocksedge* v. *Fanshawe* (20), both because the judgment of the Court of Queen's Bench in that case was affirmed by this House, and because it is an instance of a right being established (on this principle), under and by virtue of a prescriptive title in a corporation, in favour of a particular class of members of that corporation, and against the corporation itself.

The Corporation of London had an immemorial right to one farthing duty on every quarter of corn imported into the city coastwise east of London Bridge (except from the Cinque Ports and Kent) by all persons not free of the City; and a claim of freemen carrying on the business of cornfactors within the City to receive from the corporation and retain for their own benefit the duties collected by the officers of the corporation upon corn so imported by their correspondents, was held to be established by proof of long usage. It was contended for the plaintiff, who was a freeman cornfactor, "that in the original grant to the corporation there might have been a proviso that whenever corn subject to the duty should be consigned to free factors they should be entitled to receive the farthings to their own use," and on the other hand "that the claim, whether as founded on an exception or proviso in the original grant, or as a trust or otherwise, could not have had a legal origin." Lord Mansfield said: "The only question is, whether such usage could by any possibility have a legal commencement. The plaintiff was not bound to find out what the actual commencement was, because it has existed from time immemorial. The City itself has no writing or grant to shew .... The rule of law is that wherever there is an immemorial usage the Court must presume everything possible which could give it a legal origin. . . . Now, why is it not possible that in the original grant the Crown may have said, for the purpose of encouraging persons to take up their freedom, that no freeman should pay the duty to the City, either for his own corn, or for corn consigned to him as a factor? Would such a grant be void? Certainly, there may have been such a grant."

It is clear, both from what Lord Mansfield said when a new trial was granted, and from the reasons given on both sides in the House of Lords, that the claim established by the plaintiff Cocksedge was not to an exemption of the corn consigned to him from duty, but to have the duty actually received from the owners upon the importation of that corn paid over to him by the corporation for his own use and benefit. Among the reasons signed by the Attorney-General (Wallace) and Mr. Cambre in support of the judgment which the House of Lords affirmed, was this: "In the original grant from the Crown to the corporation, the duty on corn consigned might be appropriated to the use of the freemen to whom it was so consigned. A corporation may take such a grant, or they may prescribe for the benefit of individual members belonging to such corporation; and the individuals may enjoy and assert the rights so granted or prescribed for in the name and through the medium of the corporation to which they belong."

Is it then, or is it not, reasonably possible that the right claimed by the present appellants may have had a lawful origin, assuming as true all that is stated in the Special Case, and also assuming that the mayor and free burgesses of Saltash have a prescriptive title to a several fishery in the *locus in quo*? An affirmative answer to that question would solve every difficulty in the case, and would reconcile all the evidence as to user on which both parties rely.

If it were necessary that the class to which the appellants belong should make out a right to a *profit à prendre in alieno*

(20) 1 Doug. 119; 3 Brown's P.C. 703.

solo, I should be of opinion that they could not do so. *Gateward's Case* (21) is a conclusive authority against such a claim by such a class, unless made through a corporation under its corporate title, as it was in the *Coventry Case* (*Boteler* v. *Bristow*) (9) and in *White* v. *Coleman* (8). Here there is no corporation through which the claim could be made, except the mayor and free burgesses of Saltash themselves; and the right could not possibly be prescribed for through them, or under their title, as a *profit à prendre in alieno solo*, because, if a several fishery exists, they are the owners in fee-simple of that fishery. But it appears to me to be consistent with all the facts and documents stated or referred to in the Special Case, that the fishery may have been originally granted to the free burgesses of Essa, subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish, as they have been accustomed to do, in every year from Candlemas to Easter.

I am unable to discover any reason why this should not be a good foundation in law for the right which the appellants claim. If an actual grant, so qualified, were produced, it would be immaterial whether the word used in it were "trust," "intent," "purpose," "proviso" or "condition," or whether the trust or duty imposed on the mayor and free burgesses were cognizable in equity only, or also at law. In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. "If I give" (said Lord Cairns in the *Wax Chandlers' Case* (22)) "an estate to A upon condition that he shall apply the rents for the benefit of B, that is a gift in trust to all intents and purposes." A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity—*Jones* v. *Williams* (23), *The Attorney-General* v. *The Mayor of Carlisle* (24), *Howse* v. *Chapman* (25); and see *The Attorney-General* v. *Heelis* (26) and *The Attorney-General* v. *The Mayor, &c., of Dublin* (27). In a case cited during the argument of this appeal —*Wright v. Hobert* (10)—Lord Macclesfield established, as a charitable trust, an ancient grant of land for the pasture, during three months of the year, of the cows of "as many of the inhabitants" of a certain village "as were able to buy three cows," and during seven months of the rest of the year, "to be in common for all the inhabitants"; saying "that if this manner of grazing had been by prescription or usage, no person but the inhabitants of ancient messuages could be entitled to it, but it is otherwise appointed by the grant of the donors."

The law of Scotland on this class of subjects may not be (and probably is not) in all respects the same as that of England. But when I find judicial opinions delivered in some Scotch cases (more or less in *pari materia*) which express with accuracy the point of view from which I regard the case now before your Lordships, I may without impropriety borrow the language of those opinions to illustrate my own. Those Scottish authorities were distinguished from cases of servitude by Lord St. Leonards in *Dyce* v. *Hay* (28): "Some of the most important of them" (he said) "are corporation cases, where the inhabitants claimed rights as against their corporation, that corporation being in fact trustees for the inhabitants; and the claim was one, not between the corporation and the public, but between the governing body of a corporate place and the bulk of its own population." In the *Musselburgh Case* (*Sanderson* v. *Lees*) (29), where the inhabitants claimed rights of recreation, &c., over land vested in the corporation, Lord President Mac Neill said: "The right of the complainer and the other inhabitants is not to be regarded as a servitude right at all. The

(21) 6 Rep. 59 *b*.
(22) 42 Law J. Rep. Chanc. 425; Law Rep. 6 H.L. Cas. 1.
(23) Amb. 651
(24) 2 Sim. 437.
(25) 4 Ves. 542.
(26) 2 Sim. & S. 67, 76, 77; 2 Law J. Rep Chanc. 35.
(27) 1 Bligh N.S. 347.
(28) 1 Macq. H.L. 305.
(29) 22 Sc. Sess. Cas. (2nd ser.) 27.

magistrates held the property all along for the community; but the purposes for which it has admittedly been possessed by the inhabitants are not inconsistent with the right of property in the magistrates. These uses have been co-existent with the property from the first; and the property, as I look upon the case, was in the magistrates for the community for the purposes in question as much as for other purposes; and I think that the possession contended for and established by the verdict was all along a quality of the right which the magistrates had to this property, and that the inhabitants are entitled to protect it from encroachment." Lord Curriehill said: "On principle, as well as on authority, I hold that the title of the burgesses and inhabitants consists in the conditions of the grants to the corporation; and that the legitimate effect of the inveterate usage following thereon is to explain their true import, and the nature and extent of the grants thereby made in favour of the burgesses and inhabitants." Lord Deas agreed, and added: "I presume there is no doubt at all that if there had been produced original charters dedicating this ground to these particular purposes, the ground could not have been applied to any other purposes; and the question therefore is whether we have not got what is equivalent."

The question being (as I have said) what is reasonably possible, it appears to me to be reasonable to presume, in favour of such user as is proved in the present case, that the grant to the free burgesses of Essa of this several fishery, proved only by prescription, and also proved to have been immemorially enjoyed (at certain times and in a uniform manner) by the free inhabitants of ancient messuages within the borough, was originally made to the corporation upon condition, and for the purpose, that it should be so enjoyed. I think that such a presumption is not only reasonable in law, but probable in fact.

The Special Case, upon the statements in and inferences from which your Lordships have to decide, is silent as to the original relation of "the free inhabitants of ancient messuages" in the borough of Saltash to the body corporate. Under the modern constitution of the borough they are not burgesses or freemen. But the constitution of the municipality was altered by King Charles 2, and it is, at least, not improbable that these "free inhabitants" may have had, before that time, some greater share in the corporate privileges than afterwards. We have to deal with rights acquired, not under the modern, but under the ancient constitution, whatever it was—*Beadsworth* v. *Torkington* (11). The word "free" seems to me most naturally to import that, in some sense, and to some extent (though not defined), such inhabitants of ancient messuages do, or did anciently, participate in the "liberties" of the corporation; and, though the light thrown on that point by the charters and other documents is obscure and imperfect, it cannot, in my opinion, be said that there is none, or that it is of no importance.

The charter of Reginald de Vantort appears to me to point to the holders of burgage tenements (which may be presumed to be identical with or to include the "ancient messuages") within the borough as the original "burgesses of Essa." Their tenure was that described by Littleton (sections 162 and 164). There was a "hundred court" belonging to the borough, in which they doubtless did suit. Queen Elizabeth's charter shews that "the town and borough, with all and singular its suburbs, members and appurtenances," was vested in the body corporate; and the same charter granted to the corporation powers (doubtless the same with those previously exercised by "the burgesses of Essa") to take tolls, duties and customs, and to make ordinances for the good government of all the inhabitants, and for the public good, common advantage and good rule of the borough. In ancient boroughs there were often various degrees of participation in the borough franchises. (See *Hinks* v. *Clerk* (18) and *The Mayor of Workingham* v. *Johnson* (30); also *Madox, Firma Burgi*, p. 269.)

It is now proper to consider the objection, stated in the 16th paragraph of the Special Case, "that an usage to dredge oysters without stint, for the purposes of sale or otherwise, in a several fishery, is

(30) Ca. t. Hard. 284.

unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter;" and the finding, in the same paragraph, that "The said usage does, in fact, tend to the destruction of the said oyster fishery, and, if continued, will destroy the same."

This last statement must, of course, be taken in conjunction with the 9th paragraph, which finds that the privilege claimed by the free inhabitants of ancient messuages within the borough had been annually exercised from time immemorial down to the year 1876; and what Lord Ellenborough said as to by-laws in *The King* v. *Ashwell* (31) seems to apply here in principle—namely, that "the long continuance of a by-law, though it would not legalise it if it were in itself illegal, is fair evidence to shew that there is no intrinsic inconvenience in it—at least the acquiescence of the corporation in it for above two centuries is a fair answer to any theoretical argument of inconvenience."

Authorities were cited at the bar—*Clayton* v. *Corby* (17) and *Bland* v. *Lipscombe* (15)—for the purpose of shewing that, if the claim were to a common of piscary, it ought to be made with some limitation or restriction, and that an indefinite claim to destroy the subject-matter (*e.g.* by taking away minerals which are part of the soil and freehold) cannot be supported in law as a *profit à prendre in alieno solo*. But, in the view which I have taken of the present case, it is not one of common of piscary or of any other kind of *profit à prendre in alieno solo*; so that the objection, if it is of any force at all, can only be to the reasonableness of the presumption of fact which your Lordships are asked to make. Considered in that light, the objection does not appear to me to be of any serious weight. The tendency to the "destruction" of the oyster fishery, spoken of in the Special Case, can mean no more than what must always be in the power of the public where there is a general public right of fishing, or of any owner (whether absolute or limited) where there is a several fishery—namely, the exhaustion of the fishery by taking excessive numbers of fish. Fish (whether floating or shell-fish) are not part of the soil or freehold. Their capture is merely the ordinary mode of the preception of those fruits and profits which a fishery produces. They grow and are reproduced continually from spat and spawn; and if it is true that a fishery might possibly be exhausted by excessive fishing, it is only in the same way that a field may be exhausted by over-cropping. If the corporation had taken the fishery upon condition or trust that the free inhabitants of ancient messuages should be at liberty to fish without stint, for sale or otherwise, at all reasonable times throughout the year, the possibility of the exhaustion of the oyster-beds by an improvident use of that privilege would not have been a valid objection to such a condition or trust; and, if not, it cannot be so when the right is more limited. The usage in this case, although it is to take oysters "without stint, for the purposes of sale or otherwise," is not unlimited, being confined to a particular class of persons—namely, the inhabitants of ancient messuages within the borough (whose number would not be capable of indefinite increase) and to a particular time of the year, varying between a minimum of seven and a maximum of twelve weeks. It must also necessarily be subject to any general restrictions by statute law as to taking the spat, spawn and young brood of oysters, and to any reasonable regulations consistent with the substance of the right itself, which the corporation may think fit to make, by by-law or otherwise, as to the manner of exercising it, such, *e.g.*, as those restrictions relating to the size of oysters proper to be taken which are found in the leases to Clemens and Dunsford of 1774 and 1867.

My opinion is, that the question in this case being altogether one as to the true nature, character and conditions of a prescriptive title established by evidence of user and enjoyment only, the whole user which has prevailed from time immemorial until now, and not only that part of it which is in favour of the respondents, may be, and ought to be, taken into account. That user, taken as a whole, appears to me to establish a title in the respondents to a several fishery; not, however, an absolute and unqualified title for their

(31) 12 East, 22.

own sole benefit, but one qualified by a trust or condition in favour of the free inhabitants of ancient tenements within the borough, in accordance with the usage stated in the 9th paragraph of the Special Case. I therefore think that the order appealed from ought to be reversed.

The principle on which I have arrived at this conclusion would not, in my opinion, be applicable to such a case as *Lord Rivers* v. *Adams* (4), in which, if the defendants had alleged the plaintiff to be their trustee, that allegation would have been met by the production of the plaintiff's title-deeds, shewing that he held under conveyances made to him and his ancestors (in the usual way in which titles to land are established in this country) without any trust. Against such a title, a trust could not, in my opinion, be presumed from any evidence of mere fishing in a stream which passed, and of which the plaintiff had possession, under those conveyances.

I must move your Lordships that the order under appeal be reversed, and that judgment in the action be entered for the appellants, with costs in both the Courts below and the costs of this appeal.

EARL CAIRNS.—I have arrived at the same conclusion.

There were several questions argued, both here and in the Court below; and I think it desirable to mention them for the purpose of explaining that I should be very far from attempting to call in question the law as applicable to those questions. In the first place, I agree with the view of the Common Pleas Division that the free inhabitants of ancient messuages in Saltash cannot be presumed to be incorporated so as to be capable of prescribing for a *profit à prendre in alieno solo*. In the next place I think it to be clear law that while you may by custom claim an easement to be enjoyed over the land of another, you cannot by custom claim a *profit à prendre in alieno solo*. I think it also to be clear law that you cannot claim by prescription anything which could not have a lawful beginning. And I think it also clear that a fluctuating and uncertain body cannot claim a *profit à prendre in alieno solo*, and indeed cannot be the grantee either of a several fishery or of any other kind of real property. Upon all those questions, therefore, nothing that I am going to say will raise or suggest any kind of doubt.

But, in the first place, upon the evidence it appears to me clear that the corporation have established a right (I do not go into the evidence, because my noble and learned friend has referred to it) to a several fishery in the river, subject to whatever may be the just inference to be derived from the statement in the 9th paragraph of the Case. [His Lordship read the paragraph.] Therefore, your Lordships have on the one hand the conclusion from the evidence of a title to a several fishery on the part of the respondents, and you have this unqualified statement of the exercise from time immemorial of the defined right as I have read it on the part of the appellants. The question seems to me to be, How are those two titles to be reconciled?

I wish to put aside a suggestion which was made both in some parts of the argument and in some of the judgments in the Court below, that the facts in this 9th paragraph of the Case are easily explained by supposing that the corporation had the right which I have stated, and that the exercise of this particular privilege on the part of the appellants was by permission, by licence, on the part of the corporation, and that it was a revocable licence, which could be put an end to at any time. The Special Case is one from which your Lordships are entitled to draw any conclusion, as to matters of fact, which you think proper. It appears to me impossible to draw any conclusion such as the argument I have referred to would suggest, but that, on the contrary, we are bound to draw a conclusion of the opposite kind; because I find, with regard to the character of the acts of the appellants, the statement in the 16th paragraph, that the respondents "contend that an usage to dredge oysters without stint for the purposes of sale or otherwise in a several fishery is unreasonable and destructive of the fishery, and does not raise any presumption of any royal grant or charter, and cannot be the subject of any prescription or right under the statute mentioned in the previous paragraph. The said usage does in fact tend to

the destruction of the said oyster fishery, and, if continued, will destroy the same."

If that is the opinion of the respondents at the present time, it must have been the opinion of the corporation at all times; and it appears to me to be utterly incredible, and a thing the idea of which cannot for a moment be entertained, that with that impression on their minds the corporation allowed, as a matter of licence and permission, these practices, or the exercise of this right, described in the 9th paragraph of the case. But in addition to that, it appears to me that the statement in the 9th paragraph itself is inconsistent with the idea that the exercise of the right was by permission or licence on the part of the corporation; because the statement is that "the free inhabitants of ancient tenements in the borough have from time immemorial without interruption, and claiming as of right, exercised the privilege" in question. Those two circumstances—namely, the character of the acts (taken in connection with the opinion entertained by the corporation of the character of those acts), and the statement in the 9th paragraph—appear to me to dispose of the idea that this right on the part of the appellants was exercised by the licence of the corporation.

Then, coming to the titles of the two contending parties, and treating them as independent and separate titles, and repudiating the suggestion that the acts of the appellants are to be explained by a licence or permission on the part of the respondents, we have cast upon us the duty of reconciling in some way these two titles and these two parallel practices. I agree that we have not all the information which would be desirable as to the origin of the term "the free inhabitants of ancient tenements in the borough of Saltash"; but, looking to what my noble and learned friend has referred to, the changes which this corporation has undergone from time to time, and the absence of the documents which might inform us precisely as to the nature of those changes, it appears to me that we must conclude that these "free inhabitants of ancient tenements in the borough of Saltash" were persons who originally had some share in the corporation and were in some way connected with the corporation, and that very probably these ancient tenements in the borough were those burgage tenements which are spoken of in the passage in Littleton to which my noble and learned friend has referred.

Then I come to the question, Is there any difficulty, in that state of things, in supposing, what we are bound to suppose if it is possible, an ancient grant to the corporation of Saltash which would explain and reconcile the whole of the practice which we have thus laid before us? It appears to me that there is no difficulty at all in supposing such a grant, a grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant in some terms which are not before us, but which we can easily imagine—a condition that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the Case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which, in the very wide language of our Courts, is called a charitable—that is to say, a public—trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable—that is to say, a public—interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the Courts which was very well explained in a well-known case in the Court of Chancery which was decided when Lord Campbell was Lord Chancellor, a case with regard to Shakspeare's house—*Thompson* v. *Shakspear* (32). Indeed, it is a principle which has been established in many cases.

I therefore agree with my noble and

(32) 1 De Gex, F. & J. 399; 29 Law J. Rep. Chanc. 276.

learned friend that we are bound here to suppose a grant of the kind which I have mentioned, that that grant would not be in any way contrary to any rule of law, and that the privilege which the appellants have enjoyed from time immemorial should be held to be founded upon a title of this kind. I therefore agree with my noble and learned friend that the decision of the Court below should be reversed.

Lord Blackburn.—The law is, I think, now perfectly settled on many of the points raised in this case, and I think that the learned counsel, who argued on each side with great ability, agreed that it was so, and did not either of them raise any false points.

The right of fishing in arms and creeks of the sea and in tidal rivers is originally lodged in the king; yet, as Lord Hale (33) says, "the common people of England have regularly a liberty of fishing in the sea, or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers where either the king or some subject hath gained a propriety exclusive of that liberty." One of the modes in which such a propriety can be gained by a subject is by prescription. And when it can be shewn that a corporation which existed before the time of legal memory, and was therefore capable of taking by prescription, has, as far back as living memory goes, enjoyed this exclusive right of fishery, excluding the common liberty, and dealing with it as of right as a distinct and separate property, and there is nothing to shew that its origin was modern, the proper presumption is, as was said in *Malcolmson* v. *O'Dea* (34), that the fishery, being reasonably shewn to have been dealt with as property, must have become such in due course of law, and therefore must have come into existence before the time of legal memory.

The charter of Reginald de Vantort confirmed to "my free burgesses of Essa all their liberties and free customs hereunder written which they had in the time of my ancestors." This charter was inspected, ratified and approved by Richard 2. It is not dated, but as Reginald de Vantort was one of the great barons entrusted with enforcement of Magna Charta in the reign of Henry 3, this charter is sufficient proof that the free burgesses of Essa, who had in the time of his ancestors the liberties, &c., which he confirmed to them, were a corporation existing before the time of legal memory, capable of having at that time, and not improbably actually having, a property in the fishing, in that part of the sea, exclusive of the common liberty of the common people of England to fish there. The various charters to be found in the appendix to the Case shew that the liberties of this prescriptive corporation of Essa were from time to time confirmed, enlarged, and surrendered, and regulated, and the name of the borough was by Queen Elizabeth changed from that of the free burgesses of Essa to that of the mayor and free burgesses of Saltash. Her charter was surrendered by the then corporation to Charles 2, who recreated the corporation; and George 3, on the corporation becoming incapable of continuing itself, recreated it. There is nothing that I see in these various charters indicating that the corporation had ever an exclusive fishery, but there is nothing inconsistent with it; and it was not disputed at the bar that if there was a prescriptive right of exclusive fishery in the old corporation of Essa, it was properly and validly continued down to the present corporation, neither the change of name nor the surrenders and regrants in any way affecting their property.

The proof of enjoyment and acts of ownership by the corporation from 1680 downwards, now more than two hundred years, is such as would beyond reasonable doubt raise the presumption that the corporation had enjoyed this exclusive right of fishery from time immemorial, were it not for the 9th paragragh of the Case. I have felt some difficulty from not being able to understand who "the free inhabitants of ancient tenements in the borough of Saltash" are. I think it, however, quite clear that they are not the public at large, and that the acts of the free inhabitants of ancient tenements in taking oysters from the 2nd of February to Easter Eve are not acts of the public, as such, exercising,

(33) De jure Maris, pars prima, c. 4.
(34) 10 H.L. Cas. 593.

though only during a limited portion of the year, the general liberty, from which the plaintiffs claim to have by prescription the right to exclude them during the whole year; but only acts of a limited portion of the public claiming, in conjunction with the plaintiffs, to exclude the general public from this liberty.

What the acts of ownership and the fact found in the 9th paragraph taken together prove, is that during the greater part of the year the plaintiffs, and during the period between the 2nd of February and Easter Eve the plaintiffs and this limited portion of the public as tenants in common with the plaintiffs, have excluded the general public. I cannot, therefore, agree with Lord Justice Baggallay that the effect of this paragraph is to disprove the exclusive right of fishing, and shew that all the public, and the defendants as part of them, have a liberty of fishing, either during the whole year or this limited portion of it. I think, however, that if the "free inhabitants of ancient tenements in the borough of Saltash" are capable of, in any way, acquiring a right of property in the fishery during this limited time, the presumption should be made that they have acquired it. If they cannot acquire such a property, the privilege, however long tolerated, may be withdrawn.

After the former argument it was, I think, agreed that this was the main question, and also that, in this case, it is to be considered on the assumptions that the plaintiffs have established the prescriptive right of fishery against the public, and that the defendants have not established that they were incorporated so as to be capable of prescribing in their own right.

I do not attach any weight to the statement in paragraph 16. I do not doubt its truth, but the unlimited right given at common law, in the absence of prescription, to all the public to fish would be even more likely to destroy the oysters. It affords an excellent reason why the mayor and aldermen, if they have the power—as, till I learned that the decision of this House was to be the other way, I thought they had—should put an end to the practice, or put it under such restrictions as will prevent the oysters from being extirpated; just as it affords a reason why the Legislature should put restrictions on the common law right, but does not prevent the mode of enjoyment from being legal, though wasteful.

I do not think it is disputed that the law was accurately stated by Mr. Justice Willes in *Constable* v. *Nicholson* (35), where he says:—"The distinction is well established that by custom you may claim an easement to be enjoyed over the land of another, but you cannot claim a profit out of the land. The only difficulty in these cases is to ascertain what is a *profit à prendre*, and what an easement." And I think it was not disputed that a licence to take and carry away fish for sale or otherwise is a licence of a *profit à prendre*, which may at this day be created by a grant to a grantee, capable of taking an interest in the land—*Wickham* v. *Hawker* (36); nor that there was not any difference in this respect between a licence by the owner of a prescriptive fishery in the sea, and the owner of a fishery in an inland river. And as such a right would now be created by grant to anybody capable of holding such a profit in land, it can be prescribed for by any one who is capable of prescribing. I think the law is that though a custom may, if in other respects reasonable, establish a local law in a particular place differing from the common law, as a custom of gavelkind or borough English, and many others which could not since the time of memory be created by anything but an Act of the Legislature, yet prescription can only be of something which could have a lawful origin at common law. This has often been laid down. I will only refer to *Dalton* v. *Angus* (37), where the Lord Chancellor (Selborne) says: "The rule as to prescription is thus stated in Sir Francis North's argument in *Potter* v. *North* (38): 'The law allows prescriptions, but in supply of the loss of a grant. Ancient grants happen to be lost many times, and

(35) 14 Com. B. Rep. N.S. 240; 32 Law J. Rep. C.P. 240.

(36) 7 Mee & W. 63; 10 Law J. Rep. Chanc. 153.

(37) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.

(38) 1 Vent. 383; 1 Saund. 347; 1 Lev. 268.

it would be hard that no title could be made to things that lie in grant but by shewing of a grant; therefore upon usage *temps dont*, &c., the law presumes a grant and a lawful beginning, and allows such usage for a good title, but still it is but in supply of the loss of a grant; and therefore for such things *as can have no lawful beginning*, nor be created at this day *by any manner of grant, or reservation, or deed that can be supposed*, no prescription is good.'" I have preferred quoting from *Dalton* v. *Angus* (37), because the italics are Lord Selborne's, and shew what he thought, and I think, is the true test.

I have come to the conclusion that no form of grant, either ancient or modern, could be framed effectually giving to a fluctuating body a right in fee to a *profit à prendre* in land, either by a grant to that body direct, or by casting upon the grantee in fee of a several fishery or of any other real property an obligation to permit a fluctuating or uncertain body to take such a *profit à prendre* out of the subject of the grant. I say nothing at present as to whether such an obligation might not be enforceable as a trust. I confine myself to the question at law. But, as I fear that in saying this I differ from the Lord Chancellor, and perhaps some others of your Lordships, I must give my reasons at more length than I should have otherwise done, especially as this question was not raised below, or at least not so raised as to lead the Judges to discuss it.

Gateward's Case is reported in 6 *Co. Rep.* 60, and also in *Cro. Jac.* 152. The two reports quite agree, and, as I think, from them both it is to be collected that the reason, or at least a principal reason, why the custom was held bad was that it is repugnant to the nature of an inheritance in a *profit à prendre* in real property that it should be vested in a body not capable of releasing or dealing with it; or, at least, that it is against the policy of the law of England to allow it to be so vested. This is expressed in *Cro. Jac.* thus: "Nor can such a common be released; but if one inhabitant should release, another which succeeded him might claim it; which is against the rules of law that an inheritance in a profit should not be discharged;"—and the 4th resolution in 6 *Co. Rep.* is to the same effect. This, if it is the reason of the rule, is equally strong against the validity of a grant direct to such a fluctuating body of an inheritance in a profit in land. In *Constable* v. *Nicholson* (35) Mr. Justice Willes said such a grant was not good. In *Chilton* v. *The Corporation of London* (6) the Master of the Rolls said, "Such right cannot exist by grant." And I have not been able to find any case in which it has been said that such a grant would be good, unless where, being from the Crown, and out of Crown property, it might be implied that the Crown created the grantees a corporation for this special purpose.

But it was argued that even if there could be no such grant direct to the fluctuating body, there might be an exception or condition in the original grant to the owners of the fee, requiring them to allow such a fluctuating body to take a *profit à prendre* out of the land so granted, and that such an exception or condition would be good, at least where there was such a relation between the grantees and the body as exists between a corporation of a town and the whole or a class of the inhabitants of that town. And cases were cited in support of this position, which, as they seemed to the Lord Chancellor to support it, I have carefully examined, but which I do not understand as he does.

I think such an exception or condition, operating so as to give to that fluctuating body an inheritance in a profit in land, would be just as open to the objection that it was repugnant to the rules of law not to allow an inheritance in a profit in land to vest so as not to be capable of being discharged, as a direct grant. And it seems to me a strong authority against the validity of such an exception or condition that in every case where it was proved or admitted that there was a custom for a fluctuating body from time immemorial to take a *profit à prendre* in the soil of another, the presumption that the fee was originally conveyed subject to such an obligation would be quite as strong as in the present case; and the right of the fluctuating body, if properly pleaded, would be good, if good here; and

in the recent case of *Lord Rivers* v. *Adams* (4), where no point turned on the pleadings, it ought to have been held that the fee was, before the time of legal memory, conveyed to the person whose estate Lord Rivers now has, subject to such an obligation. Yet there is no case of which I am aware in which such a claim has ever been made, certainly none in which it has been supported. *Cocksedge* v. *Fanshawe* (20) was not, as I read it, such a case. The claim there was not one relating to real estate at all, and *Gateward's Case* (21) could have no bearing upon it. The original grant of the Crown (presumed from long usage) to the Corporation of London was to take a tax on all corn imported into the city. And the question was, whether there could be a lawful origin for an exception, equally proved by ancient usage, of corn consigned to the freemen of the city. The Crown had, at common law, a right to take certain dues; some (either before or after legal memory) it granted to subjects, some it retained to itself, amongst others prisage of wine. Petty customs and town dues were very often granted to the municipal corporation, and the duty on corn sued for in *Cocksedge* v. *Fanshawe* (20) seems to have been granted to the city before the time of memory. Lord Hale, in his treatise concerning the customs, part 3 of his treatise *De jure Maris*, chapter 3 (I quote from Hargrave's *Law Tracts*, Dublin edition, A.D. 1787, page 125), says that such rights may be discharged or transferred; and "touching the former of these, how this discharge may be had, I shall set down the learning thereof in these ensuing propositions." Of these I shall only read the third: "A man, or town, or corporation may have a discharge of prisage by charter; and this is without all question, as shall be shewn. If the king grant to the mayor and commonalty of the city of London, *quod omnes cives civitatis pr dictæ* shall be free of prisage, though the charter be granted to the corporation, yet the exemption is well transferred to particular persons; and so in case of a discharge of toll, of putting into juries, and the like privileges of discharge."

This was solemnly decided in the great case of *Walter* v. *Hanger* (39). It is only material to say that the charter there relied on was after the time of legal memory, namely in the 1st Edward 3. And the same is the law as to a discharge by a subject to whom the right to take tolls had been transferred, as appears by the case of the Mayor and Commonalty of Nicholl against the Mayor &c. of Derby, cited in *Mellor* v. *Spateman* (7). There the deed by which the mayor &c. of Derby covenanted with the mayor &c. of Nicholl not to take toll from the commonalty of Nicholl was produced in Court, and it was held that an action lay by the corporation of Nicholl, though the damage was, it was argued, not to the corporation of Nicholl, but to the individuals from whom the tolls were taken. These cases are not in the slightest degree inconsistent with the reason which I think was the ground of *Gateward's Case* (21); for, in the first place, there was no profit taken in the soil or in any way connected with the soil; and, secondly, they were cases of discharge, not of grant. But they are very strong to shew that Lord Mansfield was quite right when he said that a grant to take tolls, subject to an exemption that they should not be taken from a certain class of freemen, would not have been void. In fact, there are many towns in England where the town dues are not exacted from the citizens of London or the Cinque Ports, the grant from the Crown under which the town dues are claimed having presumably been after the date of the exemptions by charter of the citizens of London and of the Cinque Ports from all dues.

Neither can I put the same construction on the effect of the cases as to the form of pleading in prescription which was put in the argument.

I have no doubt that a right to take a profit in *alieno solo* may at this day be granted in gross to a common person in fee, as indeed was done in *Wickham* v. *Hawker* (36), or in gross to a corporation in fee. And it may also be made appendant to other lands and so as to be conveyed along with them. And as such an interest could be created now, it is clear that it might be prescribed for. That is in

(39) 1 Roll. 138; Moore 833.

no way inconsistent with what I take to be the reason of *Gateward's Case* (21), for such a person can always release or otherwise part with the right.

The owner of the *profit à prendre* may take it in person or by his servants. But he may also, whether the profit is in gross or appendant to land, get the benefit of his *profit à prendre*, by selling or letting an interest in it, for a longer or shorter term, to any person capable of taking such an interest, and so long as that interest endures the donee has an irrevocable licence to take so much of the profit. And it is clear justice that the tenant or other person taking an interest ought, by good pleading, to be able to protect himself if an action be brought against him by the owner of the servient tenement for using the right whilst his interest endures, whether that interest was long or short. And the mode in which this should be done was the question in the case of *The City of Coventry* (9). At that time, according to Beatson's *Political Index*, Brian was Chief Justice of the Common Pleas, Littleton and Choke were puisne Judges. Catesby was not a Judge till some years later, and Genny and Pigot never were Judges at all, and these three must have been serjeants, and probably counsel for the parties. There the plea, as first pleaded, was that Coventry was an ancient city, and that all the citizens and inhabitants have had, from time immemorial, common for their beasts, *levant* and *couchant*, in the city in the *locus in quo*, and the defendant being an inhabitant put his beasts in. This was demurred to by Pigot, on the ground that an inhabitant in the city, who was at most a tenant-at-will, could not prescribe. It was agreed that this was so, and then the question discussed was how the plea should be amended. Littleton seems at first to have thought that the plea ought to be that there was a custom in the city of Coventry for the inhabitants to have common in the *locus in quo*, and that the issue should be on the custom; which would have been a direct authority against what was afterwards decided in *Gateward's Case* (21). But Brian pointed out that the custom bound the land and not the person; and after some discussion, in which Littleton referred to a case in the Exchequer which made against his first view, Choke said that the prescription was in the city, and that the inhabitant was in the same position as if he was tenant-at-will to the city, and that the "plea might be in this form—that the mayor and citizens have had the right of common for them and all the inhabitants in the city, and could not be otherwise." On this, Pigot said that if such was the opinion of the Court, and the defendant would plead in that form, he would take issue on the plea. On a later day in the same term, Trinity Term (pl. 16), the defendant put in his plea, wishing to allege the common to be for all beasts, and to leave out the averment that it was for beasts, *levant* and *couchant*, in the city. Pigot demurred, on the ground, as I understand it, that the only reason that the inhabitant had common at all was that he was in the same situation as a tenant-at-will to the city, who had the city to which the common was appendant, and that, therefore, the plea was not good for any beasts save those *levant* and *couchant* in the city, and of this opinion were the Court. But Pigot said that a man might have common in gross attached to his person for beasts not *levant* and *couchant*. It seems plain that this was a case of common appended to the property in the city. And it certainly seems to me far from being an authority for saying that the inhabitant had a right, as against the city, to have this common. All that was decided was that a tenant-at-will of part of the dominant tenement might justify putting on the servient tenement, beasts which were *levant* and *couchant* on the dominant tenement. And this is, I think, the rule of pleading which is stated in the 6th resolution of *Gateward's Case* (21). There is a mistranslation or misprint, I do not know which, in the first edition of *Coke's Reports* in English, which renders this resolution as printed unintelligible, and it has not been corrected in any of the subsequent editions. On reference to the original in French it will be found that Lord Coke wrote "as he who hath not ('auscun') any interest cannot have ('auscun') any common, so there is none who hath ('auscun') any interest, albeit but at will, and ought to have common,

but what, by good pleading, he may enjoy it." And so in *White* v. *Colman* (8), the mayor and burgesses prescribed properly enough for common of estovers for them and every inhabitant to burn in their houses. Common of estovers, from its nature, must be appurtenant to the land on which stand the houses in which they are to be burned. It is not necessary to enquire as to the ruling that this prescription was good for new houses, for that is not material in this case.

Bodies corporate may as such hold property in their corporate capacity, and it is, I think, incident to the nature of a corporation that there should be a power in the governing body from time to time to make ordinances for the management of that property. In the charter of Queen Elizabeth such a power is expressly given to the mayor and aldermen, or the major part of them, in convocation, to make from "time to time" such ordinances as to them in their discretion may seem meet, *inter alia*, "for the letting and demising of the lands, tenements, possessions, revenues and hereditaments, given, granted or assigned, or hereafter to be given, granted or assigned, to the mayor and free burgesses and their successors."

I suppose an ordinance directing that any property belonging to the corporation should, till further order, be enjoyed by the individual burgesses would be good enough; and in all corporations, whilst such an ordinance allowing the individual burgesses to enjoy a right of common existed, the burgesses could plead the prescription for their benefit to protect themselves, just as the tenants-at-will could, and I think the various cases referred to go no further than this. And if the ordinance thus made was revocable, it would be in no way inconsistent with *Gateward's Case* (21), and I am not aware of any authority for saying that such a by-law or ordinance, however ancient, was irrevocable, till some rights given to freemen and others were made so by the 2nd section of the Municipal Corporation Act, 5 & 6 Will. 4. c. 76; see *Hopkins* v. *Mayor of Swansea* (40). But in no way can the 9th paragraph of the Case be understood as stating a right that comes within that enactment. The corporation, I think, just like any other owner in fee, can deal with their property, and release or discharge it, unless they have conveyed it with the property in a part of the dominant tenement to some one else, and in that case the owner of the property to which it was appendant could release it. But whatever may be the meaning of the "free inhabitants of ancient tenements," it cannot be construed as meaning the owners of property to which the right of fishing was appendant. It is not impossible that there was once a by-law or ordinance allowing the inhabitants of the town freely to take oysters from the 2nd of February to Easter Eve; at least its existence would be a lawful origin for the practice stated in paragraph 9. But if there was one it was revoked when the mayor and aldermen made the leases in 1680, and whatever reason the inhabitants then living might have had to complain, I cannot see why that revocation should not be effectual against those who have two hundred years after become inhabitants.

It was argued that at all events such a grant in favour of a fluctuating body might be worked out by treating the corporation as a trustee, and the intervention of the Court of Chancery. I speak with diffidence on a subject with which I am not very conversant, but I believe the rule against perpetuities, which is founded on nearly the same reason as that of *Gateward's Case* (21), applies to all trusts, except those in which the sovereign has the power, as being the ultimate trustee for charitable uses, of altering them. And though there are many cases to the effect that a trust for public purposes, not confined to the poor, may be considered charitable for many purposes, I do not know of any that say that such a trust as is now supposed would be taken out of the rule against perpetuities; and *Carne* v. *Long* (41) seems rather against it. As, however, the noble Earl (Earl Cairns) agrees with the Lord Chancellor that such a trust would not be held void in equity as being against the rule against perpetuities, I do not venture to differ from them. But I do feel strongly that, after the numerous

(40) 4 Mee. & W. 621; 8 Law J. Rep. Exch. 121.

(41) 29 Law J. Rep. Chanc. 503.

cases, from *Gateward's Case* (21) down to *Lord Rivers* v. *Adams* (4), in no one of which was it ever suggested that such a trust should be presumed, your Lordships should not presume it here, unless some distinction can be shewn why the corporation of Saltash should be presumed to be a trustee, and a private person owner of an estate in fee, like Lord Rivers, should not; which is hardly done to my satisfaction.

If, therefore, it depended on my opinion, the judgment of the Court of Appeal should be affirmed, and this appeal dismissed, with costs.

LORD WATSON.—The questions raised in this appeal belong to a department of English law with which I am not familiar; and I have experienced great difficulty in forming an opinion upon them satisfactory to my own mind. Having, however, done my best to examine for myself the numerous authorities cited in the course of the arguments at your Lordships' Bar, I have come to the conclusion that the appellants ought to prevail; and seeing that the facts of the case and these authorities have already been fully commented upon, I shall endeavour very briefly to indicate the considerations which have led me to that result.

The right of the corporation of Saltash to a several oyster fishery in the River Tamar is not established by any written, or, as it has been styled, paper title. The progressive charters, produced and founded on by the respondents, do carry back the origin of the corporate body, whose constitution has undergone several changes, to a period antecedent to Magna Charta; and their terms are not inconsistent with the fact of the corporation having acquired and possessed a right of several fishery beyond the time of legal memory. The existence of right, its nature and its extent, are all dependent upon evidence of user, and I apprehend that the right asserted by the respondents can only be sustained in so far as it is supported by such evidence.

I think it is proved, as matter of fact, that, subject to one notable exception, the respondents have from time immemorial had exclusive possession, as owners, of the several oyster fishery which they claim. But it is also established as matter of fact by the admission of parties—an admission which appears to me to be not only consistent with, but supported by, the evidence in the case—that, from the earliest period until the year 1875, concurrently with the possession had by the corporation, the free inhabitants of ancient tenements in the borough of Saltash, in each year, from the 2nd day of February to Easter Eve, took and carried away oysters from the fishery in question, without stint, for sale and other purposes. During that limited period, the corporation had never had exclusive possession, but a possession shared by the inhabitants of ancient tenements, by whom the privilege was claimed as matter of right.

In the face of the admissions made by the corporation, I cannot assume as matter of fact that the privilege annually exercised by the inhabitants of ancient tenements had its origin in, and was dependent upon, an ordinance or any other form of licence from the corporation. No doubt the admission must be disregarded, if it can be shewn that it is contrary to fact and that these inhabitants fished by leave of the corporation; but I can find nothing in the evidence which warrants that inference. Yet it may be matter of legal inference that their possession was attributable to mere tolerance, although, in point of fact, they fished as in the assertion of a right; and I think that must be the inference in law, unless it can be shewn that the right which they asserted is capable of having a legal origin. The real question, therefore, comes to be, whether the immemorial possession of these inhabitants of ancient tenements, which has been, in fact, coeval with the immemorial possession of the corporation, ought in law to be ascribed to a condition in favour of that class, qualifying the original grant of the fishery to the corporation.

The authorities conclusively establish that a fluctuating body, such as the inhabitants of ancient tenements within a borough, cannot by prescriptive possession acquire for themselves a right to a *profit à prendre in alieno solo*. That was expressly ruled in *Gateward's Case* (21), and in *Lord Rivers* v. *Adams* (4); and it seems to follow from the *rationes* assigned by the Judges who decided these and other

similar cases, that a direct grant of a right of that nature to such a fluctuating body would not be effectual. On the other hand, it has been held in *Boteler* v. *Bristow* (9) and in *White* v. *Coleman* (8) that immemorial possession of a *profit à prendre in alieno solo* by the inhabitants of a borough, not being necessarily burgesses, will enable them to defend themselves against any attempt on the part of the owner of the *solum* to interfere with their privilege by ascribing their possession to the title of the corporate body entrusted with the civic government of the borough in which they reside.

I humbly conceive that the claim put forward by the appellants on behalf of the free inhabitants of ancient tenements within the borough of Saltash may be sustained without violating the principles established by *Gateward's Case* (21) and the other authorities which have been referred to. I venture to think that the corporation of Saltash and the inhabitants of its ancient tenements do not stand to each other in the relation of strangers; and that the uniform and well-defined privilege of taking oysters, which that class of the borough community has immemorially enjoyed, has not been exercised *in alieno solo*, within the meaning of these authorities. I am of opinion that it ought to be presumed that the original grant of the fishery to the corporation was made subject to the condition that the class of inhabitants which the appellants represent, should, in all time coming, possess and enjoy the right which is now claimed by them. Having regard to the relative positions of the corporation and of these inhabitants, I can see no good reason why a qualification of the grant expressed in these terms should not have been held sufficient to constitute what in the law of England is known as a charitable trust in the corporation for their benefit. And, having regard to the facts proved or admitted in the present case, I can see no good reason for refusing to give effect to the presumption that the title of the corporation is, and always has been, qualified by such a condition. If the respondents had been able to produce a grant of the *fishery* to the corporation, in terms absolute and unqualified by any condition, or if they had established the fact that, before the inhabitants of ancient tenements began to exercise their privilege, the corporation had the sole and exclusive possession of the fishery, there might have been room for holding that the appellants were now endeavouring to set up a claim adverse to the title of the corporation. But it is an admitted fact that the possession of the corporation, which constitutes its only evidence of title, has never been exclusive of, but, on the contrary, that it has been limited by and concurrent with the possession of these inhabitants; and I think the evidence establishes that the privilege exercised by these inhabitants was until very recently conceded to them as matter of right, and not by way of tolerance. In these circumstances, the presumption for which the appellants contend appears to me to be in fact reasonable and probable; and seeing that, in my opinion, it is not excluded by any legal principle, and will give a lawful origin to the privilege which the inhabitants of ancient tenements have immemorially enjoyed, I think the presumption ought to be sustained, and the judgment of the Court below reversed.

LORD BRAMWELL.—In this case I agree entirely with the reasons and conclusions of the Lord Chancellor and in his application of the authorities he has cited. But having formed an independent opinion, I had better shortly state it.

I think there never was a stronger case than that of the appellants, one that the law is more bound to sustain if it can. It is found that they have had and enjoyed, claiming as of right, from time immemorial that which they now claim. And their case is not that of a fixed and permanent body, like a corporation, or of a lord of a manor claiming a title against the public—the claimants knowing their rights and always ready to extend them; the public ignorant of the rights, and of course made up of persons who cannot be said to represent those who lived before them—but the case is that of a varying body against a fixed and permanent body, which had every interest to resist the exercise of that which was claimed against them. If, therefore, the appellants can have such a right, we ought to say they have it. I

think they can have it, not as a right by prescription *in alieno solo*, but on other considerations.

The Crown, before Magna Charta, had no right of separate fishery in arms of the sea. Unless that was granted, and by the very grant created, all the Crown's subjects might fish. Now, why might not the Crown grant and create such right, except as to certain persons at certain times, leaving them at those times to their common law right, I cannot see. I think it might well be. I think this is shewn by *Cocksedge* v. *Fanshawe* (20).

It is said that that case does not shew that, and that what was claimed and allowed there was not the right to have or take something—only a discharge, a right to be free from something. But what is an exclusive right of fishery? It is a right by its very name to exclude. And what is the appellants' claim but of a right at a certain season to be free from that exclusion? Lord Mansfield expressly puts the case of an exception in the original grant of the tolls in favour of freemen. If I am asked whether I believe there was such a grant with such an exception as I have supposed, I answer, I believe in the exception at least as much as in the grant. If such a thing could not be, then I would much rather believe and find that the corporation had no title, but had from time to time encroached on the public, except in so far as the appellants and their predecessors had withstood them. In either view I think the appellants are entitled to our judgment.

As to the argument that a perpetuity which cannot be released is created, the answer is that the perpetuity is only that which all the Queen's subjects have—namely, to fish in an arm of the sea.

Lord Fitzgerald.—I have read the judgment of the Lord Chancellor, and I concur in it. It seems to me that the respondents have established a title in themselves to the several fishery in controversy exclusive of the public, but subject to a condition in favour of the free inhabitants of ancient tenements within the borough. We cannot get rid of the 9th paragraph of the Case by any supposition that the privilege there so clearly stated and admitted was exercised merely by permission and at the will of the corporation, or under a by-law capable of revocation, or otherwise than as a claim of right exercised as such from time immemorial. The admission in paragraph 9 is so strong and so unequivocal that we must interpret it as the admission of the user of a privilege co-existent with the corporation itself, and exercised as of right and without interruption from time immemorial. We have only to enquire whether such a privilege could by any possibility have had a legal commencement, and we must presume everything in its favour. Although the charter of Reginald de Vantort is the earliest we have before us, he did not create the borough of Essa, for his is a charter of confirmation to the burgesses of that which they had in the time of his ancestors, and we have no means of knowing what was the origin of the borough. We know not whether it was a borough by prescription and not by charter, or whether it may not have had its origin before the Conquest and before the introduction of feudal rule. Probably it was in its origin a baronial, and not a royal, borough, for there is no doubt that before, and for a considerable time after, the Conquest the great nobles claimed and exercised the prerogative within their own demesnes of conferring corporate privileges on their own towns. The recitals in the charter of Reginald de Vantort indicate that the borough of Essa was originally of that character, and one of very early origin.

One of the objects of creating such a corporation was to confer privileges on the members of the corporate body under one general description, and remove the necessity of a grant to each individual member, and hence it may not be unreasonable to infer that the original grant, whatever it may have been, to the corporation of Essa, was on condition that some privileges should be allowed to those who, as a class, were either members of the corporate body, or lived within the territorial ambit of the borough, and, as such, were subject to the corporate authority and liable to perform corporate duties. Whatever the terms of the original gift may have been, or whatever the character of the privilege bestowed on the free inhabitants of ancient tenements

in the borough, the fact seems necessarily to imply that the parties so described were then in some way or other capable of taking and enjoying the privilege.

The Special Case affords no interpretation of free inhabitants, and I understood from Mr. Mackenzie that he did not contend that it meant "freemen"; but I presume that he intended "freemen" in the modern and perverted application of the term. Probably "free" was used to distinguish the individual from one who was not free and was classed as a villein, to whom no privileges were usually conceded. Free inhabitant householders constituted a class well recognised in the early period when the incorporation of towns first commenced, and they usually constituted the burgesses, or the body from whom the burgesses came. They usually contributed to the public charges, whatever they were, and took their part in bearing the public duties. They participated usually in the benefits conferred on the town, and became subject to its duties. The free inhabitants of ancient tenements were probably either originally members of the corporation itself, or a recognised class within the borough, on whom privileges were conferred in respect of their having erected houses within its limits, and being inhabitants or residents therein.

There are many instances to be found, amongst ancient records, of grants of privileges to a class within a corporation.

I see nothing unreasonable in presuming that the prescriptive grant to the corporation of Essa was subject to a condition that the free inhabitants of ancient tenements within the borough should be permitted to enjoy the privilege in controversy.

The appellants do not claim adversely to the right of the corporation, or in the sense that their claim should be interpreted as a claim adversely to a *profit à prendre* in the inheritance of another. They claim not adversely to, but through, the corporation; they assert no independent title in themselves, but insist that the corporation should faithfully observe the condition on which the original gift to them was made.

As to *Gateward's Case* (21) I may say that I am no admirer of it, nor do I entirely appreciate its reasoning, or the wisdom of its conclusions. Probably if the same questions had arisen in the present time, unfettered by authority, it might be found very difficult to reach the same results. However that may be, we do not interfere with that case, or its authority, which is now well established in law; we leave it exactly as we found it.

We were in the course of the argument pressed very much with the difficulty that the appellants' claim, if established, could not be released, and amounted to a perpetuity. I think that difficulty has already been answered, and it is satisfactory to bear in mind that the inheritance itself is in mortmain in the corporation, and that no evil can ensue from this condition.

Order of the Common Pleas Division, and order appealed from, reversed; judgment for the appellants, with costs in both Courts below and of this appeal.

Solicitors—Wedlake & Letts, agents for Edmonds & Son, Plymouth, for appellants; William Bohm, agents for Cleverton & Son, Saltash, for respondents.

1882. Dec. 8. Dec. 21. THE CENTRAL WALES AND CARMARTHEN JUNCTION RAILWAY COMPANY *v.* THE GREAT WESTERN AND LONDON AND NORTH WESTERN RAILWAY COMPANIES.

Railways — Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 11—"*Through Traffic*"—"*Through Route and Rate*"—*Rights of Railway forming intermediate Link between other Systems*—*Railway Commissioners.*

The applicants, a railway company, owning a line which communicated at either end with two other railway systems, applied as against both such railway companies to the Railway Commissioners for an order for a through route and rate to be allowed for goods via their line from a station on the one company's line to a station on the other company's line. The applicants had no rolling stock, and their line was wholly worked by another com-

pany, under an agreement by which the receipts for through traffic were apportioned according to mileage. They did, however, manage their own line and collect and forward their own traffic, the whole of the staff at the stations on their line being employed and paid by them:—Held, *affirming the decision of the Railway Commissioners, and in accordance with the judgment of the Court of Session in* The Greenock and Wemyss Bay Railway Company *v.* The Caledonian Railway Company (3 Nev. & M. 145), *that the applicants were entitled to the order, as they were a railway company, within the meaning of the section, entitled to require through traffic to be forwarded, and the traffic in question was "through traffic to or from their railway" as therein defined.*

This was a Case stated, pursuant to section 26 of the Regulation of Railways Act, 1873, by the Railway Commissioners, who had granted an application by the Central Wales Railway Company to them for an order allowing a through route and rate for flour between Chester and Haverfordwest. The Great Western Railway Company had opposed the application, and upon their request the Case was stated. It is unnecessary for the purpose of appreciating the decision of the Court to set out the Case at length; the important facts are recapitulated in the considered written judgment below, and the question raised may be shortly stated to be as follows: Can a company which does not work its own line, and which neither takes goods from the consignor nor delivers them to the consignee, being only an intermediate link in the chain of communication between two places, neither of which is situate upon its line, require a through route and rate to be fixed by the Railway Commissioners under section 11 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48)? That section provides that the facilities which by section 2 of the Railway and Canal Traffic Act, 1854, are to be afforded, "shall include the due and reasonable receiving, forwarding and delivering by every railway company and canal company, at the request of any other such company, of through traffic to or from the railway or canal of any other such company at through rates, tolls or fares (in this Act referred to as through rates)."

R. E. Webster, Q.C., and *R. S. Wright*, for the Great Western Railway Company.—The applicants here require that the Great Western Railway Company at their station at Haverfordwest as the forwarding company, and that the London and North Western Railway Company at their station at Chester as the receiving company, should be bound by a through rate to be fixed by the Commissioners. The public cannot make any such application so as to compel traffic to go by a particular route, and the question is, can this intermediate company do so? Now the interpretation clause in section 3 of "railway company," as "the owner, lessee of, or working any railway," shews that this company is not a railway company for the purposes of section 11, where it means owners and working. This company does not work its own line at all, and has no rolling stock. It therefore cannot require a through rate for through traffic. But there is a further objection — this is not "through traffic." It neither comes to nor goes from the line of the applicants, it is simply passing over it — so it is not within the section. Generally, as against such a case as this being intended to come within it, it may be observed that there is no mutuality—a company which applies ought to be capable of being applied against.

There is a case in which it must be admitted that the decision of the Court of Session in Scotland is adverse to the contention of the Great Western Railway Company; but the point whether an intermediate company could apply was not directly raised—*The Greenock and Wemyss Bay Railway Company* v. *The Caledonian Railway Company* (1). There it was assumed that the Wemyss Bay was a terminal company.

Littler, Q.C., *Bompas, Q.C.*, and *Batten*, for the applicants.—The Scotch case is directly in point; the fact of there being a steamboat service at the end makes no difference. It is provided for in section 11, sub-section 9. No distinction is there

(1) 3 Nev. & M. 145.

drawn between an intermediate and a terminal company as disentitling the former from applying. But, even independently of that authority, on the construction of section 11 the applicants' position is a sound one. The object is to benefit the public and ensure goods being carried by the shortest and most convenient routes at reasonable rates. It is admitted that the public cannot apply, and it is left to the railway companies which are interested; but neither the Great Western nor the London and North Western Railway Companies would apply, because they have other interests, and so the section would be inoperative if this company could not do so. In sub-section 1 of section 11 the notice has to be sent to each forwarding company, words which are precisely applicable to this case. He referred also to the language of Cockburn, C.J., in the *South Eastern Railway Company* v. *The Railway Commissioners* (2).

R. S. Wright in reply.

Cur. adv. vult.

The judgment of the Court (3) was delivered (on Dec. 21) by

FIELD, J.—This is a Case stated by the Railway Commissioners, at the request of the Great Western Railway Company, on an application by the Central Wales Company for an order, under the 11th section of the Regulation of Railways Act of 1873, allowing a through route and rate for flour between Chester and Haverfordwest. The route claimed from Chester to Haverfordwest was *via* Chester, the Craven Arms and Llandilo Junction (over lines owned or worked over by the London and North Western Company), and the applicants' line (also worked over by the same company) by Abergwilly Junction, and thence by the Great Western line to Haverfordwest (exclusively owned and worked over by themselves), and *vice versa* from Haverfordwest to Chester. It will be seen, therefore, that the "route" for which the "through rate" is required commences and terminates off the applicants' line, both the termini being on other lines. It appears also that the applicants have no rolling stock and do not work their own railway. It is worked by the London and North Western Company under an agreement of the 29th of November, 1867, in correspondence with trains on their own system, and the receipts in respect of the "through traffic" are apportioned between the two companies, after deductions for terminal and working expenses, according to their mileage proportion. The applicants, however, maintain and manage their own line, and collect, forward and deliver their own traffic, the whole of the staff at the several stations on their line being employed and paid by them and under their orders.

On the hearing of the application by the Railway Commissioners they considered that the proposed "route" was "reasonable," and allowed a "through" rate accordingly; but at the request of the Great Western Company they stated the Case for our opinion, the questions stated being as follows:—

First, Whether the traffic in question is through traffic to or from the railway of the Central Wales Company, within the meaning of section 11 of the Regulation of Railways Act of 1873; and,

Secondly, Whether, in respect of such traffic, the Central Wales Company are a company entitled to require such traffic to be forwarded within the meaning of the said section.

It will be recollected that by the Railway and Canal Traffic Act of 1854, it was enacted that every railway company should afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon its railway, whether it belonged to or was worked by it; and by the 11th section of the Regulation of Railways Act of 1873, those facilities were declared to be the due and reasonable receiving, forwarding and delivering by every railway company, at the request of any other such company, of "through traffic" to and from its railway at "through" rates, the requiring company being required to give a written notice to "each" forwarding company of the through rate and route.

The objections taken by the Great Western were two; the most important being that the applicants were not a rail-

(2) 49 Law J. Rep. Q.B. 273; Law Rep. 5 Q.B. D. 217.

(3) Field, J., and Stephen, J.

way company entitled to require a through route and rate within the meaning of the statute, on the ground that under the agreement with the London and North Western Railway Company they did not work over their own line; and so it was said that, as they did not actually receive, forward or deliver any part of the through traffic, they had no right to demand a route or rate in respect of it.

The Railway Commissioners were of opinion that this objection could not be sustained, indeed they had previously arrived at the same conclusion under circumstances identical in principle if not precisely in fact, and their judgment has been upheld by the Court of Session in Scotland refusing a prohibition. That case is reported in 3 Neville and Macnamara, p. 145, under the name of *The Greenock and Wemyss Bay Railway Company* v. *The Caledonian Railway Company;* and although not strictly binding upon us, the judgment of that Court is entitled to the greatest consideration and weight at our hands, and in the reasoning and decision of it we entirely agree. The only differences between the two cases are that the applicants there were perhaps, according to the facts, a terminal and not an intermediate company, which, as we shall presently say, does not affect their rights in this respect; and the other is one rather in favour of the applicants' right in this case; for in the *Greenock Case* the applicants did not even maintain or manage their own line. If therefore they, in the language of the Lord President of the Court of Session, were not so far deprived of their interest in the line and traffic as to deprive them of the relief intended to be given by the 11th section, *a fortiori* the present applicants are not. We therefore answer the second question stated in the present Case in the affirmative.

We give the same answer to the first question. We think that the traffic in respect of which the through rate is required, although commencing and ending as it does at stations off the applicants' line, is through traffic within the meaning of the 11th section. The Great Western are asked to "receive or deliver at Abergwilly Junction." Traffic to and from any Central Wales station is clearly "through" traffic at that point, and we fail to see what difference it makes that the goods to be "received" or "delivered" have come from or are going to stations off the applicants' line. It is not the termini of the route which are material, it is the point of contact at which the facilities are required to be given, or where the obstruction or refusal takes place.

It was admitted by Mr. Webster that if this question had to be answered differently, all the railways in Great Britain and Ireland in the same position as the North Eastern, with its system interchanging traffic as it does with other companies at both termini, would be entirely shut out from the benefit intended to be conferred on railways and the public by the Legislature by the 11th section; and we can see no reason for supposing that so great a restriction was intended to be imposed upon legislation so much in the interest of the public, which provides for traffic being forwarded by the shortest route, and consequently at the cheapest rate.

Judgment of Railway Commissioners affirmed.

Solicitors—R. R. Nelson, for Great Western Railway; S. F. & H. Noyes, for Central Wales Railway.

1882. Nov. 16.

READ *v.* ANDERSON.

Contract — Gaming and Wagering — Agent employed to Bet in his Own Name— Repudiation of Bet before Payment—8 & 9 *Vict. c.* 109. *s.* 18.

R., a betting agent, was employed by A. to make bets for A. in R.'s own name, and A. tacitly agreed to indemnify R. R. made bets for A. accordingly. The bets were lost, and were paid by R., who would otherwise have suffered serious inconvenience and loss as a defaulter. R. suing A. for the amount so paid, A. alleged that he had repudiated the bets before payment:—Held, *by* HAWKINS, J., *that such repudiation, if any, was inoperative, and*

that A. was legally bound to indemnify R., in pursuance of his agreement, such an agreement not being "a contract by way of gaming or wagering" within the meaning of 8 *&* 9 *Vict. c.* 109. *s.* 18.

Per HAWKINS, J.—*A request to another person to bet in that person's own name implies in law a promise to indemnify him; and the principal cannot escape liability to his agent by repudiating the bet after it is made.*

Action tried before Hawkins, J., without a jury. The facts and arguments are stated in the judgment.

McCall (with him *W. G. Harrison, Q.C.*), for the plaintiff.

Petheram, Q.C., and *C. W. Mitcalfe Dale*, for the defendant.

The following judgment was delivered (on Nov. 16) by

HAWKINS, J.—This action was brought to recover 175*l.*, the amount of three bets made by the plaintiff, in his own name, at the request of and for the defendant, and paid by the plaintiff to the winners thereof. It was tried before me without a jury.

The plaintiff is a turf commission agent, and a member of Tattersall's subscription room. The defendant is a licensed victualler at South Shields.

According to well established usage, known to the defendant, a turf commission agent, instructed by an employer to back a horse, backs it in his own name, and becomes himself alone responsible to the layer of the odds or the person with whom the bet is made; and on the settling day after the event he receives or pays, as the case may be, rendering his own account to his employer, paying to or receiving from him the balance of moneys won or lost.

For some time before the Ascot meeting, 1881, the plaintiff had, according to such usage, been in the habit of backing horses for the defendant, of receiving bets won, paying bets lost, sending accounts to the defendant, and paying to or receiving from him the balance thereof.

On the Friday of the Ascot meeting (17th of June, 1881) the plaintiff, being at Ascot, received from the defendant a telegram to this effect:—"Put me Fifty on 'Limestone,' first race—pony all Archer's mounts—Fifty 'Sword-Dance,' Hundred 'Elf King,' Wokingham—Hundred 'Red Rag' Filly, Castle Stakes. Reply."

This telegram, though handed in at South Shields at 12.8 p.m., and received at Ascot at 1.29 p.m., did not reach the plaintiff until 1.40 p.m., at which time the first race for the day, in which "Limestone" ran, was over, that race having been run at half-past one; for that race, therefore, of course "Limestone" could not be backed.

The second race of the day was "The Wokingham Stakes," which was set for 2 o'clock. For that race "Sword-Dance" and "Elf King," mentioned in the telegram, and "Valentino," ridden by F. Archer, were entered. The plaintiff accordingly, acting on the telegram, backed in his own name "Elf King" for 100*l.*, "Sword Dance" for 50*l.*, and "Valentino" (as one of Archer's mounts) for 25*l.*

Neither of these horses won; the consequence was that these bets, to the amount of 175*l.*, the subject of the present action, were lost.

At 2.55 p.m. the plaintiff handed in at the telegraph office at Ascot the following message to defendant:—"Nothing done 'Limestone' or Archer's mounts the first race. Your message came ten minutes after the race." In this message, which was not delivered to defendant until 3.14 p.m., it will be observed, nothing is said about the second race; but at 3.5 p.m., the plaintiff telegraphed the result of that race to defendant in these terms:—"Your message received—'Viridis' won." (This was evidently a mistake, for no such animal as "Viridis" ran in the race. The Wokingham was won by "Wokingham," by "St. Albans" out of "Viridis." The mistake, however, is immaterial.) This message was not received at South Shields until 3.35 p.m., and then the defendant had received information by telegram from another person of the result of the first two races.

On the evening of the same day the defendant repudiated these bets, and all liability in respect of them, by the following letter to the plaintiff:—

Read v. *Anderson.*

"Exchange Vaults, South Shields,
"June 17th, 1881.

"Mr. Read,—I find your message was not handed in before the race for the Wokingham Stakes; I had the result of the race ten minutes before I received your reply. I enclose you the message, which please return to me; they were both handed in at 2.15, that being fifteen minutes after the order of running, so I shall consider I am not on anything for two first races to-day, as I cannot stand the messages being sent away after the race is over to say I am on. In haste,

"I remain, yours respectfully,
"J. Anderson."

In reply to this letter the plaintiff wrote to defendant as follows:—

"Dear Sir,—The reason you did not get your message about Elf King, S.-Dance, and F. Archer mounts, sooner, was on account of so many messages being sent away the result of the Wokingham H'Cap. The following bets I took for you; I enclose you the names:

100-800.....Elf King....Jacob, A.
50-225.....S.-Dance.....Robinson, J.
25-150.....Valentino...Masterman.

Concerning Limestone and F. Archer's mounts I declare it to the telegraph officials nothing done; in fact I waited at the telegraph board for ten minutes, expecting for a message.

"Yours truly,
"J. Read,
"J. Anderson, Esq. "*pro* J. Read."

With this letter the plaintiff sent a detailed account of the various bets he had made for the defendant during the Ascot meeting, and of the amounts which he would have to receive from and pay to the defendant.

In number there were between fifty and sixty, and the account shewed that upon these the defendant's losses, including the bets in question, amounted to 1,420*l.* 0*s.* 5*d.*, whilst his winnings were 705*l.* 17*s.* 4*d.*, leaving a balance of 714*l.* 3*s.* 1*d.* to be paid by the defendant.

The defendant in reply, on the 19th of June, enclosed a cheque for 539*l.* 3*s.* 1*d.*, as being the real balance due, and with regard to the difference, 175*l.*, wrote thus:—"I cannot think about paying the other, as I have other people to please as well as myself, and paid for reply, and you said you received message ten minutes too late for first race, but you cannot give any excuse for not answering it until the next race was over. I am quite satisfied that had any of them won I should not have been on." Other correspondence followed, but it is not material for the question I have to decide.

On the settling day the plaintiff paid the three bets in question to the winners of them. Had he not done so, he would have been "a defaulter" within the meaning of the 3rd rule of Tattersall's new subscription room; and if, upon complaint made to the committee of the room, the committee adjudged him to be so, his membership of the room would thereupon have ceased, and he would have been thenceforward excluded from it; and, by the 50th of the rules of racing made by the Jockey Club, if he had been reported by such committee as being a defaulter in bets, he would, until his default had been cleared, have been subject to certain disqualifications mentioned in rule 49 of the rules of racing as to entering and running horses. The consequences of becoming a defaulter would therefore have been very serious to the plaintiff.

For the defendant it was contended—first, that the authority to make the bets in question was subject to an express condition that the defendant should be informed by the plaintiff by telegram delivered at the telegraph office before the race was run that he was "on"—that is, that the bets had been made on his behalf; secondly, that, if there was no such express condition, there was a universal usage and custom importing a condition to that effect into every authority conveyed by telegram to back horses when a reply was paid, and that, inasmuch as no reply telegram was handed in by the plaintiff for defendant until a quarter of an hour after the race was run, the defendant was entitled to repudiate the bets as he did by his letter. The defendant further insisted that the bets were wagering contracts; that he had never given any authority to the plaintiff to pay them; and, even if he had, that authority was revoked before the money was actually paid.

I am of opinion, and I find as a fact, that there was no such express condition, nor is there any such usage or custom as contended for. The payment for a reply to the telegram requesting the plaintiff to back the horses, no doubt, was an intimation to the plaintiff that the defendant desired to be speedily informed of what had been or was about to be done on his behalf; but it did not constitute a condition to the plaintiff's authority to make the bets. As a matter of fact, where it can be done, a message in reply is no doubt usually handed in at the office before the race; but no universal custom or usage was established before me, making it imperative upon the commission agent to do this as a condition to his binding his customer. Long and unreasonable delay in replying until after the race is run and the event known might, under certain circumstances, afford strong ground for suspecting that in fact the agent did not make the bets on behalf of his customer, and was fraudulently attempting to saddle him with the loss. There is, however, no evidence before me to justify such an imputation in the present case. It was clearly established to my satisfaction that the bets were made *bona fide* by the plaintiff for the defendant in pursuance of the telegram, and that the plaintiff paid those bets in discharge of his liability to the persons with whom they were made. The objections of fact therefore fail.

This brings me to the consideration of the legal objections to the plaintiff's claim. I am of opinion that neither of them can be sustained.

At common law wagers were not illegal, and before the passing of the 8 & 9 Vict. c. 109, actions were constantly brought and maintained to recover money won upon them. The object of the 8 & 9 Vict. c. 109, passed in 1845, was not to render illegal wagers which up to that time were lawful, but simply to make the law no longer available for their enforcement, leaving the parties to them to pay them or not as their sense of honour might dictate. Accordingly it was, by the 18th section, enacted in these words:—"All contracts or agreements by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained for recovering any sum of money or valuable thing alleged to be won upon any wager." There is nothing in this language to affect the legality of wagering contracts; they are simply rendered null and void and not enforceable by any process of law. A host of authorities have settled this to be the true effect of the statute. I will mention only one or two. In *Fitch* v. *Jones* (1) it was expressly so decided, Mr. Justice Erle saying: "I think that the defendant might, without violating any law, make a wager. If he lost he might, without violating any law, pay what he had lost." In *Hill* v. *Fox* (2) the same learned Judge said the parties do not violate any law by making a bet; but the law will not assist the winner by enforcing payment of it. (In *In re Lister* (3) I observe the Master of the Rolls is reported to have spoken of gaming or betting being illegal; I feel sure, however, that learned Judge must have been misunderstood—see his judgment in *Lynch* v. *Godwin* (4), in which he expressly stated that a bet was void but not illegal.) But, although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorise anybody else to do for him; and if by his request or authority another person pays his lost bets, the amount so paid can be recovered from him as so much money paid to his use.

In *Rosewarne* v. *Billing* (1863) (5) the defendant had employed the plaintiff to make in his own name wagering contracts respecting mining shares; and the plaintiff accordingly made them, and paid certain differences on such shares, and brought his action to recover from the defendant (his employer) the money so paid. In giving judgment for the plaintiff Chief Justice Erle said, "It is clear that though the defendant was not liable to pay the sums due under these wagering contracts,

(1) 5 E. & B. 238; 24 Law J. Rep. Q.B. 293.
(2) 4 Hurl. & N. 359, at p. 362.
(3) 47 Law J. Rep. Bankr. 100; Law Rep. 8 Ch. D. 754.
(4) Solicitors' Journal, June 10th, 1882 (C.A.), p. 509.
(5) 15 Com. B. Rep. N.S. 316; 33 Law J. Rep. C.P. 55.

he might do so if he chose; and if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request." *Oldham* v. *Ramsden* (1875) (6) is to the same effect; so is *In re Lister* (3), in which an appeal by the trustee under Lister's bankruptcy against the Registrar, for allowing a proof by Barratt for money lent and paid by him at Lister's express request in discharge of lost bets at Tattersall's, was dismissed by the Court of Appeal.

The request or authority to make such payments may be either express, or it may be implied from usage or from the nature of the dealings between the parties themselves. If a person authorises another to bet for him in his own name, an implied request to pay if the bets are lost is involved in that authority. For this, too, there is abundance of legal sanction. In *Bubb* v. *Yelverton; Ker's Claim* (7), where there was a suit for the administration of the estate of the Marquis of Hastings, deceased, and Lord Charles Ker claimed a sum of 850*l.* for money paid for the marquis for bets made and lost on his account, it was held by Lord Romilly, Master of the Rolls, that a request to bet implied an authority to pay the bets if lost, and that Lord Charles Ker was entitled to prove against the estate of the marquis for the amount paid. See also *Oldham* v. *Ramsden* (6) and *Rosewarne* v. *Billing* (5), and, lastly, *Lynch* v. *Godwin* (4), which has not, so far as I am aware, been reported in any of the regular reports at present. In the present case, I find as a fact that, at the time the defendant gave the authority to make the bets, he gave also an implied authority to pay them if they should be lost.

The defendant, however, contended that, assuming wagering contracts not to be illegal, and that a person who employs another to bet gives that other implied authority to pay, such authority may be revoked at any time before payment is actually made, and that it was in fact revoked in the present case. Upon the evidence before me, I am of opinion, and find as a fact, that the defendant did not revoke the authority to pay; on the contrary, by settling the rest of the account he seems to me to have confirmed that authority to pay whatever bets were honestly made and lost on his account; and the correspondence satisfies me that he only desired to raise the question whether these particular bets were honestly made or not. Assuming, however, contrary to my opinion, that there was a revocation in fact, I am of opinion such revocation was inoperative in law.

I am not aware that hitherto this point has been judicially decided, although it was shortly mooted in *Rosewarne* v. *Billing* (5). I think it right, therefore, to state my reasons for the conclusion to which I have arrived.

As a general rule, a principal is, no doubt, at liberty to revoke the authority of his agent at his mere pleasure. But there are exceptions to this rule; one of which is that when the authority conferred by the principal is coupled with an interest, based on good consideration, it is in contemplation of law irrevocable—that is, though it may be revoked in fact, that is to say by express words, such revocation is of no avail. In *Smart* v. *Sanders* (8), Chief Justice Wilde said, " the result appears to be that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable." (See also *Story on Agency*, sections 476 and 477.) In the present case, the authority to pay the bets if lost was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost; the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bets the authority to bet might, beyond all doubt, have been revoked; but the instant the bets were made, and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In

(6) 44 Law J. Rep. C.P. 309.
(7) 19 W. R. 739; 24 L. T. N.S. 822.
(8) 5 Com. B. Rep. 894, at p. 917; 17 Law J. Rep. C.P. 258, at p. 263.

other words, the case may be stated thus—If a principal employs an agent to do a legal act the doing of which may, in the ordinary course of things, put the agent under an absolute or a contingent obligation to pay money to another, and at the same time gives him an authority, if the obligation is incurred, to discharge it at his (the principal's) expense, the moment the agent, on the faith of that authority, does the act, and so incurs the liability, the authority ceases to be revocable.

The cases of *Hampden* v. *Walsh* (9) and *Diggle* v. *Higgs* (10) were cited for defendant in support of his contention that the authority to pay was revocable. Those cases do not assist him; they were actions brought against stakeholders to recover back deposits on wagers, and the revocation of the authority to pay over to the winner was before the money was paid over; in each of those cases, the stakeholder must be taken to have received the deposits subject to the legal obligation to return them to the depositors if demanded back before payment over. The stakeholder's authority in those cases was coupled with no interest, and his position was unaffected by the revocation. Those cases are, therefore, not like the present, and do not fall within the exception to the rule I have referred to.

The opinion I have expressed as to the irrevocability of the authority to pay lost bets applies only to cases where the agent, by the principal's authority, makes the bets in his own name, so as to be personally responsible for them. If an agent were simply to make bets in the name of his principal, I am far from saying that the principal might not repudiate authority to pay at any time before payment was actually made, for his non-payment of bets made for him and in his name would not render his agent liable as a defaulter or subject such agent to loss or obloquy. It is not necessary, however, to decide this point now.

The plaintiff's case may also, as it seems to me, be supported on this ground—that if one man employs another to do a legal act which, in the ordinary course of things, will involve the agent in obligations, pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied by law (see *Story on Agency*, sections 337 and 338). And I think it signifies nothing that such obligation is not enforceable in a Court of justice, if the non-fulfilment of it would entail serious inconvenience or loss upon the agent; for he is not bound to submit to these things for his employer if by doing that which was in contemplation of both at the time of the employment he can avoid them, as he can in the case of bets lost by paying them; and he is not bound, in my opinion, to incur the odium and consequences of repudiating his honourable engagements. As a matter of fact, I find that when the plaintiff in this case was employed to bet there was a tacit agreement, on the part of the defendant, to indemnify him against all the ordinary consequences of his so doing.

In pleading, such a contract of indemnity might, in substance, be thus described. In consideration that the plaintiff, as a turf commission agent, would at the request of the defendant, and as his agent, make for him, in his the plaintiff's own name, certain bets subject to and according to the usages of Tattersall's, the defendant promised that he would indemnify the plaintiff against all the consequences of making such bets according to such usages, &c. Many cases might be cited to shew that such a contract, though made with reference to and in contemplation of wagering contracts, is not in itself a wagering contract—see *Bubb* v. *Yelverton* (*claim of Steel and Nicholl*) (11), *Johnson* v. *Lansley* (12) and *Beeston* v. *Beeston* (13).

The result is, that if a person employs another to bet for him in his (the agent's) own name, an authority to pay the bets if lost is coupled with the employment; and, although before the bet is made the employment and authority are both revocable, the moment the employment is fulfilled by the making of the bets the authority to pay it if lost becomes irrevocable.

For the reasons I have stated, I am of

(9) 45 Law J. Rep. Q.B. 238; Law Rep. 1 Q.B. D. 89.

(10) 46 Law J. Rep. Exch. 721; Law Rep. 2 Ex. D. 422

(11) 39 Law J. Rep. Chanc. 428; Law Rep. 9 Eq. 471.

(12) 12 Com. B. Rep. 468.

(13) 45 Law J. Rep. Exch. 230; Law Rep. 1 Ex. D. 13.

opinion that the plaintiff is entitled to my judgment for the amount he claims; and I give judgment accordingly.

On full consideration I have determined to allow such amendments (if any) in the pleadings as may be necessary to raise all the legal questions involved in the case, in order that it may be determined upon its true legal merits.

The costs will follow the event of the action.

Judgment for the plaintiff.

Solicitors—T. R. Apps, for plaintiff; J. & E. Scott, agents for T. T. Dale, South Shields, for defendant.

[IN THE COURT OF APPEAL.]

1882. Nov. 10, 11, 13, 14, 15. 1883. Jan. 17.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON AND CHINA *v.* THE NETHERLANDS INDIA STEAM NAVIGATION COMPANY (LIMITED).*

Ship and Shipping—Bill of Lading—Collision between Ships belonging to same Owners — Default of Servants—Excepted Perils—Action of Tort—Measure of Damages—Admiralty Rules—Judicature Act, 1873, *section* 25, *sub-section* 9.

The plaintiffs shipped goods on board one of the defendants' ships, the "Kroon Prins," under a bill of lading, which was in the English language, and described the defendants by their corporate name, and which excepted, amongst other things, "collision and accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the company in navigating the ship."

The goods were lost by the "Kroon Prins" coming into collision on the high seas with the "Atjeh," which also belonged to the defendants; and the jury found that, though both ships were in fault, the chief blame was to be attached to the "Atjeh."

The defendant company, which was composed entirely of English shareholders, in addition to being registered in England as a limited company, was also registered in Holland as a Dutch company, which was in fact a bare trustee of the ships for the English company. The ships also were registered as Dutch ships, and carried the Dutch flag. Such registration was for the purposes of trading to and from Dutch ports. The ships were not registered under the Merchant Shipping Acts as British ships. In an action to recover the value of the goods, based, first, on the contract to carry safely contained in the bill of lading; and secondly, in tort,—

Held, *that, so far as the action was based on contract, the defendants, as owners of the "Kroon Prins," were relieved from liability for the negligence of their servants on board that ship by reason of the exceptions in the bill of lading, which was an English contract, and must be construed accordingly; also that the defendants were not liable either expressly or impliedly under the bill of lading, which had reference only to the carrying ship the "Kroon Prins," for the negligence of their servants on board the "Atjeh."* Held *also, that the defendants, as owners of both the ships, were liable in tort, and that the action, viewed as an action of tort, came within section* 25, *sub-section* 9, *of the Judicature Act*, 1873; *and the Admiralty rule, as to dividing the loss when both ships in collision are to blame, was applicable, so that the defendants, as owners of both ships, would have been liable for the whole amount of the loss; but that as they were exonerated by the exception in the bill of lading from the share of the loss occasioned by the negligence of those navigating the "Kroon Prins," they were only liable for the other half of the loss occasioned by the negligence of those on board the "Atjeh."*

Held *also* (*per* BRETT, L.J.), *that both the ships were English and not Dutch ships, notwithstanding that they were registered in Holland as Dutch ships and carried the Dutch flag, inasmuch as the nationality of a ship depends upon the question of ownership.*

* *Coram* Baggallay, L.J.; Brett, L.J., and Lindley, L.J.

Judgment of the Queen's Bench Division reversed.

Appeal from a judgment of the Queen's Bench Division (reported 51 Law J. Rep. Q.B. 393).

The following statement of the facts, which were not in dispute, is taken from the written judgment of Lindley, L.J.

The action was brought by the plaintiffs as owners of goods shipped at Singapore under a bill of lading in the defendants' vessel, the *Willem Kroon Prins der Nederlander*, to be carried to Sourabaya, and lost through a collision between that vessel and the *Atjeh*, another vessel of the defendants. The collision took place on the high seas. The bill of lading, which was in the English language, and in which the defendants were described by their above corporate name, excepted, among other things, first, collision; secondly, accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners, or other servants of the company in navigating the ship. The jury found at the trial that the *Atjeh* was mainly in fault in causing the collision, but that the *Kroon Prins* was also in some degree to blame. The Divisional Court held that the defendants were liable by virtue of their contract for the whole of the loss. In addition, however, to the facts there mentioned, it was stated to the Court of Appeal that the two ships were registered in Holland in the name of a Dutch company, composed of the same persons as the English company who are the defendants. The Dutch company was, in fact, a bare trustee of the ships for the defendants; and the object of forming the Dutch company, and of having the ships registered in Holland in the name of that company, was to enable the defendants to trade with those ships to Java, which is a Dutch possession. The counsel for the defendants, whilst denying all liability on the part of the Dutch company, waived any advantage which might be taken of the fact that the Dutch company was not in form a party to this action, and admitted that for all the purposes of this action the defendants represented the Dutch company. The Court below decided in the plaintiffs' favour on the ground that the contract contained in the bill of lading was governed by English law and not by Dutch or Dutch-Indian law; and upon the further ground that, according to English law, the defendants were liable for a breach of the contract to carry contained in the bill of lading. In this view of the case it became unnecessary to consider the liability of the defendants irrespectively of the contract, and the Court below did not express any opinion upon that point.

The defendants appealed.

Benjamin, *Q.C.*, and *Cohen*, *Q.C.* (with them *Raikes*), for the defendants.—The defendants are not liable under the contract contained in the bill of lading for loss by collision arising from the negligence of those navigating the *Kroon Prins*. The exceptions were introduced to meet cases such as *Phillips* v. *Clark* (1), where it was held that a shipowner is liable for loss arising from leakage and breakage caused by the negligence of the shipowner's servants in stowing goods, because the bill of lading, although it contained a stipulation that the shipowner should not be accountable for leakage and breakage, did not exempt him from liability for loss arising from improper stowage, which was the cause of the accident—see also *Lloyd* v. *The General Iron Screw Collier Company* (2). The contract here has relation only to the carrying ship, and not to other ships, or to acts of negligence done by persons on other ships. It would be contrary to the intention of the parties to hold that the defendants when they entered into this contract, which relates to the carriage of goods on the *Kroon Prins*, contemplated a contract as to the acts of their servants on board other ships. If this be solely a collision, the defendants, being within the exception, are not liable. Under this bill of lading the defendants are not even responsible for the negligent acts of servants on board the carrying ship. The judgment of Willes, J., in *Grill* v. *The General Iron Screw Collier Company* (3), which was affirmed in

(1) 2 Com. B. Rep. N.S. 156; 26 Law J. Rep. C.P. 168.

(2) 3 Hurl. & C. 284; 33 Law J. Rep. Exch. 269.

(3) 35 Law J. Rep. C.P. 321; in error, 37 Law J. Rep. C.P. 205; Law Rep. 1 C.P. 600, 611 in error, Law Rep. 3 C.P. 476, 481.

the Exchequer Chamber, covers the whole case; the contract here exempts the defendants from the obligation to take reasonable care, as well as from the consequences of collision, and the contract always relates to the ship on which the goods are carried, and not to any other ship. The case of *Steel* v. *The State Line Steamship Company* (4), though not directly in point, contains, in the judgment of Lord Blackburn (at p. 88), the principle which exonerates the defendants in this case, for they have protected themselves by saying certain perils are to be excepted, whether caused by negligence of the ship's crew or the shipowner's servants, or not.

Irrespective of the terms of the bill of lading the defendants are not liable, under the circumstances, in *tort* — see *Thorogood* v. *Bryan* (5), *Catlin* v. *Hills* (6), *Childs* v. *Hearn* (7), *Tuff* v. *Warman* (8), *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (9), *Waite* v. *The North Eastern Railway Company* (10) and *The Milan* (11). The Court below held that the defendants were liable for the whole loss; but if the action is to be considered an action of *tort*, within the meaning of the language of section 25, subsection 9, of the Judicature Act, 1873—namely, any cause or proceeding for damages arising out of a collision between two ships—then the rules in force in the Admiralty Court must prevail, because they are at variance with those in force in the Courts of common law. The rule in the Admiralty Court is that where both vessels are to blame, the owners of each ship are only liable for one half of the damage, and the innocent owner of the cargo, as to the other half, must sue the owner of the ship on board which his goods are carried—*The Milan* (11). The defendants, as owners of the *Kroon Prins*, would therefore be liable to the plaintiffs only for one half of the damage; but they are also freed from liability as to this one half of the damage under the terms of the bill of lading; consequently they are not liable at all.

Next, the question whether the defendants are liable or not must be decided according to Dutch law: both the ships carried the Dutch flag; the collision took place on the high seas. The ships were registered in Holland, and must be considered as Dutch ships. If an English company owns a Dutch ship, that ship is governed by Dutch law; a vessel carrying the Dutch flag is part of Holland, and no action can be maintained here, because no action would, in the circumstances of this case, lie in Holland—*The M. Moxham* (12), *Phillips* v. *Eyre* (13) and *The Halley* (14). There is no law which prevents a ship built in England from being made a foreign ship if she is not registered in England and if she is registered elsewhere. The Merchant Shipping Act, 1854, section 18, sub-section 3, and sections 19, 38, 39, 102 and 103; the Merchant Shipping Act, 1862, section 3; *The Gaetano* (15), *Long* v. *Duff* (16), *Lloyd* v. *Guibert* (17) and the Dutch Code, sections 321, 534, 535, 536 and 537, were also referred to.

Butt, *Q.C.*, and *Myburgh*, *Q.C.* (with them *Barnes*), for the plaintiffs.—First, as to the question of *tort*. The Dutch law does not apply to this case; the English law is applied even to foreign ships brought into the English Court of Admiralty, for a *tort* on the high seas is *communis juris*. But these ships are not Dutch ships, the bill of lading and the articles of association shew that the company is an English company; the goods also were shipped at a British

(4) Law Rep. 3 App. Cas. 72 (Scotch).
(5) 8 Com. B. Rep. 115; 18 Law J. Rep. C.P. 336.
(6) 8 Com. B. Rep. 123.
(7) 43 Law J. Rep. Exch. 100; Law Rep. 9 Exch. 176.
(8) 2 Com. B. Rep. N. S. 740; 26 Law J. Rep. C.P. 263; in error, 5 Com. B. Rep. N.S. 573; 27 Law J. Rep. C.P. 322.
(9) 44 Law J. Rep. Exch. 89; Law Rep. 10 Exch. 47.
(10) E. B. & E. 719; 28 Law J. Rep. Q.B. 258.
(11) Lush. 388, 400, 403; 31 Law J. Rep. Adm. 105.
(12) 46 Law J. Rep. P., D. & A. 17; Law Rep. 1 P. D. 107.
(13) 40 Law J. Rep. Q.B. 28; Law Rep. 6 Q.B. 1.
(14) 37 Law J. Rep. Adm. 33; Law Rep. 2 P.C. 193.
(15) 51 Law J. Rep. P., D. & A. 67; Law Rep. 7 P. D. 137.
(16) 2 Bos. & P. 209.
(17) 35 Law J. Rep. Q.B. 74; Law Rep. 1 Q.B. 115.

port. It is a fallacy to say that a ship is a part of the territory of the country of which she carries the flag; in many cases she is by international comity considered to be so for the purpose of preventing interference with commerce; but there is no such principle of law, and a merchant ship can only be considered to be so in a very limited sense; this is clearly pointed out in the judgment of Lindley, J., in *The Queen* v. *Keyn* (18). In the case of collision on the high seas, if the English Court has jurisdiction, it applies English law—*The Johann Friederich* (19); foreign law may apply to matters within the ambit of the ship, but not beyond.

Even if the case be governed by Dutch law, still the defendants are liable in *tort*. It is contended by them that by Dutch law the liability of the owner is co-extensive with the liability of the master, and that in such a case as the present one, as there is no *tort*, each ship would bear its own loss; but this cannot be maintained, for the evidence shews that a *tort* has been committed according to Dutch law, and, that being so, the Dutch code only regulates the amount of the damages. *Lloyd* v. *Guibert* (17) and *The Gaetano* (15) do not apply to the question of *tort*, but only shew that all contracts are made with the master, regard being had to the law of the flag. *The Halley* (14) establishes that the English Court will not apply foreign law; so that, even for a *tort* committed in a foreign state, the Court will not apply foreign law.

If a *tort* has been committed, then the question arises, what are the damages? The defendants contend that the Judicature Act renders each party liable to pay half the damage suffered. That might be so if the two ships belonged to different owners, but in this case the same persons own both the ships, so that it would be a matter of set-off, and a man cannot sue himself—*Chapman* v. *The Royal Netherlands Steam Navigation Company* (20), which, though overruled in *The Stoomvaarts Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Company* (21), may still be an authority on this point. The case of the plaintiffs is, however, more forcible if it be considered an action of contract. In these cases the *causa causans* must be considered, and the exception on which the defendants rely cannot apply to a collision caused by themselves or their servants; the limitation of the general contract does not affect the liability of the defendants for the negligence of their servants. The meaning of the word collision, therefore, must be limited, and the proper limitation to be given is to refer it only to collisions not caused by the master of the ship in which the goods are carried, or by the fault of the defendants themselves. It is said that *Lloyd* v. *The General Iron Screw Collier Company* (2), *Grill* v. *The General Iron Steam Collier Company* (3), *Phillips* v. *Eyre* (13) and *Czech* v. *The General Steam Navigation Company* (22) do not apply, because either the word collision does not occur in them, or the principles there laid down are not applicable here; but it will be found that they all are based on the principle contained in the judgment of Willes, J., in *Czech* v. *The General Steam Navigation Company* (22), and that, notwithstanding general words of exception, the defendants are liable for their own negligence and that of their servants. *The Hélène* (23), *Taylor* v. *The Liverpool and Great Western Steam Company* (24), *Hayn* v. *Culliford* (25) and *The Milan* (11) were also cited.

Cohen, Q.C., in reply.—It is an implied term in every contract of carriage which contains exceptions that the carrier and his servants will use due care in the performance of the contract. The carrier therefore will not be liable, unless the loss is occasioned by his own negligence or that of his servants. Here the exception as to collision was introduced, because it was considered doubtful how far collision in

(18) 46 Law J. Rep. M.C. 17, 33; Law Rep. 2 Ex. D. 63, at p. 93.

(19) 1 W. Rob. 35.

(20) 48 Law J. Rep. Chanc. 449; Law Rep. 4 P.D. 157.

(21) 52 Law J. Rep. P., D. & A. 1; Law Rep. 7 App. Cas. 795.

(22) 37 Law J. Rep. C.P. 3; Law Rep. 3 C.P. 14.

(23) Br. & L. 429.

(24) 43 Law J. Rep. Q.B. 205; Law Rep. 9 Q.B. 546.

(25) 48 Law J. Rep. C.P. 372; Law Rep. 4 C.P. D. 182.

which both ships are to blame could be considered accident or collision. The question of liability in the case of collision is now governed by section 17 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), and a ship is deemed to be in fault if any of the statutory regulations for the prevention of collisions has been infringed, unless it is satisfactorily proved that the circumstances of the case made departure from the regulations necessary. That Act was passed, as was suggested by Lord Blackburn in *The Stoomvaarts Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Company* (26), in order to do away with the effect of the decision in *Tuff* v. *Warman* (8), and also because it was a difficult question to determine whether the violation of the regulations contributed to the accident, and was the *causa proxima*.

Lastly, it is not the duty of the English Courts to construe a foreign code by the rules of construction applicable to English law—*The Sussex Peerage Case* (27); if, therefore, it can be shewn that the defendants' ships were Dutch ships, then they are not liable, because by the Dutch code the master of a Dutch ship would not be liable.

Cur. adv. vult.

The following judgments were delivered on the 17th of January, 1883:—

BRETT, L.J.—In this case the plaintiffs have shaped their action in two ways, having sued the defendants—first, for a breach of the contract to carry and deliver these goods safely; and, secondly, in *tort*, or in the old form of an action on the case for the loss of these goods through the negligence of certain servants of the defendants. It is not necessary to go into the facts of this case, but as the judgment of the Queen's Bench Division, if it is to stand, has made this case one of general importance, I have thought it right to give my individual opinion.

As far as the case upon the contract is concerned, it is to be observed that the whole of the contract, which no doubt is a contract of carriage, has been reduced by the consent of the parties into writing in the form of a bill of lading; and you cannot look for any term of the contract outside of the bill of lading. The questions which arise in the action, when considered as an action of contract, are—first, by what rule or by what law is the contract contained in the bill of lading to be determined? secondly, what is the true construction of the bill of lading? and, thirdly, to what matters does it apply? It has been suggested that the bill of lading is a Dutch bill of lading, which must be construed according to Dutch law. I doubt whether the construction of this bill of lading, even if it were a Dutch bill of lading, would be different from the construction of an English bill of lading; the contract is in writing, and no evidence has been given of any particular mode of construing it in Holland. It seems to me to be clear beyond dispute that it is an English bill of lading, which must be construed according to English rules of construction. It was suggested that the contract must be considered as a Dutch contract, because the bill of lading was given by the captain of a ship which is registered in Holland and which carries the Dutch flag; but the whole of that argument would fall to the ground if the ship be an English ship. However, it seems to me that the contract, even if the ship be a Dutch ship, is nevertheless an English contract. It may be true in one sense that where a ship carries the flag of a particular country, *prima facie* the contract made by the captain of the ship is a contract made according to the law of the country whose flag the ship carries. But that fact is not conclusive. The question as to what the contract is, and by what rule it is to be construed, is one of the intention of the parties, which must be gathered from all the circumstances of the case. In this case all the persons for whose benefit the ship was employed and was earning profit were Englishmen. The defendants are registered in Holland as a Dutch company, but they are also registered in England as a joint stock company. The contract was made by an agent of the defendants in order to obtain profit for them; it was made at an English port for the carriage of goods from that port to a Dutch port; it was drawn up in

(26) Law Rep. 5 App. Cas. 876, 893.
(27) 11 Cl. & F. 85, 114 *et seq.*

the English language in the ordinary form of an English bill of lading, and the defendants are named therein as an English limited company. Taking those circumstances into consideration, the inference is irresistible that it was the intention of the parties that the contract, even although the ship was a Dutch ship, which I think it was not, should be an English contract. If that be so, the contract must be construed according to the rules applicable to the construction of an English bill of lading. The goods were lost as the immediate result of a collision at sea; and, if there had been no exceptions in the bill of lading, it would not have signified how that collision had occurred. The first part of the bill of lading contains an absolute contract both to carry and to deliver these goods safely; so that the defendants, within the terms of the written contract, would have been liable for a breach of the contract, by reason of the non-delivery of the goods safely at the end of the voyage. But the bill of lading contains exceptions, and the question arises, whether the defendants are relieved, under the bill of lading, from the consequences of a loss which is the inevitable result of a collision. There are three kinds of collisions which it is obvious may arise. A collision at sea may arise from mere accident—that is, without any default on the part of those who are navigating either ship; and a collision of that kind comes within the exception of accidents of the sea; and in the absence of any express exception of collision, the shipowner would be absolved from liability by reason of the exception of accidents of the sea. But a collision may arise from the default either of those on board the ship which is carrying the goods, or of those who are conducting another ship without any fault on the part of the ship which is carrying the goods; or there can be a collision which is the fault of both ships.

A collision caused, without any fault on the part of the carrying ship, by the negligence of those on board the other ship, cannot be called an accident of the sea. If, therefore, a bill of lading does not contain any exception of accidents of the sea, the owner of the carrying ship would be liable, even though there was no default on the part of his own servants, but the collision was caused solely by the default of those on board the other ship. In order to meet such a case as that, the exception of collisions was put into the bill of lading; and, if the collision was the only thing which could be given as the cause of loss, the Court would have no right to put any limitation upon the meaning of that word. It would cover every sort of collision, and certainly a collision caused solely by the fault of those on board a ship other than the carrying ship. Such a loss as that is now covered in the bill of lading by the exception of collision—that is, collision simply. But a loss may be the immediate result of a collision which has been brought about by the negligence of those on board the carrying ship. Such a loss, if treated as a loss by collision, is now covered by the exception of collisions alone; but in the case of a bill of lading, as distinguished from a policy of insurance, the *causa causans*, and not merely the *causa proxima*, may be looked at; and where a collision is brought about by the negligence of those on board the carrying ship, although the collision is the immediate cause of the loss, yet, looking at the *causa causans*, the loss is a loss by reason of negligence. It was held in *Lloyd* v. *The General Iron Screw Collier Company* (2) that the *causa causans* might be looked at; it was further held in that case, and also in *Phillips* v. *Clark* (1), that there is in every bill of lading an implied undertaking by the shipowner that the master and crew will use ordinary care in the carriage of goods, and that taking the collision only as a circumstance in the case, the negligence on the part of the master and crew is a breach of the implied stipulation to carry the goods with ordinary care which was not covered by the exception of collisions. In order to meet that, the shipowners have, in the present bill of lading, insisted upon the stipulation that they shall be excepted from liability arising in consequence of the neglect or default of the master or any other of their servants in navigating the ship, and this stipulation was assented to by the shippers. The liability, therefore, which was held to exist in *Lloyd* v. *The General Iron Screw*

Collier Company (2) does not exist here, because the bill of lading excepts, not only collision, but also any loss caused by the negligence of the master or mariners of the carrying ship, so that the implied contract on the part of the shipowner that the goods shall be carried by his servants with reasonable care cannot be relied on. There are, however, liabilities on the part of the shipowner which would still exist under the present bill of lading, as, for instance, any personal negligence of the shipowner which could be relied upon as the real cause of the loss. Thus, if he were to employ as master a person who was known to be of drunken habits, and it could be shewn that the collision or loss was the natural consequence of the drunkenness of the master, that would be personal negligence on the part of the shipowner for which he would be liable. So also if the shipowner were to appoint as master a person who was without reasonable knowledge or skill; or if he were to give written instructions to his master not to employ a pilot upon the vessel entering a particular port, and by reason of such instructions the ship were lost, that would be negligence on the part of the shipowner for which he would be liable. It was said that, notwithstanding that a loss occasioned by the negligence of the master and crew of the carrying ship is excepted, yet the defendants are liable because the loss was partly caused by the negligence of their servants on board another ship the *Atjeh*, and that such negligence is not covered by the exceptions. That may be true; but the question at present is, whether the defendants, as owners of the *Kroon Prins*, have, under the bill of lading, undertaken any liability for the negligence or want of reasonable care of their servants on board another ship; and that depends upon the question whether there is any such implied contract in this bill of lading. Such a contract can only be implied where it can be assumed that the parties at the time when the contract was entered into intended that such a contract should be implied. It seems to me to be unreasonable to suppose that the parties at the time of making the contract for the carriage of the goods in a particular ship were considering the conduct of the shipowners' servants on board another ship. The shipowners cannot be held liable in respect of a contract as to the conduct of their servants on board another ship, not because their conduct is not within the exceptions, but because it is not within the contract at all. Therefore the plaintiffs, so far as they rely upon the contract contained in the bill of lading, cannot recover against the defendants for a loss caused by the negligence of the defendants' servants on board the *Atjeh*; they could recover for the negligence of the master and crew on board the *Kroon Prins*, were it not for the exceptions in the bill of lading.

Then the question arises, whether the defendants may not be liable in *tort* or in the form of an action on the case for the negligence of their servants on board the *Atjeh*, the jury having found that the collision was caused in part by the negligence of those on board the *Atjeh*. In answer to this it was suggested that the ships were both Dutch; that by Dutch law the defendants were not liable, and that the Court was bound to administer Dutch law. Now that raises the questions, whether these ships were Dutch ships, or rather whether the *Atjeh* was a Dutch ship; and whether if the *Atjeh* was a Dutch ship the defendants are not liable in *tort* in this action. In my opinion these ships were not Dutch, but English ships, for the purpose of considering whether any liability attaches to the defendants according to English law. It was said that they were Dutch ships because they were registered in Holland according to Dutch law, and also because, as it was suggested, they carried the Dutch flag. But the defendants are an English joint stock company limited, composed of English shareholders alone; and for the purpose of carrying on a particular trade from Holland it was necessary that the company should be registered in Holland; consequently the company registered first themselves as a company, and then their ships in Holland, but the Dutch company had no power to, and in fact did not, deal with the ships. Every appointment with regard to the ships was made by the English company. The captain of the *Atjeh* no doubt was a Dutchman, but he was the servant of the

English company, by whom he was employed, and to whom he owed obedience. The question, therefore, is whether the mere fact that a ship which was worked for the benefit, and was conducted by the servants, of an English company, was registered in Holland, and carried the Dutch flag, makes her a Dutch ship? It is absurd to suppose that the fact of carrying a Dutch flag makes her a Dutch ship. Pirates always carried the flags of every nation, but they were hanged by every nation. The ordinary mode of evading the laws of war was by carrying false papers, but it never was supposed that the mere fact of carrying a foreign flag and having papers of a foreign country would cause the ship to be considered as belonging to the nation whose flag and papers were carried by her. The nationality of a ship, unless she is employed under letters of marque, which thereby make her a government ship, depends upon her ownership alone. Here the owners of the *Atjeh* are an English company; and the mere fact that she was registered in Holland for the purpose of carrying on a Dutch trade for the benefit of the English company, and for them alone, does not prevent her being an English ship. It seems to me that both these ships were English ships. It was suggested that these ships could not be deemed to be English ships because they were not registered as British ships under the Merchant Shipping Acts. Those Acts would not of course be applicable except to English ships and English owners, for the Legislature would not be entitled to legislate with regard to foreign ships. The question, therefore, whether a ship is bound to be registered according to English law depends upon whether she is an English ship or not. A ship is an English ship if she belongs absolutely to English owners; and that is so whether she is registered or not. Unless she is registered as a British ship she does not obtain the advantages which are given in these Courts to British ships by reason of such registration. Although an unregistered ship cannot claim certain advantages, yet it has been held, and seems to me to be the law, that she cannot evade the law by the mere omission to be registered as a British ship. If that were not the law, it would be to the advantage of an owner to omit to register in order to escape liability. It seems to me that the nationality of a ship depends solely upon her ownership, and as to her liability it is immaterial whether she is registered or not. The defendants therefore cannot escape from liability according to English law for the negligence of the captain and crew of the *Atjeh*, who are admitted to be their servants, by saying that the ship was not registered as a British ship, but was registered as a Dutch ship.

Assuming, however, that both these ships were Dutch ships, it seems to me, whatever may be the Dutch law, if this action had been tried in Holland, that the defendants still are liable. The negligence of the defendants' servants did not take place in Holland, nor within the sole and territorial jurisdiction of any foreign country, as in the case of *The M. Moxham* (12), where the ship ran against a pier or quay in Spain; so that the cause of action, whatever it might have been, arose entirely in Spain, and the action was an action of *tort*, to which the well-known rule applied, that for any *tort* committed in a foreign country within its own exclusive jurisdiction, an action cannot be maintained in this country unless the cause of action would be a cause of action both in that country and also in this.

The negligence in the present case took place upon the high seas, which is a locality common to all nations, so that the rule referred to does not apply. The question, therefore, assuming both these ships were Dutch ships, is whether an action for a *tort* committed on the high seas between two foreign ships can be maintained in this country, although it is not a *tort* according to the laws of this country. From time immemorial such actions have been maintained in the Court of Admiralty, where the rule that the shipowner is liable for the acts of his servants has been invariably applied; and inasmuch as a writ could be served in this country upon a foreigner for an act of his servants committed on the high seas, which is as much within the jurisdiction of England as that of any other country, then an action can be maintained in a Court of common law for the same reason.

That being so, the question of collision raised in a suit in this country must be tried according to the maritime law of this country, which is part of the common law as administered in England; and by that law a shipowner is liable for the negligence of the master and crew of his ship—see *The Milan* (11) and *The Leon* (28). The defendants are therefore liable for the negligence of those on board the *Atjeh*, even if she be a Dutch ship.

The jury, however, have found that the loss was the consequence of the combined negligence of those on board both of these ships. If the ships had belonged to different owners, and if the loss had been caused by the negligence of those on board both of the ships, then the owner of each ship would, according to the case of *The Milan* (11), have been bound to pay part of the loss claimed. The result, therefore, is that the defendants would be liable for the whole loss as a consequence of the negligence of those on board the *Kroon Prins* and the *Atjeh*. If both these ships had been seized in the Admiralty Court, the judgment, supposing there had been no exception in the bill of lading, would have been that the damages should be recovered, half by the sale of the *Kroon Prins* and half by the sale of the *Atjeh*; but inasmuch as the defendants are relieved by the exception in the bill of lading from the consequences of the negligence of their servants on board the *Kroon Prins*, they would also have been relieved in the Court of Admiralty from the consequence of the negligence—namely, the sale of that ship. The exception in the bill of lading relieves the defendants from liability for that half of the loss. But now, by section 25, subsection 9, of the Judicature Act, 1873, if in an action of this kind brought in the High Court of Justice the rules in force in the Court of Admiralty are at variance with those in force in the Courts of common law, the rules of the Admiralty Court are to be followed. The same result, therefore, follows in this action, so that the defendants are relieved by reason of the exception in the bill of lading from liability for half the loss occasioned by the negligence of those on board the *Kroon Prins*, but are not relieved from liability for half the loss occasioned by the negligence of their servants on board the *Atjeh*; and for that amount, therefore, the defendants are liable. It seems to me that, as the appeal has succeeded in part and failed in part, there should be no costs of the appeal; but that the plaintiffs, having recovered in the action, are entitled to the costs of the action.

(28) 50 Law J. Rep. P. D., & A. 59; Law Rep. 6 P.D 148.

LINDLEY, L.J. (after stating the facts as above given, proceeded:)—Upon the first point the decision of the Court below appears to me correct. The parties to the contract were English, although the master who signed the bill of lading was a Dutchman. The contract was in the English language, and was made at Singapore, which is an English port, and where English law prevails. The ship sailed under the Dutch flag, and was bound to a Dutch port, and was commanded by a Dutch captain. As regards the privileges of trade which the ship might enjoy as a Dutch ship in Dutch ports, the parties, no doubt, relied on the Dutch law; but as regards the construction and effect of the contract itself as between the plaintiffs and the defendants, there can, I think, be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd* v. *Guibert* (17), but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French, the *lex loci contractus* was Danish; the ship was French, her master was French, and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractus* was here English, and ought to

prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law.

In order to determine the effect of the contract according to English law, it is necessary to ascertain its true meaning, and in particular the extent of the express exception of collision from the liability undertaken by the defendants. If the word "collision" means every collision, however caused, then the defendants, having expressly stipulated against liability for collision, are not liable for a breach of their contract to carry. Again, if the word "collision" means every collision except a collision caused by the negligence of those engaged in carrying the goods, then, again, the defendants having expressly stipulated against liability for collision, even though so occasioned, are not liable for any breach of their contract to carry. But if the word "collision" means collision not occasioned by the negligence of the defendants or their servants, then the defendants will not have excluded their liability for damage by all collisions, but only for such as may have been occasioned by the negligence of themselves or their servants in the navigation of the carrying ship; they will not have excluded their liability for damage by collision occasioned by the negligence of themselves or their servants otherwise than in the navigation of the carrying ship. If the word "collision" means what is now supposed, it will follow that in the events which actually happened the defendants will be liable for a breach of their contract to carry. For their contract is to carry safely except in the excepted cases, and upon the present supposition the case which has arisen will not be one of them. The contract in this case is contained in a bill of lading. The contract has reference to a particular ship—namely, to the ship on board of which the goods are to be put. The goods are to be delivered on the safe arrival of that ship; and the conditions and exceptions contained in the bill of lading all have reference to the voyage of that ship and to her captain and crew. The first set of exceptions includes collision, and perils, dangers and accidents of the sea. The second exception extends to loss or damage from any act, neglect or default of the master, mariners or other servants of the company in navigating the ship. The carriage of the goods on board the ship referred to in the bill of lading is the subject to which the contract refers, and in construing it this must be borne in mind. As a mere matter of construction, I should come to the conclusion that the word "collision" in the bill of lading meant every collision between the carrying ship and any other; but that, inasmuch as the word "collision" alone would not or might not extend to collisions occasioned by the negligence of those in charge of the carrying ship, additional words were inserted to cover even this case.

Certain authorities, however, were referred to for the purpose of shewing that the word "collision" does not extend to collisions occasioned by the negligence of the carrier or his servants. But the authorities referred to do not go this length; they are all confined to negligence on the part of those who are in charge of the goods to be carried. The word "collision" as construed in those cases was restricted, but only so far as the true construction of the whole contract required. We are now asked to restrict it further, and, as it appears to me, to an extent not warranted by the rest of the contract or by the authorities. On the one hand, care must be taken not to confine a general principle to cases which merely illustrate its application; but, on the other hand, care must be taken not to apply decided cases so as to defeat the real object and meaning of persons when expressed in sufficiently plain language. The introduction of the word "collision," in addition to risks and dangers of the sea, shews that something was intended to be excepted, which those words would not or might not themselves include. But such expressions as "perils of the sea, accidents or damage of seas" and the like in charter-parties and bills of lading have been long held to extend to collisions not occasioned by the negligence of the master or crew of the carrying ship —*Bullen* v. *Fisher* (29). And on the other hand, such expressions have been held not

(29) Abbott on Shipping, 11th ed. p. 341.

to apply to collisions occasioned by such negligence—*Lloyd* v. *The General Iron Screw Collier Company* (2) and *Grill* v. *The General Iron Screw Collier Company* (3). So an exception of leakage and breakage has been held not to include leakage or breakage caused by the carelessness of the shipowner or his servants in stowing—*Phillips* v. *Clark* (1) and *Czech* v. *The General Steam Navigation Company* (22); see also *The Chasca* (30). Having regard to these decisions, the introduction of the word "collision" into the bill of lading in this case would not exonerate the defendants from liability in respect of a collision caused by the negligence of their servants who had charge of the ship in which the plaintiffs' goods were being carried; but this liability is expressly excluded by additional words. These additional words were probably inserted to meet, not only the decisions referred to, but also the more general observations of several eminent Judges to the effect that the shipowner cannot protect himself from liability for the misconduct of his servants by the use of general words only (see *per* Kelly, C.B., in *Grill* v. *The General Iron Screw Collier Company* (3) at p. 481; *per* Willes, J., at p. 611; *per* Lush, J., in *Taylor* v. *The Liverpool and Great Western Steam Company* (24), at p. 549). In truth it is the application of this principle which gives rise to the difficulty which the Court has to solve. The plaintiffs themselves invoke this very principle and rely upon it, and contend that the general word "collision" is not sufficient to protect the defendants from liability for the negligence of their servants, whether in the management of the carrying ship or any other. This, moreover, is the view taken by the Court below. The answer to it is that the meaning of the parties must be gathered from the whole contract, and that all the exceptions taken together shew that what the parties really intended was to exclude all collisions even although attributable to the negligence of those who were entrusted with the carriage of the plaintiffs' goods. This intention might, no doubt, have been expressed more plainly; but the closer the course of decisions on this subject is studied, the more plain does it, I think, become that the real meaning of the parties was as above stated.

I am aware that in questions arising on bills of lading and charter-parties the rule is to regard the *causa causans* rather than the *causa proxima*, and that there is a difference in this respect between such documents and policies of insurance. But this rule is, after all, subordinate to the true construction of the contract, and ought not to be applied so as to defeat the intention of the parties as therein expressed. For example, if the *Atjeh* had been owned by strangers, and the collision had been caused wholly by the negligence of her captain, the loss of the plaintiffs' goods would, as between them and the defendants, be regarded as a loss by collision within the true meaning of the bill of lading, and not as a loss by an unexcepted peril—namely, the negligence of the captain of the *Atjeh*. This illustration shews that the liability of the carrier turns on the true construction of the contract; and that the distinction between *causa proxima* and *causa causans* is not the test of liability. The word "collision" may cover both or only the first, according to the meaning of the parties as expressed in the contract.

For the above reasons I am unable to concur in the view taken by the Court below, that the defendants are liable on the contract—that is, for a breach of their contract to carry safely.

It becomes, therefore, necessary to consider whether the defendants are liable to the plaintiffs for the loss of their goods apart from the contract into which the parties entered by the bill of lading. It is contended that because both ships were registered in Holland in the name of a Dutch company, and were both lawfully sailing under the Dutch flag, and came into collision on the high seas, the plaintiffs' rights apart from the contract must be decided by Dutch law. But although both ships may have been Dutch and entitled by the law of Holland to trade with Dutch ports in Java, yet it is not to be forgotten that both ships were, in fact, owned beneficially by the defendants, and were both navigated by persons who were in fact the ser-

(30) 44 Law J. Rep. Adm. 17; Law Rep. 4 Ad. & Eccl. 446.

vants of the defendants. What, then, is the law applicable, as between the plaintiffs and the defendants, to a loss of the plaintiffs' goods occasioned by a collision between these two ships? What reason is there for saying that Dutch law, as distinguished from English law or the general maritime law, is to govern such a case? The reason alleged is that, each ship being Dutch, the law of the flag—that is, the Dutch law—regulates the persons on board each ship, and determines the rights and liabilities of her owners, both towards the captains and crews, and towards the owners of the cargoes on board. This reason is based on a very common and fruitful source of error—namely, the error of identifying ships with portions of the territory of the States to which they belong. The analogy is imperfect, and is more often misleading than the reverse, as I have endeavoured to point out before—*The Queen* v. *Keyn* (18). In this particular case the analogy appears to me more misleading than usual.

I am not aware of any decision in this country to the effect that, where two ships come into collision on the high seas, the rights and liabilities of their respective owners have been held to depend on the laws of the respective flags of the ships. The law applicable in this country to cases of collision on the high seas is the maritime law as administered in England, and not the laws of the flags—see *The Johann Friederich* (19), *The Leon* (28) and *Foote on Private International Law*, pp. 398 and 403. According to the maritime law, the defendants, as principals of the captain of the *Atjeh*, are clearly liable for the consequences of his negligence. If it be objected that the Dutch Company, and not the defendants, are the owners of the *Atjeh*, and responsible for the acts of her captain, the objection is answered by the admission made by the defendants' counsel in this Court, that the defendants represent the Dutch Company for all the purposes of this action. Probably even without this admission the result would be the same, considering that the Dutch company were bare trustees for the defendants. But the admission gets rid of all difficulty with respect to ownership, such as had to be encountered in *The General Steam Navigation Company* v. *Guillou* (31).

Assuming, then, that the defendants are liable to the plaintiffs for the loss occasioned by the negligence of the master of the *Atjeh*, it is necessary to determine the amount of damages to which the plaintiffs are entitled. The action, viewed as an action of *tort*, appears to come distinctly within section 25, clause 9, of the Judicature Act, 1873, and the rules of the Admiralty Court have to be ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *Thorogood* v. *Bryan* (5) and other cases of that class; for the Admiralty Court has never adopted that doctrine—see *The Milan* (11). According to the rules of the Admiralty Court, if the two ships had belonged to different owners, then, as both ships were to blame, the plaintiffs would have been entitled to recover one-half of the amount of their loss from the owners of the *Atjeh*, and one-half from the owners of the *Kroon Prins*—see *The Milan* (11). As both ships belong to the same owners, the above rule would render the defendants liable for both halves—that is, for the whole of the loss; and this would be the proper result, were it not for the special stipulation contained in the bill of lading, and which exonerates the defendants from the share of the loss attributable to the negligence of those in charge of the *Kroon Prins*. The contract in this case exonerates the defendants from half of the loss and leaves them liable for the other half; and the plaintiffs are entitled to judgment on this footing. Unless the parties can agree upon the sum for which judgment is to be entered, the amount must be ascertained by a reference to a Master or a referee. The plaintiffs will be entitled to the costs of the action, but, the appeal having been to a great extent successful, each party should pay his own costs of the appeal.

Lord Justice Baggallay has read and concurs in this judgment.

BRETT, L.J.—I wish to say that the nationality of a ship depends upon the question of ownership; the question of the

(31) 11 Mee. & W. 877; 13 Law J. Rep. Exch. 168.

flag and of registration are circumstances only of the nationality of a ship. I also desire to state that if shipowners in general or in a particular trade venture to draw bills of lading which absolve them from all liability for their own personal negligence or want of reasonable skill or care, and it is found that the shippers cannot resist them, the shipowners would be assured of their error by an Act of Parliament such as that which was passed to put down a similar attempt on the part of railway companies to escape from liability.

Judgment for the plaintiff.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Lovell, Son & Pitfield, for defendants.

[IN THE HOUSE OF LORDS.]

1881. Nov. 11, 15, 22. 1882. June 6. July 12. Aug. 1.

THE CAPITAL AND COUNTIES BANK *v.* HENTY AND OTHERS.

Libel—Innuendo—Evidence for Jury.

H. & Sons, a firm of brewers, having quarrelled with a branch manager of a bank, issued a circular to the tenants of their public-houses to the following effect:—"Messrs. H. & Sons hereby give notice that they will not receive in payment cheques drawn on any branch of the" Bank in question. A run on the bank followed, which there was some evidence to connect with the circular. The bank brought an action of libel, alleging by innuendo that the circular imputed insolvency.

On motion by the defendants for judgment:—

Held (*dissentiente* LORD PENZANCE), *that there was no case to go to the jury, that the words were innocent in their primary and natural sense, and would not be read by a reasonable man as imputing insolvency.*

This was an appeal from a decision of the Court of Appeal, which reversed one of the Common Pleas Division.

The case is reported in the Courts below, 49 Law J. Rep. C.P. 830; Law Rep. 5 C.P. D. 514.

The respondents, Sussex brewers, had a dispute with the manager of the appellants' branch bank at Chichester, and in consequence issued to the tenants of their public-houses a printed circular in the following terms:—"Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any branches of the Capital and Counties Bank."

The appellants brought an action for libel, alleging by an innuendo that the circular meant "that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheques of their customers."

There was evidence that a run upon the bank took place after the circular was issued, and that the respondents refused to withdraw the circular when requested.

The jury by whom the case was tried were unable to agree. The respondents moved for judgment on the ground that there was no case to go to the jury. They were unsuccessful in the Common Pleas Division, but succeeded in the Court of Appeal.

The bank appealed.

Sir John Holker, Q.C., and *C. Russell, Q.C.* (*R. T. Reid* with them), for the appellants.—The point to be decided is, whether the circular is capable of bearing the construction put upon it in the innuendo. If it is, then it is a question for the jury whether it did bear that construction. If there is doubt upon the point, as the difference of opinion among the Judges shews there is, the case ought not to be withdrawn from the jury.

What is the interpretation which reasonable men reading the circular would put upon it?—*Fisher* v. *Clement* (1) and *Sturt* v. *Blagg* (2). Any one would suppose it meant to throw doubt on the sol-

(1) 10 B. & C. 472.
(2) 10 Q.B. Rep. 906

vency of the bank. The general form in which it is expressed would not shew any one that it was intended for tenants only —*Parmiter* v. *Coupland* (3), *Mulligan* v. *Cole* (4), *Watkin* v. *Hall* (5), *Cox* v. *Lee* (6) and *Hart* v. *Wall* (7).

The true test in interpreting is not what is in the mind of the writer, but what would be the construction a reasonable man who received the document would put upon it—*Hankinson* v. *Bilby* (8) and *Baylis* v. *Lawrence* (9), where Lord Denman says, "A Judge must not leave the fact of the defendant's intention as a question for the jury, except so far as the intention may be shewn by the tendency of the publication itself." There was evidence to shew that some of those who received the circular in fact took it as throwing doubt on the solvency of the bank, and that there was a run upon the bank in consequence.

The respondents must have known what interpretation would be put upon the circular, and intended it to have the effect it had, or at any rate were reckless whether it did or not.

If the circular bears the meaning given to it in the innuendo there can be no privilege. The effect of privilege is that one who makes a statement he believes to be true is protected though it turns out to be false. Here, if the interpretation in the innuendo is right, the respondents did not believe their imputations to be true.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Sir H. Giffard, Q.C.* (*A. L. Smith* with them), for the respondents.—The words used are not in their primary sense libellous. Nobody can say that the words mean that the bank is insolvent; that is a mere inference which might be drawn from the act done as to the reasons why it is done. If the meaning is to be extended by an innuendo, there must be circumstances outside the document to prove the innuendo. Here it was the fact that Messrs. Henty would not take the cheques (as they had a right not to do), not the way in which they expressed their intention not to take them, which did the harm. Had they merely told their collector not to receive them the effect would have been the same. The persons to whom the publication was made were all persons who were likely to pay in the cheques, and would have ground to complain if they were refused without notice.

Then, as to privilege, it is admitted that the occasion was privileged, and there is no evidence of express malice. Lord Coleridge and Grove, J., say that if the circular bears the meaning in the innuendo there must be malice. But it is a fallacy to argue, This is a libel, because reasonable men would interpret it in a libellous sense, though there is no evidence that the defendant so intended it, and then to say that, having the meaning imputed to it, the defendant must have known it to be untrue, and therefore that there was express malice.

The cases cited are all distinguishable. You cannot infer malice without an intention on the part of the publisher.

Reid, in reply by leave.

Cur. adv. vult.

THE LORD CHANCELLOR (LORD SELBORNE) (on Aug. 1).—I have read with interest the able and instructive opinions of those of your Lordships who have endeavoured to ascertain with exactness the respective provinces of Judge and jury in a question of libel or no libel, where the alleged libellous meaning is not to be collected, according to ordinary rules of construction, from the mere words which the defendants have used. Into that enquiry I will not follow them further than to say, that the authorities which I think most material are *Woolnoth* v. *Meadows* (10), *Wood* v. *Brown* (11), *Wright* v. *Clements* (12), *Goldstein* v. *Foss* (13), *Hearne* v.

(3) 6 Mee. & W. 105; 9 Law J. Rep. Exch. 202.
(4) 44 Law J. Rep. Q.B. 153; Law Rep. 10 Q.B. 549.
(5) 9 B. & S. 279; 37 Law J. Rep. Q.B. 125; Law Rep. 3 Q.B. 396.
(6) 38 Law J. Rep. Exch. 219; Law Rep. 4 Exch. 284.
(7) 46 Law J. Rep. C.P. 227; Law Rep. 2 C.P. D. 146.
(8) 16 Mee. & W. 442.
(9) 11 Ad. & E. 920; 3 P. & D. 526.

(10) 5 East, 463.
(11) 1 Marshall, 522; 6 Taunt. 169.
(12) 3 B. & Ald. 503.
(13) 2 You. & J. 146; 4 Bing. 489; 1 Mo. & P. 402.

Stowell (14) and *Capel* v. *Jones* (15). I should willingly have deferred to the experience, learning and ability of those who have thought the evidence in the present case proper to be left to a jury, if the disagreement from them of others not less entitled to respect had not compelled me to trust more than I could have wished to my own judgment. The Court of Appeal has thought that there was no evidence to go to a jury, and I must be satisfied that their judgment was wrong before I can say that it ought to be reversed.

I do not understand any of the learned Judges in the Courts below to have been of opinion (nor do I think it is the opinion of any of your Lordships) that the question of libel or no libel must always, and necessarily, be left to a jury as to words not in themselves (that is, in their proper and natural meaning, according to the ordinary rules for the interpretation of written instruments) libellous, without some evidence either of a libellous purpose on the part of the writer, or of some other extrinsic facts calculated to lead reasonable men to understand them in a libellous sense. I should myself be very sorry if such were the law.

In *Sturt* v. *Blagg* (2) Chief Justice Wilde said, "It is the duty of the Judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the Judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it." If the Judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the innuendo to the jury. In deciding on the question whether the words are capable of that meaning, he ought not, in my opinion, to take into account any mere conjectures which a person reading the document might possibly form as to some out of various motives or reasons which might have actuated the writer, unless there is something in the document itself or in other facts properly in evidence which to a reasonable mind would suggest, as implied in the publication, those particular motives or reasons.

The alleged libel, in the present case, is a printed circular sent through the post by the defendants (brewers at Chichester) to certain of their own tenants and customers, giving them notice that the defendants "would not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The meaning ascribed to this document by the innuendo is, "that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers." The question is, whether there was evidence to be left to the jury in support of that innuendo. From the words, standing by themselves, it appears to me to be impossible to collect such a meaning, on any known principle of construction. By construction merely the only conclusion to be arrived at is, that they mean exactly what they say—namely, that the defendants had come to a resolution not to receive in payment of any moneys due or to become due to them, from the persons to whom that circular was addressed, cheques drawn on any of the branches of the plaintiffs' bank. For such a resolution they might have had various motives and reasons, good, bad or indifferent. To mention some, which (whether morally right or not) would be remote from any question of libel, the defendants might (as the fact really was) have taken offence at some conduct on the part of the plaintiffs' agents; or they might have found that mode of payment, from some cause or other, inconvenient; or they might have had greater facilities for cashing cheques drawn upon the branches of some other bank (*e.g.* the London and County Bank); or they might wish, as far as their influence went, to favour some competitors of the plaintiffs in the business of banking. They were under no obligation to give, and they did not give, any reason, and it would, in my opinion, be arbitrary and not reasonable, to imply, from the mere words of the circular, an imputation upon the plaintiffs' credit or solvency. The test, according to the authorities, is, whether, under the circumstances in which the writing was published,

(14) 12 Ad. & E. 719; 4 P. & D. 696; 11 Law J. Rep. Q.B. 25.

(15) 4 Com. B. Rep. 259.

reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. Sometimes (perhaps generally) that test may be satisfied from the mere words of the document; in this case, I think it is plain that the mere words of the document are not enough for that purpose.

What, then, were the circumstances under which, and who were the persons to whom, this circular was published? In order to consider how they, as reasonable men, ought to be supposed to have understood it, all that had passed between Messrs. Henty and the plaintiffs' manager at Chichester (however material to the actual intention of the defendants) must be disregarded. What had so passed was unknown to the persons to whom the publication was made. Most of those persons were tenants of, and the rest were purchasers of beer from, the defendants. They resided at various places in Sussex and the neighbouring counties. The practice of the defendants had been to collect, from time to time, by their travellers, moneys due to them from those persons, and to accept payment from them (wholly or in part) by cheques on local banks. Among the cheques which, in the ordinary course of business, were likely (or not unlikely) to come into the hands of these persons, and which, therefore, they might be likely (or not unlikely) from time to time to offer in payment to the defendants, some were or might be drawn upon different branches of the plaintiffs' bank, as others were or might be drawn upon different branches of the London and County Bank; both which had branches at Chichester and at several other places in the neighbouring district of Sussex and Hants. When such persons received an intimation that the defendants would not accept payment from them in cheques drawn upon branches of a particular bank, I cannot see why, as reasonable men, they should infer from it more than was said. It related to the mode of conducting, for the future, a regular course of business between themselves and the writers, as to which it was proper and reasonable (if the creditor had formed such a resolution) that the debtor should be informed of it. It is not, as I understand, disputed that the defendants were entitled to decide for themselves what cheques they would accept or decline to accept in payment from their debtors, or that such a communication from them to their tenants and customers, if made *bona fide*, was by law privileged. This being so, I cannot perceive how persons standing in that relation to the defendants (whether one individual only, or few persons, or many) could reasonably draw a libellous inference from the mere fact of their receiving such a communication, unless the words of the circular, taken in their natural sense, conveyed the supposed imputation upon the plaintiffs. The publication was to those persons, and to those only to whom, if the defendants meant merely what they said, it would naturally be addressed. No evidence was given from which (as it seems to me) a jury could have been justified in concluding that those to whom this circular was sent were intended to disseminate it amongst others with whom the defendants had no business relations. On the contrary, there was uncontradicted evidence that the defendants did not send it to all their customers, but only to those whom they thought likely, at some time or other, to offer payment by cheque on the plaintiffs' bank. It seems that some of those who received the circular did, in fact, shew it to some strangers; but I cannot think that any such communication by them to strangers, unauthorised by the defendants themselves, could properly be evidence in support of the innuendo. If it had been publicly placarded by the defendants on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document; but nothing of that kind was done.

It was said that the defendants, by some other mode of wording the circular, might have prevented mischief. But if it was actually so worded, and so published, as in itself to furnish no reasonable ground for any libellous interpretation, I cannot perceive that they were under any necessity of saying more, to repel an inference which

what they had said did not justify. It was suggested that they might have made some distinction between the plaintiffs' branch at Chichester and their other branches. But the offence which they had taken at the conduct of the plaintiffs' manager at Chichester (whether reasonable or not) would have made any such exception of the Chichester branch inconsistent with the determination which they had actually formed to have no dealings which they could avoid with that gentleman. I may add that the circular in its actual terms does not seem to extend to the central or head office of the plaintiffs' bank in London. If an exception in favour of the Chichester branch would have prevented any inference adverse to the plaintiffs' credit, why should such an inference be drawn when branches only were mentioned? There was no evidence that any single person to whom the circular was sent by the defendants acted upon it in a manner injurious to the plaintiffs. Mr. Smith, a customer of the plaintiffs, was one of those persons; he came to the manager of the plaintiffs' Landport branch, and produced to him the circular, asking what was the meaning of it, but he did not withdraw or reduce his account with the bank.

There was no evidence of any extrinsic fact affecting the reputation or credit of the plaintiffs' bank at the time which could be connected with the circular, so as to give it a meaning to those who read it which it might not otherwise have had. I cannot but think that under the old system of pleading a statement of some extrinsic facts of this nature on the record would have been necessary to support the innuendo, having regard to the absence of any sufficient ground for it in the words of the document; and this for reasons not technical—*Goldstein* v. *Foss* (13), *Hearne* v. *Stowell* (14) and *Capel* v. *Jones* (15). And although no such matter of inducement need now be stated on the record, it seems to me that without some evidence of facts which, when connected with the words of the document, would justify the meaning imputed to it, such a case ought not to go to a jury. I did not collect from the argument that the loss which the plaintiffs had suffered in the preceding month, from a defalcation by one of their agents, was sufficient to have in any way affected their reputation or credit, or was relied on by them for that purpose. Their real reliance was upon what afterwards happened—namely, the extraordinary run upon the branches of their bank, which took place during the first and second weeks after the circular was issued. Before the second week the West of England Bank had failed, and its failure had been preceded by certain sinister reports which found their way into some London newspapers. Some evidence was undoubtedly given which tended (though not, I think, in any very clear or definite manner) to connect rumours relative to the defendants' circular with the run which took place during the first, at all events, of those two weeks. But such rumours, or any consequences which they may have had, could not properly have been left to a jury as evidence tending to give a libellous meaning to the circular, if the publication itself (for which alone the plaintiffs were responsible) was not otherwise proved to be a libel. Lord Coleridge, as I understand him, thought this part of the evidence proper to go to the jury, not for the purpose of proving the innuendo, but only to prove special damage if the circular were found to be a libel. I cannot, however, help thinking that if the run upon those branches of the plaintiffs' bank had not happened when it did, there would have been a much more general agreement among the Judges before whom this case has come; and, indeed, it is tolerably certain that, in that case, the action would never have been brought.

Apart, therefore, from the facts which bear directly upon the question of the defendants' purpose and intention, but which were unknown to the persons who received the circular, I find no evidence that this was a libel proper to be left to a jury. As to those facts (which were not in controversy), it appears to me that evidence of pride, anger, ill-temper or unreasonableness, is an entirely different thing from evidence of an intention (not otherwise proved) to cast imputations upon the credit or solvency of the plaintiffs' bank. I think there was more than enough

evidence of pride, anger, ill-temper and unreasonableness. In the excellent summing-up of Lord Coleridge there is but one thing said, as to the effect of the evidence, with which I cannot agree, and that is his intimation to the jury that, although nothing which had previously passed might have justified the conclusion that the defendants had a malicious intention, some evidence of such an intention might be derived from their reply to Messrs. Stuckey & Co.'s last letter threatening an action. It seems to me to be impossible justly to draw an inference of that kind from such a reply to such a letter, unless there were other circumstances sufficient to justify it. I should not have thought that any reasonable man, who knew all that had passed between the defendants and Mr. Hooper, could have put upon the circular the construction that an imputation on the plaintiffs' credit or solvency was really thereby intended; and if not, I am unable to understand how the same facts can be evidence in support of the innuendo. The defendants were angry, not indeed without reason, but beyond the bounds of reason; and they determined, as far as possible, to have no dealings with those who had offended them. They stated, openly and frankly, to the plaintiffs' manager what (unless conciliated) they would do, in terms not favourably distinguishable, to my mind, from those of the circular which they afterwards sent out. The answer which they received was not conciliatory: and in it the manager said that he was "quite indifferent as to their sending out orders to their tenants not to cash the bank's cheques." I do not regard this as in the nature of a permission (if the manager could have given it) to the defendants to publish a libel concerning the plaintiffs; but it does seem to me to be strong evidence that the plaintiffs' manager (whom I suppose to have been a reasonable man, and as well capable of comprehending the defendants' meaning at that time as he was afterwards) did not understand the act threatened by the defendants, or the communication proposed to be made by them to their tenants, as implying any imputation upon the credit or solvency of the bank. If it had been the necessary or legitimate consequence of the action which the defendants took, that their circular should be understood, or be likely to be understood, by reasonable persons receiving it in a libellous sense, they must be taken (for all purposes of legal responsibility) as having intended that consequence. But I have already said that I think this was not either the natural sense of, or a reasonable inference from, the words which they used, or the act which they did; and the whole evidence appears to me to be against the supposition that they themselves intended it to convey that meaning.

The result is, that I think there was no evidence on which a jury could have been justified in finding that the defendants published a libel concerning the plaintiffs. The document, not being a libel on the face of it, is not shewn to be so by any extrinsic evidence proper, in my judgment, to be considered by a jury for that purpose. Before it can be deprived of the privilege which it would undoubtedly possess if *bona fide* sent to the persons to whom it was addressed for the purpose appearing on the face of it, one of two things is necessary, either the defendants should be shewn to have sent it for some ulterior purpose not covered by that privilege (of which I see no evidence), or it must be shewn properly to bear the libellous meaning imputed to it.

These are my reasons for being unable to differ from those of your Lordships who are of opinion that the judgment under appeal is right, and that this appeal should be dismissed with costs; and I shall move your Lordships accordingly.

LORD PENZANCE.—This is an action of libel, the issues in which have been tried before the Lord Chief Justice and a jury; the jury disagreed and there was no verdict; before the case could be set down again the defendants applied to the Common Pleas Division to enter judgment for them in accordance with Order XL. rule 10, of 36 & 37 Vict. c. 66, upon the ground that the Court had before it all the materials necessary for finally determining the matters in dispute without the verdict of a jury. The Common Pleas Division refused the application, which has, however, been acceded to, and judgment entered for the defendants, by the Court of Appeal.

It is from that judgment that the present appeal is made.

The case is one of considerable interest. It involves questions of first principle in the law of libel, and it has been the subject of contrary determinations in the Courts below. The Lord Chief Justice, and two Judges of the High Court of Justice, took one view of the case, which was supported by Lord Justice Thesiger in the Court of Appeal, while an opposite view has been expressed by Lords Justices Brett and Cotton in the judgment which is now under appeal.

As the facts of the case are of the first importance, I will proceed to state them. The defendants, Messrs. Henty, carry on the business of brewers at Chichester. The plaintiffs are the Capital and Counties Joint Stock Banking Company, having numerous branches in the provincial towns, and amongst others a branch at Chichester. The defendants have numerous tenants and customers, from whom they are in the habit of receiving money, and on some occasions they had received in payment of moneys due to them cheques drawn upon the plaintiffs' bank. Some of these cheques would be drawn upon branches of the bank other than the Chichester branch, and as the defendants carried on business at Chichester, it was of course a convenience to them if those cheques could be all cashed at the Chichester branch. This convenience had, before the time when the present disputes arose, been conceded to them. It is obvious enough, however, that this could only have been done in reliance on the credit of Messrs. Henty, for the managers of the Chichester branch had no means of knowing whether the person whose name was signed to any such cheque had an account with the branch upon which he drew it, or whether the signature to the cheque was in his handwriting, or what the state of his account might be.

In this state of things it so happened that a new manager (Mr. Hooper) was placed at the head of the Chichester branch, and shortly afterwards Mr. Wright, a clerk of Messrs. Henty, presented on their behalf a cheque for 5*l.*, drawn on the Petersfield branch of the plaintiffs' bank. Mr. Hooper, who knew neither the drawer of the cheque, nor Messrs. Henty nor Mr. Wright, refused to cash it. Thereupon Messrs. Henty addressed to Mr. Hooper the following letter, with respect to which it must be noted that the "Hampshire and South Wilts Bank" therein-mentioned, is, in fact, the same as the plaintiffs' bank: —"26th November, 1878. Sir,—It has always been our practice to cash the cheques drawn on the local or district branches of the banks of this city, and with that understanding we have allowed our tenants to cash such cheques and give them to our collector. If you intend to adopt an isolated policy, we shall issue an order to our tenants not to cash Hampshire and North Wilts cheques—at least with the intention of paying our collector with them. Our Mr. Wright will early to-morrow (Wednesday) present the cheque that you refused to cash to-day, and on it will depend the good feeling that has rested between us and the Hampshire and North Wilts Bank. We are, Sir, your obedient servants, George Henty & Sons."

Mr. Wright did, in accordance with this letter, present the cheque again the next day, which was the 27th of November, 1878, and Mr. Hooper cashed it; but he thought it right, after the letter he had received containing the threat by Messrs. Henty that they would issue "orders to their tenants not to cash Hampshire and North Wilts cheques," to write to Messrs. Henty and explain that he did so as a matter of grace only, and that he would do so in future if he had Messrs. Henty's authority for so doing, but that he must repudiate the threat which had been held over him. His letter was as follows: "29th November, 1878. Gentlemen,—In reply to your favour of the 26th instant, I beg to inform you that I most certainly decline to cash cheques on other branches of our company when presented by parties unknown to me, though, as a matter of grace, I am quite willing to cash cheques to your representatives if properly introduced to me with proof that they have power to sign for your firm. I am quite indifferent as to your sending out orders to your tenants not to cash our cheques. Yours faithfully, P. Mortimer Hooper."

On the 2nd of December the Messrs. Henty issued the following printed circular,

in consequence of which the present action has been brought against them: "Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). 2nd December, 1878."

There is some evidence that the effect of this circular was to cause the run upon the plaintiffs' bank which undoubtedly took place soon after it was published. The defendants proved that they only sent this printed circular to 137 persons, all of whom were either their tenants or their customers, and they alleged that they were all persons by whom they thought it was likely that they might be offered cheques on the plaintiffs' bank in payment of the moneys due from them. There was no proof, however, that they had in fact on any previous occasion received such cheques from any particular individuals among these persons. In fact, the proof regarding the number and amount of such cheques which they had been in the habit of receiving was very deficient. On the other hand, it was proved by the plaintiffs that in the last twelve months there were no more than three such cheques presented by the defendants at the Chichester branch for payment, and the amount of the whole three did not exceed 47*l.*

When the run on the bank took place, the plaintiffs' solicitor wrote to the defendants and threatened legal proceedings. The defendants, in reply, repudiated all intention of injuring the bank, and left the plaintiffs to their remedy. It has been contended upon this that the defendants' conduct in not offering to retract their circular or take any steps to mitigate its effect is evidence of a malicious intention on their part. But they were not asked to take any such step, and the threat of legal proceedings was, as it seems to me, sufficient to account for their standing on the defensive and abstaining from an interference from which it might be inferred that they knew they had been to blame.

The contention of the defendants on this state of facts is, that their circular was no more than an honest, innocent and justifiable announcement on their part to their customers that in future they must not expect that Messrs. Henty would receive in payment any cheques on the plaintiffs' bank; that Messrs. Henty had a right to refuse such cheques if they liked, and had also a right to announce their determination to do so to their customers, so as to prevent their being taken by surprise and put to inconvenience by this departure from their previous practice. And, if this is the fair conclusion to be drawn from the facts, there can be little doubt, I think, but that they are not liable in this action; for, passing by for the moment all question whether the circular ought to be considered libellous as conveying an imputation on the plaintiffs' credit, injurious to them in their trade, the occasion of this circular being published would upon the above supposition be so clearly a privileged occasion that nothing but proof of express malice would sustain the action, and express malice is upon the same supposition obviously excluded.

But the plaintiffs put a very different construction on the facts. In their view the occasion of the circular was not an honest or innocent one, but was invented and contrived out of anger, or petulance and ill-temper, at the manager of the bank presuming to throw any impediment in the way of the defendants' convenience. They therefore maintain that the circular was not privileged, but malicious, for that it was not a statement "fairly made in the discharge of any public or private duty, legal or moral, or in the conduct of their own affairs in matters in which their interests were concerned." I here use the definition of a privileged communication given by Baron Parke, with the assent of the Court, in *Toogood* v. *Spyring* (16), which has been cited with approval in several subsequent cases.

The plaintiffs put the case in this way: They say, to begin with, that no real and genuine reason existed why the defendants should refuse to take the cheques in question from their customers after the correspondence with Mr. Hooper any more than before it. For, first, the number of such cheques was ridiculously small in number and amount, not having exceeded in the previous year three in number and 47*l.* in value; secondly, Mr. Hooper had

(16) 1 Cr. M. & R. 181; 4 Tyrw. 582.

agreed to cash them in future, provided Messrs. Henty would comply with the very reasonable request that they should write him a letter authorising Mr. Wright to receive payment of them on their behalf; and, lastly, if the cheques were not cashed at the Chichester branch, they might always with all other cheques have been remitted for collection to Messrs. Henty's bankers at Arundel at the end of the week, in accordance with Messrs. Henty's ordinary practice in that respect. The need, therefore, for any step such as that which they took—a step which could not be taken without some trouble and expense—did not exist, and the true motive of their conduct must be sought for elsewhere. But, further, they say that there are other circumstances which shew the true light in which Messrs. Henty were acting. Mr. Percival Henty, one of the defendants, when asked whether it would have given him much trouble to have given Mr. Wright a note to say that he was authorised to get the cheque cashed, replied that it would, and on being pressed again and again, he said it would have given him a great deal of trouble to do so. And yet he took what was surely far greater trouble, in composing the circular, correcting the proof when printed, and directing and posting no less than 137 letters for the distribution of it to 137 persons, of whom not more than three at the most, supposing the figures of the preceding year not to be exceeded, could in any way be benefited by its reception; and all this to avoid what he called the "great trouble" of writing a short note to Mr. Hooper giving authority to Mr. Wright.

And again, Mr. Douglas Henty, another of the defendants, volunteered to say, "They (that is, the plaintiffs) said they were indifferent; so we acted on their word 'indifferent.'" This word was the expression Mr. Hooper had used in his letter in reference to the defendants' threat; and when the defendants say they acted on that, they seem rather to refer their conduct to the effect produced upon them by the terms of Mr. Hooper's letter, than to any substantial inconvenience or difficulty which the circular, it is now said, was designed to remove.

But, further, the plaintiffs point to the language of the circular itself, as shewing that it was not framed for the genuine purpose of meeting any difficulty raised by Mr. Hooper. That gentleman would, of course, cash, and be bound to cash, all cheques drawn on the Chichester branch (supposing, of course, that there were assets to the credit of the drawer), and no possible difficulty had arisen, or could arise, in reference to such cheques; and yet the circular is so drawn as to make no exception of cheques drawn on that branch, but all cheques drawn on "any of the branches of the Capital and Counties Bank" are involved in a repudiation so general, that if any one of those who received the circular had known or guessed the sort of difficulty which had arisen about the 5*l.* cheque, he could hardly have imagined the circular to be solely intended to meet that difficulty.

In a word, the plaintiffs contend that the circumstances of the case were quite sufficient to warrant a conclusion in the minds of a jury that all need for the circular was a mere pretence; that it was not dictated by a real or honest desire to save the defendants' customers inconvenience; but that it was solely conceived and designed in a spirit of petulance, if not actual ill-will, against the plaintiffs, and to let the plaintiffs feel the weight of a threat to which Mr. Hooper announced himself to be "indifferent."

Now, if this is the fair result of the facts (and there was, I think, abundant evidence to justify a jury in so finding, if they chose to do so), I confess that I think it puts a different complexion on the whole matter. I cannot doubt that in this aspect of the facts there was no privileged occasion, and even if there were, there would be upon the above supposition what the law calls actual malice.

It seems to me, therefore, impossible for your Lordships to decide whether the plaintiffs had a good cause of action, without the previous decision of a jury as to the true objects, intentions and motives of the defendants in the course they pursued, and as to how far (even supposing their original motives and objects to have been innocent) they exceeded, either in the language of the circular, or in the number of persons to whom they distri-

buted it, the line of conduct which would be justified by those motives and objects. It is true that one of the defendants said they only sent the circular to persons from whom they thought they were likely to receive the cheques in question, but whether this was the case or not would also be matter, I think, for a jury to determine.

Until these matters of fact and the proper conclusions to be drawn from them are established, I confess that I am at a loss to see how the Court below or your Lordships can determine the question whether the publication of the circular gave a good cause of action or not. The majority of the Court of Appeal appear to have thought, not that these matters of fact were for the Court to determine, but that, however they were determined, and whatever conclusions might properly be drawn from them of actual malicious injury on the part of the defendants, the plaintiffs could have no cause of action, and they have therefore refused to send the matter to a jury, and have given judgment for the defendants.

I will state as shortly as I can why I consider this to be wrong.

For this purpose I must assume, for the moment, that a jury might have found that this circular was issued, if not with an actual desire to injure the plaintiffs, at least in petulance and anger, and with indifference whether it caused injury to them or not; and that the supposed convenience of the defendants' customers was a mere excuse and blind to justify them in taking a step which would shew the plaintiffs that it was not well to defy their threats, and that it would be advisable in future to consult their convenience. I must also assume that the jury might find that the number of people to whom the circular was sent was far larger than any innocent dictates of convenience would warrant.

Upon the assumption that either of these conclusions might be arrived at by a jury, it has to be determined whether this action of libel can be maintained. But here the preliminary question has been raised: Is it for the Court, or for a jury, upon a given state of facts and circumstances, to say whether the publication complained of is libellous or not?

To sustain the judgment now under appeal (which has withdrawn everything from the jury), it is necessary that your Lordships should come to the conclusion that, whatever view may be taken of the facts, it is for the Court and not for the jury to determine whether the circular did or did not in its terms amount to an actionable libel. I do not know whether the respondents intended to go so far as to say that the Court, without the intervention of a jury, can in all cases determine a publication affirmatively to be a libel; but I do understand them to assert that the Court, whatever the jury might think, is at liberty to hold that the publication is not a libel.

There is no doubt that in past days, when special pleading was still in full force, it was held to be necessary that the plaintiff should set forth on the face of the record the publication itself, together with such facts as, taken in connection with it, would enable the Court to see that he had a cause of action. It is hardly necessary to cite authorities for this; but I may mention the cases of *Fisher* v. *Clement* (1), *Wood* v. *Brown* (11) and *Wright* v. *Clements* (12).

I do not conceive that the principle involved in these decisions went any further than this—that the Court required it to be shewn to them on the record (so that a Court of error could deal with it if need be) what the publication was, in order that they might judge whether a jury could reasonably, and without doing violence to the principles and limits of the law of libel, pronounce the publication to be libellous. In other words, the Court required to be satisfied that the matter of the publication might, without doing violence to its language, have such a meaning attached to it, or such a construction put upon it, as to render it libellous, and, subject to this limitation, it devolved upon the jury to say whether it was libellous or not.

This is precisely the view taken of the law by the Court of Queen's Bench in *Sturt* v. *Blagg* (2), where Mr. Baron Parke left to the jury the question whether "they believed the innuendo as to the meaning of the letter" or not. It was contended that he ought not to have done so. Lord

Denman, delivering the judgment of the Court, said, "We are of opinion that the libel is capable of the meaning imputed by the innuendo, and as the jury have found it to be true, and the Judge is not dissatisfied with the verdict, the rule will not be granted." Similar language was used in the Exchequer Chamber in the same case upon appeal. "Undoubtedly it is the duty of the Judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the Judge is satified with that it must be left to the jury to say whether the publication has the meaning so ascribed to it."

Although special pleading has passed away, I do not consider that the law has been thereby altered, and I look upon the case first quoted, therefore, not as declaring any change in the law on the subject, but as placing in its true light what the law always has been—namely, that it is for the Court to say whether the publication is fairly capable of a construction which would make it libellous, and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. To go further than this would be to say that the question of libel or no libel is at one and the same time a question for the jury and a question also for the Court, which would surely be an anomaly in English law; and that the question ought to be left to the jury, with this proviso, that they can only determine it effectively in the negative, for if they determine it in the affirmative their opinion will go for nothing, inasmuch as the Court will afterwards determine the same question for itself without reference to their verdict. The only other alternative would be that which the Court of Appeal in this case has adopted—namely, not sending the case to a jury at all. This is in fact saying that, although the plaintiff alleges in his innuendo that the circular in question was calculated to give rise, in the minds of those to whom it was addressed, to the inference that the defendants impugned the credit of the plaintiffs' bank, the Court will settle for itself, not whether any such inference could reasonably be drawn from it by a jury, but whether any such inference would be drawn from it by persons of the class to which it was addressed (for that is the question), and the opinion of a jury is not needed. I very much doubt whether there is any authority for thus dealing with the question of libel.

When the cases which have a contrary aspect come to be examined, it will be found that they in no wise favour the proposition that the question of libellous construction should be withdrawn from the jury, but establish only that the plaintiff must shew on the record such a publication, and such extraneous facts, if any, connected therewith, as to leave room for a jury properly to declare it libellous. I will shortly refer to two of these cases. In *Goldstein* v. *Foss* (13) the supposed libel was a publication emanating from a trade protection society, and stating that the plaintiff had been reported to the society as improper to be balloted for as a member thereof. This statement, standing by itself, was held by the Court not to be a publication properly capable of a libellous construction, for that there might be many reasons, and arbitrary rules, which might stand in the way of the plaintiffs' election without any injurious imputation upon him; nor, indeed, did the plaintiff so put his case. What the plaintiff contended gave a libellous character to the publication was the fact that it was the practice of the society in question to use this form of publication as a means of conveying to the members of the society the information that a person so reported as not fit to be a member of it was a swindler, and could not be trusted. This fact the plaintiff had alleged in his declaration; and if he had alleged it with sufficient certainty, it was not denied by the Court that the publication was libellous. But unfortunately for him his pleader was held not to have stated this fact with sufficient certainty to satisfy the requirements of justice in those days. It all turned upon the use of the words, "the said society," which, taken in connection with the context, were thought to convey an ambiguous reference; and so the judgment was arrested, and the plaintiff lost the benefit of his verdict: a signal instance indeed of the length to which, in those days, the destructive criticism of the Courts in construing legal proceedings

was carried. But no complaint was made of misdirection by the Judge in leaving the question to the jury; nor did the Court profess to differ with the jury as to the publication being libellous, upon the facts which the jury had before them; deciding only that the most important of those facts ought to have been stated on the record, and that it was not so stated.

The case of *Hearne* v. *Stowell* (14) is of a similar nature. The libel complained of consisted of a charge against a Roman Catholic priest, that a most degrading penance, performed on a public road, had been imposed by him on a penitent; and he complained that this charge had injured him in his character of Roman Catholic priest. This was the substance of the declaration. The Judge left it to the jury to say whether the publication was libellous, and they found that it was. A new trial was moved for, on the ground of misdirection, and refused; but the judgment was arrested because there was no statement on the record informing the Court of the conduct which a Roman Catholic priest ought to pursue in imposing penance. Passing by some other objection which had been made, Lord Denman said, "This we need not discuss, for an independent objection appears which we think must prevail. We are not informed by the declaration, and, of course, we can take no judicial notice of the manner in which the plaintiff's character could suffer from the imputation, being ignorant of the conduct which a Roman Catholic priest ought to pursue in imposing penance." The learned Judge went on to deny that the fact of the jury having found it to be a libel was enough to cure this defect, and insisted that "the facts and circumstances that give a sting to a publication apparently innoxious ought to be brought to our notice; for we could not possibly direct judgment, either in an indictment or an action against a libeller, without seeing that a libel has been published by him." This, then, was the decision; it in no way impugned the finding of the jury, still less did it declare the Judge to have misdirected them in leaving the question of libel for their consideration; but it rested wholly upon the proposition that those facts which, in the opinion of the Court, were necessary to establish the libellous character of the publication, were not stated on the record, although they might have been, and indeed were, to some extent, given in evidence before the jury. Like the last case, it was a case of special pleading and nothing more. I am confirmed in my opinion as to the true bearing of this decision by the comments upon it of the Court in the case of *Capel* v. *Jones* (15). "It is somewhat remarkable that the plaintiffs have not ventured to aver that the alleged libel is calculated to injure them in their calling of stock-brokers. In all these cases if, by any reasonable intendment, a jury could infer that the publication complained of reflects on the moral conduct or the professional reputation of the plaintiff, it is the duty of the Court to send the matter before them. But the instances are by no means rare of judgment being arrested, when the Court has thought that by no reasonable intendment could the libel bear the construction put upon it by the innuendoes. Of this class is the case of *Hearne* v. *Stowell* (14). There . . . the Court arrested the judgment, holding that the publication was not, on the face of it, libellous; and refusing, even upon the assumption that the plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of an injury to the plaintiff, which the declaration did not shew, though some evidence to that purpose was in fact given."

I will quit this part of the subject by citing the opinion of a learned Judge, who was, at least, as well versed in questions of the character I am considering, and the niceties upon which judgments used to be arrested, as any of his contemporaries—I mean Lord Wensleydale. In *Parmiter* v. *Coupland* (3) that learned Judge is reported to have said: "A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule, is a libel. Whether the particular publication, the subject of enquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury are to exercise their judgment and pronounce

their opinion as a question of fact." The learned Judge is here only speaking of libels which affect reputation and character; but I am not aware that those which affect a man's credit in his trade stand upon any different footing.

I am, therefore, of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury, and not for the Court, to say whether a libellous construction should be put upon it. The question being not what a Court of law might understand by it, but what inferences the class of people to whom it is addressed would draw from the language used, it is properly and essentially a question of fact, and as such properly devolves upon a jury. I do not mean to assert that the jury is free to draw an inference of defamation, whatever the language of the imputed libel may be. The Court have the right, and the duty, to hold a check upon the action of the jury in such matters, and to see that the defamatory inference is one which, without doing violence to the language, can be reasonably drawn. But it has no right to go further and reject the defamatory inference, because it is not a necessary inference, or one which the Court itself would draw. There is, I conceive, considerable danger in the Court usurping the function of the jury, and by a too narrow criticism of the language of a publication rejecting inferences which, though perhaps not logical, are such as people of illogical minds (who are perhaps the majority) would draw. For it must be remembered that the question of malice, and the question whether certain language is or is not defamatory, are distinct, and whatever is held not to be defamatory is equally not defamatory, though published with the most malicious intentions and objects. It is not difficult for a malicious man to injure his neighbour by carefully selected language, avoiding a direct charge, or anything like a necessary inference of discredit; and if your Lordships should hold the present publication to be innocent, you will, I fear, go far to invite such attempts.

But, assuming that it is for the Court, and not for the jury, to say whether this circular was libellous, I am, I confess, strongly of opinion that such a question ought to be answered in the affirmative. I doubt whether any man of business could read this circular, and not be led to the conclusion that the defendants had their misgivings as to the plaintiffs' solvency; I do not mean to say that there might not possibly be other reasons for refusing to take any of the plaintiffs' cheques, on whatever branch they might be drawn; but the first and obvious reason would be, that the defendants doubted if such cheques would be paid.

In general, mankind do not refuse to take any form of payment in respect of which they feel a confidence that it will, without difficulty, be convertible into money. There are, no doubt, in the world eccentric individuals who may have a morbid preference for one bank-note or security over another, or a morbid detestation of some particular form of moneyed security; which preference or detestation are quite independent of the validity, the soundness and the easy convertibility of the securities in question. But these fancies are not to be found among business men, and provided that a note, or cheque, or security for money, is known by them to be perfectly certain to be easily and promptly convertible into cash, it is quite beyond any experience that I possess to believe that such securities would be refused. It has been said in argument that there might be numerous reasons for refusing to take the plaintiffs' cheques besides the reason that their credit was doubtful, and that it is therefore unreasonable to pitch upon this last as the meaning to be conveyed by the defendants' circular. But although this has been said, I have not heard any of these so-called numerous reasons stated or suggested, nor have I been able to imagine any of them, except, perhaps, the extra trouble involved in having to cash cheques on various branches of a country bank. But this interpretation of their meaning is excluded by the fact that the circular equally extends to cheques drawn on the Chichester branch, which there would be no difficulty or trouble in cashing. And I cannot help here remarking that if the circular had run in this way, that Messrs. Henty "would not in future accept any cheques

drawn on the plaintiffs' bank except those drawn on the Chichester branch" (which is what they now say they meant), no imputation injurious to the bank's credit could have been drawn from it, and no trouble could have arisen. But, in whatever way the circular was capable of being interpreted, I still think that an imputation on the plaintiffs' credit would be the first and most obvious reason for it which would arise in the mind of any one reading it. It must always be remembered that the persons to whom it was sent knew no more than the public at large; they knew nothing of the squabble with Mr. Hooper, and had no other key to the meaning of the circular than would have been possessed by the first man in the street who might have read the circular if it had been posted on the walls of the town.

Now it was admitted by the respondents' counsel in argument, and I think also by the learned Judges in the Court below, that if such a circular as this had been indiscriminately published, as by sticking it on a wall, it would have had the effect of damaging the plaintiffs' credit. The responsibility for a publication may be affected by the mode in which, and the persons to whom, the publication is made, but the meaning of the words, and the reasonable inferences to be drawn from them (supposing always that they have no special significance to the particular persons to whom they are addressed) must be the same, however published; and if the meaning and effect of the circular would have been injurious to the plaintiffs' credit if stuck upon a wall, why should it not have the same meaning and the same effect if received by a man in an envelope? I am not at this moment discussing whether the sending of this circular was in fact, under the circumstances, the publication of a libel. I have already said that, provided it was done innocently, as a matter of business within the definition given by Baron Parke in *Toogood* v. *Spyring* (16), it was a protected communication, and one which, without proof of actual malice, would not sustain this action. But I am assuming the contrary of all this; I am assuming that it was no innocent step taken in the course of business, but a wilful act done without need or necessity, and with intent to punish or injure the plaintiffs, and solely for that purpose, and so published; I am considering the question whether the circular contained imputations damaging to the plaintiffs' credit or not; and in this point of view I am quite unable to perceive why the circular, if posted on a wall, should carry one meaning to a reader, and if received by the same reader in an envelope, should convey another and different meaning.

The innocence and lawfulness of this circular has, in argument, been sustained by some very ingenious reasoning. Suppose, it is said, that this paper had only been sent to one person, would it be libellous? The answer, I think, depends on the motive or object which dictated it. If it was sent with the honest desire to save that person the inconvenience of having cheques drawn on the plaintiffs' bank refused in payment by the defendants' collector, it would not be libellous. If it was sent with the sole desire to cause annoyance or injury to the plaintiffs, I see no reason why it should not be libellous though only sent to one person. A libel does not require publication to more than one person. But then it is said, Surely the defendants had a right to refuse the plaintiffs' cheques; and if they had a right to do so, why had they not a right to say they should do so? This mode of argument appears to me to beg the question. Every man has, but for the law of libel, a right to say or write what he pleases. His pen and tongue are his own, and the only law that restrains the use of them (I am excepting, of course, those occasions upon which words written or spoken become acts), is the law of libel. To assert, therefore, that in the case supposed a man has a right to issue a circular of this character, is to assert that it would not be a libel if issued, which is the very point that has to be established.

There are cases, no doubt, in which although a man acts maliciously, or with a desire to annoy or injure another, he may not be responsible, because he is only exercising some right that belongs to him, such as erecting on his own land some structure of a kind which he knows will annoy his neighbour, for the sole purpose

of effecting that result. Many other cases might be put in connection with positive rights, the exercise of which does not cease to be lawful, though the motive that dictates and shapes their exercise may be malicious. But the right of publishing statements which are injurious to another is not a right of this kind; it is a right only subject to the limitations of the law of libel, and if it exceed those limitations it becomes an actionable wrong.

Some illustrations may be put. A bill discounter or banker who discounts bills of exchange may have made up his mind not to discount A B's bills, and he may not know, and probably could not know, which of his customers might bring such bills to him for discount. Would he be justified then in sticking up against the walls of his office, or sending to all his customers, a notice that he would not discount any bill on which A B's name appeared? And if it was proved from his own declarations that he did not in the least doubt A B's solvency in fact, but that he had done this with the express purpose of injuring A B's credit, would he be free from liability as having only told his customers that he meant to refuse A B's bills, which he had a right to refuse if he pleased?

A similar case may be put from social life. It would be quite permissible that a man should refuse a friend's invitation to his house, because he knew that he should meet A B there, and he did not wish to do so. But would it be permissible that he should issue a circular to all his friends at whose houses he might expect to meet A B, and announce to them that he should refuse to meet him, and should refuse all invitations to do so? And if this might be done innocently, and for the genuine purpose of avoiding A B's society, which he had a right to do, would it still be innocent, and not libellous, if it turned out that he had done it on purpose to throw a slur upon A B's character?

I cannot doubt that these questions must be answered in the negative. To say that a man is at liberty maliciously to injure another by a written publication without any better excuse, or occasion for making it, than the indulgence of animosity, spite or passion, and that the injured man is without redress, is to say that the law of libel does not exist. Malice has always been held to be the gist of an action of libel; and the only difference between what is called a privileged occasion, and one not so privileged, is that the law infers malice in the latter case, while it requires proof of actual malice in the former; but when that proof has been given the right of action is complete whatever the occasion may be. Assuming that an imputation against character, or credit in trade, is untrue, injury to the plaintiff and malice on the part of the defendant are, in my opinion, the efficient elements of an actionable libel. All this is fully discussed in the judgment of the Court delivered by Mr. Justice Bayley in *Bromage* v. *Prosser* (17).

Then again, it is said that the circular, in terms, said nothing about the plaintiffs' credit, and that it would be enlarging the language of it, without warrant, to construe it in a sense injurious to that credit. But the actual words of a publication are, in my opinion, by no means the limit of the ideas and impressions which they may be calculated to convey. The case of *Woolnoth* v. *Meadows* (10) affords a good example of this, where it was held that words which not only did not charge a criminal offence, but which on the face of them did indeed repudiate such a charge, were nevertheless libellous as being calculated to convey to the hearers of them a criminal imputation. "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable," said Mr. Justice Bayley in *Whitaker* v. *Bradley* (18). In Mr. Holt's book on Libel the following is the second definition given of what constitutes a libel against a private person—"Libels which have a tendency to injure him in his office, profession, calling or trade." That this "tendency" is the true test of the publication being libellous or not, and not the mere primary meaning of the defendant to be gathered from the words he has used, is, I think, well established by authority.

(17) 6 Dowl. & Ry. 296; 4 B. & C. 247; 1 Car. & P. 475.

(18) 7 Dowl. & Ry. 649; 4 Law J. Rep. K.B. 125.

In *Haire* v. *Wilson* (19) the Judge had left it to the jury to say whether the defendant intended to injure the plaintiff. This the Court held to be wrong. "If the tendency of the publication was injurious to the plaintiff, then the law will presume that the defendant by publishing it intended to produce that injury which it was calculated to effect. If it had that tendency, no doubt it was a libel," said Mr. Justice Littledale. In that case the intention of the defendant to injure the plaintiff was inferred from "the tendency" of his publication. This case is stronger against the defendant, for the hypothesis upon which I am considering whether the circular is libellous is, that the defendant did actually intend to injure the plaintiff.

It comes to this, therefore, in my opinion, that the only real question which arises in determining whether the language of this circular is libellous, is whether it would be calculated to raise in the minds of those to whom it was addressed an imputation against the solvency or credit of the plaintiffs, or not. For the reasons I have already given, I am of opinion that it was so calculated, and if it properly devolves upon your Lordships to say whether the language of the circular is libellous, I am therefore of opinion that it was so. But, as I have above stated, this question is, in my view of the law, a question for the jury and not for the Court; the language of the circular being capable of the construction which the plaintiffs have put upon it in their innuendo.

Upon the whole, then, this case ought, I think, to be again submitted to a jury. As to the language of the circular, the question for the jury would be whether, putting such a meaning and construction on it as in their opinion would be put on it by the persons to whom it was addressed, an imputation against the plaintiffs' credit would be thereby conveyed; and if so, they should find the circular to be in its language libellous, it being for the plaintiffs to establish that proposition to their satisfaction. But the main question for them would arise upon the circumstances under which, and the persons to whom, the circular was published. These matters should be left to the jury to enable the Judge and the Court to determine whether the occasion was a privileged one or not, as was decided in *Bromage* v. *Prosser* (17). If the jury should find that the circular was innocently published in discharge of a duty, or as a matter of business, within the definition above referred to (which was given in *Toogood* v. *Spyring* (16), the publication would be privileged. The onus of establishing that it was so lies, I think, upon the defendants.

A third question, as a matter of law, presents itself, whether, although the occasion was privileged, there was any actual malice on the defendants' part; but in the circumstances of this case this question hardly arises, except as a matter of form; for the considerations which would induce the jury to find the circular to have been issued innocently, in discharge of a duty, must practically negative all actual malice in taking that step.

I therefore think that the judgment of the Court of Appeal should be reversed.

LORD BLACKBURN.—The plaintiffs' claim is thus stated: "1. The plaintiffs are bankers, and the defendants are brewers. 2. The defendants falsely and maliciously wrote and published of the plaintiffs the letter following: 'Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank (late the Hampshire and North Wilts). Westgate, Chichester, 2nd of December, 1878.' Meaning thereby that the plaintiffs were not to be relied upon to meet the cheques drawn on them, and that their position was such that they were not to be trusted to cash the cheques of their customers."

The statement of defence sets out the circumstances under which the defendants allege that the letter was published, and proceeds: "9. The defendants thereupon, as they lawfully might do, sent to their said tenants the letter in paragraph 2 of the statement of claim set out, which is the writing and publishing complained of, and for which the present action is brought. The defendants deny that the said letter under the circumstances aforesaid is a libel. 10. The defendants say that the occasion

(19) 4 Man. & Ry. 605; 9 B. & C. 643.

of sending the said letter to their tenants as aforesaid was privileged. 11. The defendants deny the innuendo alleged in paragraph 2 of the statement of claim, and say that the said letter does not bear the said alleged meaning. 12. The defendants deny each and every of the allegations set forth in paragraph 3 of the statement of claim."

On the trial evidence was given on both sides, and on the proof being completed the case was left to the jury, who did not agree, and were discharged. The plaintiffs desire that the case should go for trial before another jury. The defendants' contention is, that they are entitled to judgment on the ground that, if the jury had found in favour of the plaintiffs every circumstance relating to the publication which the evidence could prove, and even though the jury had found that, in their opinion, the letter was libellous, the Court ought to come to the conclusion that the letter published under those circumstances was no libel, and acting on its own conclusion give judgment for the defendants, not setting that verdict aside as not satisfactory, but letting it stand and giving judgment for the defendants notwithstanding that verdict. If this is right, it follows that the case ought not to be sent to another jury.

The decision of the cause depends—first, on the question what is the province of the Court in an action for libel, and whether, where the writing is such that opinions might differ as to whether it is a libel or not, the Court can give judgment for the defendant, on the ground that, though the jury have found that, in their opinion, the writing is a libel, the Court do not think it made out to be a libel—that is a question of great public interest; secondly, whether, supposing that this can be done, the state of the evidence in this case as to the publication is such that the Court ought to come to the conclusion that this is no libel. This is of importance to the parties, but, except in so far as it may illustrate the meaning of the first general proposition, it is not of general importance. I have had and still have very great difficulty in making up my mind on this second branch of the case. I will first state my opinion on the first question.

A libel for which an action will lie is defined to be a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt or ridicule. It must be shewn by evidence that there was a writing, and that it was published. I shall afterwards say something as to what publications are privileged, so as to afford a lawful justification or excuse for the publication, though calculated to convey a libellous imputation. But, independently of all questions as to privilege, the manner of the publication, and the things relative to which the words are published, and which the person publishing knew, or ought to have known, would influence those to whom it was published in putting a meaning on the words, are all material in determining whether the writing is calculated to convey a libellous imputation. There are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances.

I think that from the earliest times it has, by the law of England, been the province of the Court to say whether words published in writing were a libel or not; and in order that a Court of error might have before it the materials for enabling it to say whether the decision of the Court below was right or not the plaintiff was, by the old rules of pleading, required to place all those materials on which he relied upon the record. The words themselves must have been set out in the declaration or indictment, in order that the Court might be able to judge whether they were a libel or not. And this still remains the law—see *Bradlaugh* v. *The Queen* (20) and *Harris* v. *Warre* (21).

In construing the words to see whether they are a libel the Court is, where nothing is alleged to give them an extended sense,

(20) 46 Law J. Rep. M.C. 286; Law Rep. 2 Q.B. D. 569; 3 Q.B. D. 607.

(21) 48 Law J. Rep. C.P. 310; Law Rep. 4 C.P. D. 125.

to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only. As was said in the opinion of the Judges delivered in the House of Lords during the discussion of Fox's Bill, I think quite justly, no one can cast about firebrands and death, and then escape from being responsible by saying he was in sport.

If there were circumstances relating to the publication which it was alleged caused the words to bear a more extended sense than they would otherwise do, the law was that those must be stated on the record, in order to enable the Court to judge whether the words understood with reference to those circumstances bore that more extended sense, or else those circumcumstances could not be looked at in favour of the plaintiff. Great nicety was required in setting out those circumstances; and the rule of pleading has been altered in that respect by the Common Law Procedure Act, 1852, and the Judicature Act; but the law which gave rise to the old mode of pleading has not been altered by those Acts. I shall say more as to the effect of this change in the mode of pleading afterwards. It never was disputed that there was much which could only be decided by the jury. Whether the words as published bore the meaning alleged where there was an innuendo, or any libellous imputation where there was no innuendo, was a question which the defendant could raise on the general issue, and the jury must decide that question when raised.

But there were a series of decisions, the last and most important of which was the famous case of the Dean of St. Asaph. The fullest and best report of that case is that prepared by Lord Glenbervie, and published under the name of *The King* v. *Shipley* (22). The headnote, I think very accurately, states what was decided by the majority of the Court. "On the trial of an indictment for a libel the only questions for the jury are the fact of publication and the truth of the innuendoes. The question of libel or no libel is necessarily a question of law for the sole consideration of the Court out of which the record comes, and on which the Judge at the trial is not called upon to give his opinion to the jury." Lord Mansfield laid it down that "by the constitution the jury ought not to decide the question of law whether such a writing, of such a meaning, published without a lawful excuse, be criminal. They cannot decide it against the defendant, because after verdict it remains open upon the record; therefore it is the duty of the Judge to advise the jury to separate the question of fact from the question of law; and as they ought not to decide the law, and the question remains entire upon the record, the Judge is not called upon necessarily to tell them his own opinion. It is almost peculiar to the form of prosecution for a libel that the question of law remains entirely for the Court upon the record, and that the jury cannot decide it against the defendant; so that a general verdict that the defendant is guilty is equivalent to a special verdict in other cases. It finds all which belongs to the jury to find, and finds nothing as to the question of law. Therefore, when a jury have been satisfied as to every fact within their province to find, they have been advised to find the defendant guilty, and in that shape they take the opinion of the Court upon the law."

Mr. Justice Willes dissented from the reasons given by Lord Mansfield, though agreeing in his conclusion that there should not be a new trial, and that the judgment of the Court should be given on the verdict found in that case, as on a verdict of guilty. And it is worth while to point out in what respect he dissented. Mr. Justice Willes said, "I conceive it to be the law of this country that the jury, upon a plea of not guilty, or upon the general issue, upon an indictment or information

(22) 4 Doug. 73.

for a libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication. Secondly, I conceive it to be law that if upon such examination the jury should, contrary to the Judge's direction, acquit the defendant generally, such a jury are not liable either to attaint, fine or imprisonment; nor can this Court set aside the verdict of deliverance by a new trial, or by any other means whatsoever." He proceeds to shew that he thought that a direction to the jury, that if they were satisfied of the truth of the innuendoes and publication they were bound in point of law to find the defendant guilty, though sanctioned by many great authorities, was wrong. He says: "So far as my opinion goes, I am still free to confess I think it is fit, it is meet and prudent, that the jury should receive the law of libels from the Court. But if my concession is extended an iota further to mean that under all the circumstances, if the innuendoes are proved, the jury are bound to find, and must find, the defendant guilty, I must beg leave to repudiate the idea, as upon the maturest consideration I say the jury are not bound to find the defendant guilty, but may give a general verdict of acquittal without being obliged to give their reasons."

It seems to me clear that whilst Lord Mansfield held that the question of libel or no libel was one exclusively for the Court, Mr. Justice Willes held that it was also a question for the jury; but he did not hold it to be a question exclusively for the jury. On the contrary, whilst holding that if the jury found the defendant not guilty it was conclusive in his favour, he expressly held that after a verdict of guilty it still was competent for the defendant to take the opinion of the Court as to whether the publication was libellous or not. He says (p. 176), "If it" (the tract which the Dean had published) "contains nothing but what Lord Somers would have approved, and the Convention Parliament have warranted" (which is what the Dean had asserted in an advertisement), "then the publication is harmless and inoffensive; but if it tends to excite the people to take arms, to alter the established representation of this country without the consent of Parliament, it may not only be seditious but nearly treasonable. I give no opinion upon this head, as this will be a proper subject of discussion if a motion is made in arrest of judgment." A motion was made in arrest of judgment, and the judgment was arrested. I have never seen any report of the grounds on which the judgment was arrested.

It is no longer material whether Lord Mansfield or Mr. Justice Willes was right in his view of the law as it stood in 1784, for by 32 Geo. 3. c. 60, it is enacted by the 1st section what the law shall be in future. The Legislature has adopted almost the words and quite the substance of that part of Mr. Justice Willes's judgment which I have just quoted; and from that time, A.D. 1792, there can be no doubt that a defendant cannot be convicted of libel unless the jury find that the tendency of the publication was libellous. But the Legislature, passing an enactment in favour of defendants, had no intention to put them in a worse position than before, and to make the verdict of a jury conclusive against the defendants. Nor did they enact that the Judge might not in this, as in other criminal cases, direct the jury to acquit because he thought that the case had failed in law; it would, I think, have been very injudicious to do so, for jurors are sometimes excited against defendants, though more commonly they are excited in their favour. And the Legislature by the 4th section provided that the defendant should still, though found guilty by the jury, have the power to take the opinion of the Court on the question of law, by moving in arrest of judgment as before that Act.

The case of *The King* v. *Shipley* (22) was a criminal proceeding at the instance of the Crown, and 32 Geo. 3. c. 60, is in terms confined to such proceedings. But though no doubt the Court has more power to set aside verdicts in civil cases, there is no reason why the functions of the Court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly, it has been for some years generally thought that the law in civil actions for libel was the same as it had been expressly enacted

that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor or plaintiff and that of the defendant. The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the defendant always was entitled to go free. Since Fox's Act, at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor or plaintiff cannot succeed unless he gets both the Court and the jury to decide for him.

Now it seems to me that when the Court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of Judges, might not unreasonably hold such words to be libellous. In fact, whenever a verdict has passed against a defendant in a case of libel, and judgment has been given in the Court below, those who bring their writ of error on the ground that there was no libel, assert that both the jury and the Court below have gone wrong; but they are not called upon to say that the words were incapable of conveying the libellous imputation; it is enough if they can make out, to the satisfaction of the Court in error, that the onus of shewing that they do convey such an imputation is not satisfied; and there are numerous cases in which, after a verdict for the plaintiff and judgment for him, that judgment has been set aside in error.

It was argued by the appellants' counsel at your Lordships' bar that, if the words were capable at all of conveying the libellous imputation, the plaintiffs had a right to have the question left to the jury. I asked for authorities for the proposition laid down by the plaintiffs' counsel, in addition to the expressions used by Mr. Justice Grove and Mr. Justice Denman, which certainly look as if those learned Judges took that view. Two, and only two, authorities were produced. Some expressions used by Chief Justice Wilde in delivering the judgment of the Exchequer Chamber in *Sturt* v. *Blagg* (2) were cited, but they, I think, do not bear the meaning supposed. No question of this kind was before the Court; the decision of the Court is in the last sentence of the judgment—"With or without the innuendo in either case, I think the plaintiff entitled to judgment; for the letter in itself discloses a cause of action, and is also such as to justify the finding of the truth of the innuendo"—and, in my opinion, no one who reads the letter can doubt that this was quite accurate.

The other case relied on as an authority was *Hart* v. *Wall* (7), where the Common Pleas, consisting of Lord Coleridge and Mr. Justice Lindley, set aside a nonsuit entered by Mr. Justice Archibald after consulting Mr. Justice Quain. If the letters there complained of were only actionable as being in the nature of slander of title, it would seem that the nonsuit was right, for there was no evidence that the defendant was doing more than defend his own title, no evidence of malice—and malice is necessary to support that action; but if the letters contained libellous imputations on the plaintiffs personally, evidence of malice was not required. Lord Mansfield expressly said in *The King* v. *Shipley* (22): "Every circumstance which tends to prove the meaning is every day given in evidence, and the jury are the only judges of the meaning, and must find the meaning;" and if the words were reasonably capable of a meaning which in the opinion of the Court would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning, and the nonsuit was wrong; and those who prepared the headnote in *Hart* v. *Wall* (7) seem so to have understood the decision in banc.

I am unable on perusing the report to make out what was the meaning which the letters were supposed to be capable of

earing which it was held would be libellous. And it may be that it was thought not only that it was for the jury to find the meaning (which Lord Mansfield admitted), and also that the jury were not bound to find for the plaintiff, whatever the Court might think, unless the jury thought the publication such that the meaning was calculated to convey a libellous imputation—which since Fox's Act, if not before, I think is the law—but also that if the jury found those questions for the plaintiff it was conclusive on the Court, unless they could see that the words were incapable of conveying such an imputation; and if such was the decision in *Hart* v. *Wall* (7) it is an authority for the argument of the plaintiffs' counsel, and as far as I know the only one. And I think there is authority against it. I think no one can read Sir W. Jones's tract, for the publication of which the Dean of St. Asaph was indicted, and particularly the latter part of it, as set out in the indictment, beginning with the suggestion as to what the people were to do if a few great lords or wealthy men were to get the King in subjection and manage the Parliament, and say that the words were incapable of conveying a suggestion that the people should arm and drill themselves, so as to be prepared by force to resist the Government so long as Parliament was managed by those few great lords or wealthy men. I can hardly believe, as has been sometimes suggested, that it was held that when the indictment set out the words, "The Common Laws are just, but the King (meaning our said Lord the King) and Parliament (meaning the Parliament of this realm) may alter them when they please," the innuendoes were bad, because there was not an express averment that these words were published of and concerning the King and Parliament of this realm; for I think the words in their natural sense bear that meaning. Yet the Court of King's Bench unanimously arrested the judgment, which I think can only have been on the ground that, though the words were capable of conveying that seditious meaning, the Court thought that the prosecution had not satisfied the *onus* which lay on them to shew that they were so published as to be calculated to convey it.

And I think that subsequent decisions shew that this principle has been acted upon. I do not think it necessary to cite any other cases than *Hearne* v. *Stowell* (14) and *Goldstein* v. *Foss* (13) there referred to. *Hearne* v. *Stowell* (14) was a peculiar case. The defendant, at a meeting called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth, read a written document, and made some verbal statements at the same time. The action was in different counts for publishing the document as a libel on the plaintiff, and also for the words, coupled with the document, as slanderous on him in his profession. The Judge ruled, and the Court of Queen's Bench held rightly ruled, that the occasion did not afford any privilege, and directed the jury to find for the plaintiff if they thought the matter libellous. The report does not say what was the direction as to the counts for slander. The jury found for the plaintiff. And I should infer, though it is not so stated in the report, that the damages were assessed only in respect of the count for libel. The written document would be libellous according to the ordinary definition which had been repeated by Baron Parke in *Parmiter* v. *Coupland* (3), if "calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule." It does not seem to me possible to contend that the document which the defendant read was not capable of being read as meaning that the plaintiff Mr. Hearne had required one of his flock to crawl on his hands and knees for several hours a day on the roughest part of the pavement of the public street by way of penance. And if the Judge gave to the jury the ordinary definition of libel (and as no complaint was made of his summing-up, he must, I think, have done so) the jury must by their verdict have found that it had this meaning, and that in their opinion the statement was calculated to injure his reputation by exposing him to hatred, contempt or ridicule.

Both the argument and the judgment are exclusively directed to the question as to the count for libel, which was of course much the most favourable for the plaintiff; and probably, though the report does not say so, the damages were assessed on that count only. The Court, though the jury

had found it a libel, arrested the judgment, because in the opinion of the Court it was not one. They say: "But the learned counsel for the plaintiff further denied that there was after verdict any defect on the record, urging that, as any words may be used in a defamatory sense, and these are alleged to have been injurious to the plaintiff's character, and the jury have found them to be so, we must now assume that they were so. A distinction was taken between libel and slander, all questions respecting the former being supposed to be expressly referred to the jury by Mr. Fox's Act. From this consideration was deduced an argument that the Court has no power to arrest the judgment in actions for libel, because they are wholly removed by the Act from the cognizance of the Court, and exclusively submitted as matters of fact to the jury. From these propositions we must express our dissent. It is not enough to entitle a plaintiff to judgment that he should charge malicious motives and calumnious tendency; he must also shew that there is a libel. The words composing it may naturally convey such a meaning, and even the most innocent may possibly deserve that name, because they may in themselves have been used with that intent and in that sense. But in such case the facts and circumstances that give a sting to a publication apparently innoxious ought to be brought to our notice, for we could not possibly direct judgment either in an indictment or an action against a libeller, without seeing that a libel has been published by him. The consequence of a contrary doctrine would be inevitably this, that any words whatever, whether sensible or otherwise, whether conveying any kind of imputation or not, and stripped of all explanation, would support a charge of libel, if only accompanied with general complaints of the intent to injure character. Several cases are opposed to this notion. We need refer to no other than the well considered case of *Goldstein* v. *Foss* (13), as fully sustaining the defendants' argument on both points. The judgment was arrested there for a similar defect. "We were desirous of considering whether the defendant was entitled to a new trial, because the learned Judge ought to have told the jury to acquit on the plea of not guilty. If the learned Judge had been pointedly required to do this, he might have declared his opinion on the question of law now discussed, or he might have reserved the point for the Court. If he had told the jury that the paper proved was a libel when the Court was of opinion that it was not, we should have been bound to set aside a verdict so obtained for misdirection. But the defendant took a different course," &c.

The alleged libel in that case in its natural sense, and without any inducement at all, imputed to the plaintiff conduct which, if believed, would, in the opinion of the jury, have injured his reputation by exposing him to hatred, contempt and ridicule, and therefore was a libel. The Court took a different view, and acted on their own view and arrested the judgment. The plaintiff might have brought error, and plausibly enough have asked a Court of error to say that they agreed with the jury and not with the Court of Queen's Bench, but he acquiesced in the judgment.

Goldstein v. *Foss* (13) contained several counts; the first contained averments of introductory matter which, if it had been properly connected with the libel and innuendo, would in the opinion of Chief Justice Abbott and Mr. Justice Littledale have supported the action. Mr. Justice Bayley only says that it might have done so. But all three agreed that it was not so connected. This is a strong illustration of what has often been said, that the technical nicety of pleading required was such that a plaintiff with a very good case might fail unless he employed a very skilful pleader; and no doubt the alteration in the law of pleading made by the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76. s. 61, was in consequence of this and other similar decisions. But besides this first count there were others, in which the libel stood thus:—"Correspondence, 1825. Society of Guardians for the Protection of Trade against Swindlers and Sharpers. I am directed to inform you that the persons undernamed, or using the firms of Goldstein" (the plaintiff and some others named), "are reported to this society as improper to be proposed to be balloted for as members thereof." On this Chief Justice

Abbott, after pointing out that the innuendo that the plaintiff was a swindler was too large, but that it might on these counts be rejected as surplusage, says, "Then is the import of the libel itself such as can be made the subject of an action? There may be fixed arbitrary rules which prevent the election of certain persons as members of the society; persons of a certain age or certain trades may be excluded; and there may be so many reasons why a person may be deemed unfit to become a member of the society, without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which this alleged libel was published."

I may observe here that I agree with what was argued at the bar, that *Fisher* v. *Clement* (1) shews that the real question was not what was the intention with which the libel was published, but what was the tendency of the libel as published; and consequently that Chief Justice Abbott, if correctly reported, made the same verbal slip in *Goldstein* v. *Foss* (13) which he afterwards, as Lord Tenterden, made in *Fisher* v. *Clement* (1). But, subject to this slight correction, I think Chief Justice Abbott here states not only that it was a question for the Court whether the publication was shewn to be libellous, but correctly states the principle on which the Court is to proceed—namely, that unless the plaintiff has so far satisfied the onus which lies on him to shew it to be a libel that the Court can, with sufficient certainty, say that the writing has a libellous tendency, they should not so say. The plaintiff in *Goldstein* v. *Foss* (13) did not submit to this judgment. He brought error, but the judgment was affirmed.

The Common Law Procedure Act, 1852, s. 61, was intended to remove the difficulties which a plaintiff had in putting a real cause of action on the record with sufficient technical precision. But it was not intended to alter the law, or to deprive the defendant of his right to ask the Court to say that words alleged to be a libel, or actionable slander, though found by the jury to be so, were not so in the judgment of the Court. It deprived him of his right to move in arrest of judgment, for the materials on which the question whether the words written or spoken were used in the defamatory sense has to be decided are no longer on the record. But when the proof is complete, and all that can be properly found on that proof in favour of the plaintiff is found for him, the Court have, I think, exactly the same power that they had before, and if they are of opinion that if all which could be found had been put on the record under the old system, the judgment would have been arrested, they should give judgment for the defendant. This was done, and I think rightly done, in *Mulligan* v. *Cole* (4).

This brings me to the question on which there has been a difference of opinion amongst the Judges of the Court of Appeal, and on which I have felt and still feel great difficulty—namely, whether the evidence here was such as would justify a jury in finding that the publication was such, and so made, that the Court would not say, after a verdict for the plaintiff, that the Court thought it not sufficiently shewn to be a libel.

The proof given shewed, I think, some facts, and might have justified a verdict finding others. Messrs. Henty & Co. carried on business as brewers at Chichester, but kept no banking account there, their bankers being at Arundel. Their practice, as it appears from the evidence, was on each Saturday to send the cash, and such cheques, not drawn on a Chichester bank, as they then held, to their bankers at Arundel. The London and County Bank and the Capital and Counties Bank had each a branch in Chichester. The managers of these branches had no more means of knowing whether a cheque drawn on another branch of their bank was genuine, or whether the person who drew it had funds in that branch sufficient to meet it, than if the cheque had been drawn on a bank with which they had no connection, and they were no more bound to give cash for a cheque on one of their own branches than for a cheque on a bank with which they had no connection. But, no doubt with a view to encourage persons to be customers of their other branches, they appear to have given cash for such cheques to any one who they believed would be responsible for the cheque if it was not honoured,

without charging any commission. Messrs. Henty had been in the habit, when they took any such cheques early in the week, instead of keeping them till Saturday and then sending them to Arundel, of sending them to the Chichester branch of the London and County Bank, or the Capital and Counties Bank, as the case might be, and getting cash for the cheques at once. This was a convenience; not a very great one, but still a convenience.

On Tuesday, the 26th of November, 1878, Messrs. Henty sent to the Chichester branch a cheque for 5*l.*, which they had received, drawn on a different branch of the Capital and Counties Bank; but there was a new manager, and he would not give cash for the cheque. Then Messrs. Henty sent this letter: "Westgate, 26th November, 1878. Sir,—It has always been our practice to cash the cheques drawn on the local or district branches of the banks of this city, and with that understanding we have allowed our tenants to cash such cheques, and give them to our collector. If you intend to adopt an isolated policy, we shall issue an order to our tenants not to cash 'Hampshire and North Wilts' cheques—at least, with the intention of paying our collector with them. Our Mr. Wright will early to-morrow (Wednesday) present the cheque that you refused to cash to-day, and on it will depend the good feeling that has rested between us and the Hampshire and North Wilts Bank. We are, Sir, your obedient servants, George Henty & Sons. To the Manager of the Chichester branch of the Hampshire and North Wilts Bank." The manager did, on the 27th of November, give cash for the 5*l.* cheque then brought to him, but, apparently having taken offence at the tone of this letter, he wrote as follows: "The Capital and Counties Bank, formerly styled Hampshire Banking Company, Chichester, 29th November, 1878. Gentlemen,—In reply to your favour of the 26th instant, I beg to inform you that I most certainly decline to cash cheques on other branches of our company when presented by parties unknown to me, though, as a matter of grace, I am quite willing to cash cheques to your representatives, if properly introduced to me with proof that they have power to sign for your firm. I am quite indifferent as to your sending out orders to your tenants not to cash our cheques. Yours faithfully, P. Mortimer Hooper, Manager. Messrs. Henty & Co., Westgate."

The letter alleged to be a libel was, on the 2nd of December, 1878, written. So far the facts are not in controversy. The plaintiffs gave no other evidence that it was published by the defendants than was contained in the defendants' answer to interrogatories. That answer admitted that they did, on that 2nd of December, send the letter to a large number of persons named (I think 138 in all), but at the same time stated that they were all tenants of the defendants, or persons who took their beer from them, and that the letter was not sent to any persons who were not in the habit of remitting or likely to remit to them in cheques on the Capital and Counties Bank? and no attempt was made, either by evidence on the part of the plaintiffs, or by cross-examination of the defendants' witnesses, to shew that the letter was sent to any one not in such a position. Evidence was given that the letter did in fact become known to persons who were not in that position, and that there was a run on the bank in December. It is certainly not to be taken as proved that the run was occasioned by this letter, for it was shewn that the West of England Bank had stopped payment on the 7th of December, and that rumours as to its position had prevailed before. But though it may well be said that this was the main cause of the run, yet if the letter was libellous, it might aggravate the run, and there was evidence, therefore, that the letter did cause the bank damage. There is not, as far as I can see, any suggestion on the evidence that Messrs. Henty knew that there was such a failure as that of the West of England Bank impending, and that it was likely to cause all persons to enquire as to the stability of such a bank as the plaintiffs, still less that they sent out the letter to persons whom they knew to be likely to make such enquiries. Nor do I see anything to justify the inference that those to whom the letter was sent were desired, or intended, to make it generally known. The question, therefore, seems to me whether, by shewing such a

publication, the plaintiffs have so far satisfied the onus which is on them, that the Court can (to adopt Lord Tenterden's language) with reasonable certainty say that the tendency of the letter was to convey the libellous imputation.

There can be no doubt that the defendants were not required to take cheques drawn on this bank on account of any debts due to them, or in any other way whatsoever, and had a right to refuse to do so. No reason was needed to justify such a refusal. Such a refusal could not be made without using words which, whether written or spoken without sufficient occasion to give rise to a privilege, would be actionable if the tendency of those words would be to cast a doubt on the credit of the bank. I think, however, that there are so many reasons why a person may refuse to take on account the cheques drawn on a particular bank, that, acting in the spirit of what Lord Tenterden said in *Goldstein* v. *Foss* (13), the Court could not say that the letter, which in terms goes no further than merely to state the fact, was libellous, as tending to impute a doubt of the credit of the bank. No doubt some people might guess that the refusal was on that ground, but as Lord Justice Brett says, it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. I do not think it libellous by itself to state the fact. But I quite agree that such a statement might be published, in such a way and to such persons, as to shew that its natural tendency would be to convey an impression that the person refusing to take the cheques on that bank did doubt its credit, and then it would be libellous.

I do not much like to express an opinion on a state of things not before me, but I think I may safely say that in a time of panic a statement published in the city article of one of our newspapers, that such a one had withdrawn his account from such a bank, might have a tendency to shake the credit of that bank, and that those who published such a statement in such a way would know, or ought to know, that it would be read by persons who come to the paper for information to guide them as to whom they would trust; and therefore the statement would very probably be understood by such persons as conveying an imputation on the credit of that bank. And a statement such as that contained in the letter, if published in such a way, though less obviously connected with the credit of the bank, might perhaps also be so construed. I am inclined, therefore, to think that in the case of such a publication as above supposed, not only might a jury reasonably find that it was a libel, but that if they did, the Court would think that the plaintiffs had satisfied the onus cast upon them to shew to the satisfaction of the Court that it was a libel.

Both Lords Justices Thesiger and Cotton in this case go further, and intimate an opinion that any publication so made that it would come to persons who had no concern at all with the defendants' proceedings, but who might possibly be interested, as customers of the bank, in considering whether the bank was in good credit, would have a tendency to injure the credit of the bank in the opinion of such persons. I have not been able quite to make up my mind on this, and prefer to point out that the question does not arise.

I think if the letter had been sent to only one person, and that person was one who was in the habit of sending many such cheques to the defendants, it could not be said to be libellous. It was sent to a great many persons who were in the habit of sending some, but very few, cheques to the plaintiffs, and the inconvenience which was occasioned to Messrs. Henty by having to keep such cheques till Saturday was so slight that I cannot but view their conduct with moral disapprobation; but unless some good legal reason can be suggested for holding what they did actionable, the judgment should be affirmed.

One point more has to be considered. A publication calculated to convey an actionable imputation is *prima facie* a libel, the law, as it is technically said, implying malice, or, as I should prefer to say, the law being that the person who so publishes is responsible for the natural consequences of his act. But if the occasion is such that there was either a duty, though, perhaps, only of imperfect obligation, or a right to make the publication,

it is said that the occasion rebuts the presumption of malice, but that malice may be proved; or I should prefer to say that he is not answerable for it, so long as he is acting in compliance with that duty or exercising that right; and the burden of proof is on those who allege that he was not so acting. In this case, if any customer of Messrs. Henty who had been in the habit of remitting such cheques to Messrs. Henty and having them taken on account of his debts, had had such cheques returned to him, that customer would have had good reason to complain that this was done. If, therefore, Messrs. Henty had resolved to take no such cheques in future, there was a moral obligation on Messrs. Henty either to tell such a one that the cheques would not be taken in future, or when he brought them, to take them and warn him to bring no more; and the occasion was, I think, one that gave rise both to a duty to their customers, and a right in themselves to give the warning, and the occasion was privileged. But I think there was here evidence (I say no more) that Messrs. Henty did not send the circular because they had resolved to take no cheques, but resolved to take no cheques in order that they might send the circular. And if that was found by a jury to be the fact, I think they could not shelter themselves from the consequences of publishing the letter, if it was a libel, by an occasion which they sought. I think, therefore, that the only question is whether there was here evidence from which such facts could be found as, in the opinion of the Court, would satisfy the onus, which, I think, lies on the plaintiffs, to shew that this publication had a libellous tendency. And as I am of opinion that there was not, I think that the judgment should be affirmed.

LORD WATSON.—I am of opinion that the judgment of the Court of Appeal ought to be affirmed, and a very few words will suffice to explain the considerations which have ultimately led me to that conclusion.

I think it is quite possible that some of those persons to whom Messrs. Henty's circular of the 2nd of December, 1878, was sent might suppose that its language was intended to convey to them a quiet hint that the affairs of the bank were not in an altogether satisfactory condition; that, however, is not the meaning of the words of the circular, upon any possible construction of them; it is an inference drawn by the reader from the fact notified in the circular, which does not *per se* constitute a libel. If I were satisfied that an inference injurious to the credit of the bank would naturally and necessarily suggest itself to the mind of any person of average intelligence on reading the circular, I should hold that it had a libellous tendency, although the language used is not in itself libellous. But, besides the one injurious inference suggested by the appellants, there are many other inferences of an innocent character, which naturally might, and probably would, suggest themselves to any reader of the circular who was not induced to put a malignant construction upon it by some cause such as is not proved to have existed in the case of any one of the persons to whom it was sent.

I am accordingly of opinion that, whilst the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation of which they complain, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or, in other words, have failed to shew that it had a libellous tendency. And as I have been unable, after carefully considering the authorities bearing on the case, to differ from the law as stated by the noble and learned Lord who has just delivered his opinion, it necessarily follows that, in my opinion, the judgment of the Court below is right.

LORD BRAMWELL.—In this case the plaintiffs have stated as their cause of action a publication relating to them of the defendants, to which they, the plaintiffs, have by innuendo attached a particular meaning—namely, that it imputed to them insolvency in their trade or business. They have proceeded to trial, and given no evidence in support of their innuendo, except such, if any, as is afforded by the publication itself. The Court of Appeal have dealt with the case as though there had been no innuendo and the case had

come before them on demurrer. They have held that the publication is no libel, and given judgment for the defendants.

I have no doubt that it was competent for the Court so to deal with the case. Whether they have come to a right conclusion in holding that the publication was no libel may be a question; but that they had jurisdiction and power so to decide there cannot be a doubt. They could not indeed hold that it was a libel, unless expressly referred to them by demurrer; but it is clear that they could hold that it was not a libel, either on demurrer, or formerly on motion in arrest of judgment, or on such a proceeding as that which brought the question before them—*Hearne* v. *Stowell* (14) and *Goldstein* v. *Foss* (13). But though they had this power or jurisdiction, it is still for your Lordships to say whether they came to a right conclusion.

Now the publication, the alleged libel, is a notice sent by the defendants to their customers that they, the defendants, will not receive in payment cheques drawn on any of the branches of the plaintiffs' bank. I omit all mention of the innuendo, because, as I have said, no evidence was given in support of it beyond proof of the notice itself. But it is contended for the plaintiffs that the notice proves or shews that the defendants charged that the plaintiffs were insolvent, not to be relied on to meet the cheques drawn on them, and not to be trusted to cash the cheques drawn on them by their customers. No doubt, if it means this, or if this is the proper inference or the inference reasonably to be drawn from it, it is libellous, because it is admitted on all hands that the common expression "meaning" is incorrect and inadequate; for the question is not what the writer of an alleged libel means, but what is the meaning of the words he has used; and more than that, for the words themselves may be harmless, if a libellous inference may be drawn from them as a necessary or natural consequence they are libellous. I wish to avoid a definition or the laying down of a rule as much as possible, but I think that what I have said is correct, and that the question in this case is whether such inference is to be drawn here; for the words in themselves are perfectly harmless, they contain nothing of or about the plaintiffs, their character or conduct. All that the words say is, that the defendants will not take in payment cheques on them.

Now, as to insolvency, the words infer insolvency or they do not; if not, there is no libel. If they infer insolvency, they infer that and nothing else, or they infer two or more of several things, of which insolvency is one—that is to say, that the defendants refuse the cheques for some reason or reasons of which insolvency may or may not be one. It seems to me impossible to say that they infer insolvency and insolvency only. It is impossible to say that a person reading them, especially the customer to whom they were sent, might not infer that there had been a quarrel between the parties, that the plaintiffs charged a commission or too large a commission, or would not discount the defendants' bills, or opened and shut their offices at inconvenient hours, or would not cash cheques on one branch at another, or fifty other reasons. I think, therefore, it cannot be inferred from the alleged libel that only insolvency of the plaintiffs is imputed, and that that and nothing else was the cause why the defendants refused to take in payment cheques on the plaintiffs' branches. If so, two questions remain for consideration—Is insolvency one matter which may be inferred?—If it, but many others, may be, is the publication libellous?

In the first place, to my mind, no one ought to infer from the words an imputation or charge of insolvency. I say this with hesitation, because I think that no one else has said so yet, though the case has been before and in the hands of so many most eminent lawyers thoroughly conversant with business; but if I had been left to my own unassisted and unbiased judgment, I should have said it was clear that insolvency was not imputed. People do not refuse in payment cheques on a banker because the banker's solvency is doubtful. A man who privately knew that a banker could not pay a shilling in the pound would take a cheque on him, and be glad to get it. He would calculate that the banker would last for a few hours, and if he did not, at the worst, he, the

taker of the cheque, would have recourse to the drawer. It is true indeed, as suggested by the noble and learned Lord on the Woolsack, that if the cheque was dishonoured the taker would have the trouble of giving notice; but I venture to say that such a matter is never taken into consideration, it is too recondite. It would not count as against the advantage of having an acknowledgment of the debt from the debtor so easily enforced as a cheque, saving all the trouble of proving the debt and producing payment, unless the banker stopped before the cheque could be presented.

I confess I cannot but entertain this opinion very strongly, and though, for the reason I have given, I hesitate to express it, yet I must say it is strongly confirmed by what the Solicitor-General pointed out. No witness is called who received the circular and who acted upon it as imputing insolvency. I do not say that any witness could have been properly asked what he inferred from the circular, but in reference to the damages he might have been asked if he drew his cash from the plaintiffs, and did it because of the circular. No doubt a witness said he drew 5,000*l.* because he heard of the circular. Very likely; but he did not see what was in it, nor was he a recipient of it, nor therefore capable of judging of its purport as a customer of the defendants would be. With all submission, I think his evidence was not admissible. Further, it is to be remembered that it is admitted that the defendants did not mean to impute insolvency. Fortified by these considerations, I cannot but think that the circular neither charged nor gave rise to the inference of insolvency, and that therefore the appeal should be dismissed.

I have now dealt with two out of the three meanings or inferences which may be found in, or drawn from, the circular. I will suppose I am wrong in thinking no inference of insolvency can be drawn from the circular, and will now deal with the third—namely, that the inference to be drawn from the circular was that the defendants, for some reason or reasons, of which the insolvency of the plaintiffs might be one, would not take in payment cheques on the plaintiffs' branches. Is that actionable? I think not. The question seems to me one of entire novelty, strange as it may be that such a question should now arise for the first time. I cannot think that an action lies in such a case. I think that the defamer is he who of many inferences chooses a defamatory one. He should enquire what the truth is before judging. No doubt, he often will not, but what then? The risk of his not doing so is one we must run if we live among our fellow-creatures. I do not see how the world's affairs could be conducted if it were not so. Take this case for an example. The defendants had a perfect right to do the thing they did—namely, refuse to, or not, take cheques on the plaintiffs. I think, not only had they that right, but it was reasonable of them to do as they did after the impertinent letter of Mr. Hooper. Had they not, they might at some future time have been told that they were under an obligation for a favour, a matter of grace, and been called on to return it. They had a right to tell their customers. If when each customer came who brought a cheque on the plaintiffs they had refused to take it, they would have done and said what they have done and said now, with this difference, that their customers would have had a right to complain that they were not warned beforehand. But if this circular is a libel they would have uttered an actionable slander, for an action will lie for words imputing insolvency to a trader. Their refusal of the cheque and giving their reasons would be saying what, as it is, they have written. What, then, were they to do? If they had said they did not mean to impute insolvency, it would have been argued that that shewed that it was the natural inference from the letter. If they had said they had had a difference with the plaintiffs, the same remark might be made, or that that was not the reason. Besides, they were under no obligation to give a reason. Or, it might be argued, that even if that were the reason, the legitimate inference, or an inference, was that the plaintiffs conducted their business in a bad or inconvenient way.

In short, it seems to me that the defendants had a right to do and say what they did and said; and if people will draw from

their doings a possible (for I am now assuming it possible) inference of insolvency in the plaintiffs it is no fault of the defendants. Take the case put, of an invitation to dinner, and a refusal because A was to be of the party. It might be inferred from that that the writer imputed that A was not fit for society. But would it be actionable? Take the case which I put. The plaintiffs' manager is asked to take a glass of beer, and refuses, saying that he never drinks Henty's beer. A possible inference is that it is bad beer. Is it actionable? I have said that the defendants had a right to do and say what they did. By that I did not mean that they had any special right. All the Queen's subjects have a right to refuse payment by cheques on the plaintiffs' bank, and to say so. I have; and I think that I should exercise that right if such a cheque were offered to me, not because I doubted their solvency, but because they might have a troublesome manager. But if I am wrong in giving this right to all the Queen's subjects, at least these particular defendants had it.

I say, then, that the words are harmless in themselves, and that they do not import or justify the inference of the plaintiffs' insolvency. If I am wrong in this, and if the words do impute or justify the inference of insolvency as a possible cause of the defendants' refusal to take cheques on the plaintiffs, I say that that is only one of several things which they import, or of which they justify the inference; that no action lies in such a case; that if it would lie against any one not interested to do and say what the defendants did and said, it does not lie against them who were so interested and did and said no more than they had a right to do. In this way the question of privilege arises in a sense. If they had such right, it seems to me that their motive is immaterial, and that they might do what they did, though out of anger or malice.

If I am wrong in the above, and if the inference, or an inference to be drawn from the words used is the imputation of insolvency to the plaintiffs, and if the action is otherwise maintainable, I think there is no defence on the ground of privilege. I think that that follows from the defendants' own contention. They say that they did not believe the plaintiffs to be insolvent, and had no intention to say so, and that if that is the inference to be drawn from their language, their language is wrong. But they have no privilege to use wrong language. They have only a right to say what they believe. It may be by mistake that they have said what they do not believe, but for that mistake they are liable. I am of opinion, however, that for the above reasons they are not liable, that the plaintiffs have no cause of action, and that the judgment should be affirmed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors—Nash & Field, agents for Stuckey, Son & Jennings, Brighton, for appellants; Robinson, Preston & Stow, agents for Raper & Freeland, Chichester, for respondents.

1883. Feb. 14. } SHAFFERS *v.* THE GENERAL STEAM NAVIGATION COMPANY.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *ss.* 1 *and* 8—*Superintendence —Personal Injury caused by "the negligence of any person in the service of the employers who has any superintendence entrusted to him whilst engaged in the exercise of such superintendence."*

Action for personal injuries caused by the negligence of a "gangway man," whose duties were to give the word when certain sacks were to be hoisted by means of a steam crane from a barge alongside and lowered into a vessel, and also himself to manage a guy-rope for the purpose of regulating the movements of the beam of the crane and to call out to the men in the hold to "look out" when the sacks were to be lowered. During the lading with the sacks, the ship being also laden with coal listed to port, and the bulwark over which the grain was raised gradually became higher than the other, so that when the sacks had been hoisted from the barge and were being swung round by the crane they struck against the combing of the hatchway, owing to their not being checked by the guy-rope,

were knocked off the sling, and fell on the plaintiff*:**—Held, ***that the "gangway man" was not a person having "superintendence" within the meaning of sections 1 ***and*** 8 ***of the Employers' Liability Act,*** 1880 (43 & 44 ***Vict. c.*** 42); ***and, further, that if he had such superintendence the accident did not happen while he was engaged in such superintendence, the cause of the accident being his failure to use the guy-rope, and not any act or omission of his in respect of the hoisting or lowering, or of warning those in the hold.***

This was an action brought in the City of London Court under the Employers' Liability Act to recover 150*l.* damages for injuries sustained by the plaintiff by reason of a number of sacks of corn falling upon him while he was working in the hold of the *Eider* on the 29th of March, 1882, through the acts or omission of persons in the service of the defendants who were in charge of the said ship and of the crane and gearing by which the sacks were being hoisted, as also by reason of the defective nature and improper position of the said crane and gearing.

The steamer was at the time of the accident being loaded with sacks of grain from a barge lying alongside.

The loading was effected by means of a steam crane fixed to the deck of the vessel.

The beam of the crane being swung round over the side of the vessel, so that it projected over the barge, the chain of the crane was lowered, and men in the barge attached a sling containing eight sacks of grain to the chain.

The crane, which was worked by steam, then hoisted up the sacks of grain, and by another movement of the machinery the beam was swung back, so that it projected over the hold of the vessel. The crane then lowered the sacks into the hold, where they were received and stowed away by men employed by the defendants for the purpose.

The loading of the vessel in the manner thus described was entrusted by the defendants to about fourteen men. Some were on the barge putting the sacks into the sling; one was at the crane to work the machinery thereof; others were in the hold to receive and stow the sacks. The plaintiff was one of the men in the hold.

Attached to the beam of the crane was a guy-rope, by which its movements might be guided, the guidance being entrusted to a man named Jones, called the gangway man. His duty was to stand at the gangway, to give directions to the man working the crane when to lower and when to hoist, to guide the beam in its movements by means of the guy-rope when necessary, and to call out to the men in the hold to "look out" when the sacks were to be lowered. Jones, the gangway man, was one of the fourteen men employed by the defendants.

By reason of the ship being laden with coals at the same time as she was taking in the grain she listed, and the bulwark over which grain was raised gradually became higher than the other bulwark. The deck thus sloped, and when the sacks of grain which fell on the plaintiff were hoisted from the barge, and the crane itself was about to be and ought to have been swung round with care, the crane swung round suddenly of itself.

It was not checked by the guy-rope, and the lowering having commenced immediately after the sacks were hoisted over the bulwark, that lowering continued, the sacks struck against the combing of the hatchway, were knocked out of the sling, and fell on the plaintiff.

Jones might and could have stayed the swinging round of the beam of the crane by means of the guy-rope. He did not do so, and it was by reason of this negligence that the plaintiff was injured.

The learned Judge was of opinion that Jones, who described himself, and was in fact, a labourer, was a fellow-workman in common employment with the others, and therefore not a person in the service of the employer who had any superintendence entrusted to him under the statute, and therefore non-suited the plaintiff.

The plaintiff appealed by Special Case stated by the learned Judge.

Ruegg, to shew cause against the rule. —The duty of Jones was not one of superintendence; he had merely to give notice to the man in charge of the machinery when the sacks could be lowered or

hoisted. But even if he had superintendence as to the hoisting and lowering, he had none as to the use of the guy-rope, and it is found in the Case that the accident arose from the omission of the man Jones to use the guy-rope.

Bankes, in support of the rule.—It is found that Jones might have avoided the accident, and he had practically the superintendence of what was the actual work being done—namely, the hoisting and lowering of the sacks. True, Jones may at other times be a mere workman; but at this time he was superintending within the meaning of section 1, sub-section 2 (1), as interpreted by section 8 (1) of the Employers' Liability Act (43 & 44 Vict. c. 42).

MANISTY, J.—I think the learned County Court Judge was right in his decision. The question in this case is whether a certain man Jones, by reason of whose negligence it is found in the Case the plaintiff was injured, was a person having superintendence entrusted to him within the meaning of section 1, sub-section 2, of the Employers' Liability Act, 1880, as explained by section 8 of that Act. [His Lordship then read those sections.] The Case finds that the duty of Jones was to give directions as to when the man working the crane should set in motion or stop the machinery for the purpose of lowering or hoisting the sacks. But besides this he also had a duty to perform by managing the guy-rope which regulated the swing of the beam. Assuming, therefore, that he had superintendence as regards the regulation of the lowering and hoisting, he had none with respect to the use of the guy-rope. The Case finds that the accident was due to the negligence of Jones in the exercise of this duty with respect to the guy-rope. Jones was, therefore, clearly not a person who has superintendence entrusted to him; nor did the injury arise from the negligence of Jones in the exercise of superintendence.

MATHEW, J.—I am of the same opinion. I think Jones was engaged in manual labour, having no superintendence at all; and that the accident arose from his negligence in that capacity.

(1) 43 & 44 Vict. c. 42. s. 1: "Where after this Act personal injury is caused to a workman:"

Sub-section 2: "By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence."

Section 8: "For the purposes of this Act, unless the context otherwise requires, the expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

Solicitors—Ellis & Crossfield, for plaintiff; Watson, Sons & Room, for defendants.

1882. Dec. 13, 21. THE GUARDIANS OF THE POOR OF THE SALFORD UNION *v.* THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF MANCHESTER.

Poor Law — Settlement — Illegitimate Idiot — Residence with Mother — The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 34 —9 & 10 *Vict. c.* 66. *s.* 1.

[For the report of the above case, see 52 Law J. Rep. M.C. 34.]

1882. Dec. 8. THE BISHOP AUCKLAND SANITARY AUTHORITY (*appellants*) v. THE BISHOP AUCKLAND IRON AND STEEL COMPANY (*respondents*).

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 91. *sub-s.* 4—"*Nuisance*"—"*Injurious to Health*"—*Accumulation of Cinder Refuse.*

[For the report of the above case, see 52 Law J. Rep. M.C. 38.]

1882. Nov. 30. } GWATKIN AND OTHERS *v.* BIRD AND OTHERS.

Practice—Receiver—Action for Recovery of Land—Landlord and Tenant.

In an action for recovery of land brought by a landlord against his tenant under a proviso for re-entry for breach of covenant in his lease, a receiver of the rents and profits of the land pending the trial of the action may be appointed on the plaintiff's application.

This was an appeal from a refusal by the Judge at chambers to appoint a receiver pending the trial of an action.

The action was brought for recovery of possession of land and houses at Bethnal Green, Middlesex. The plaintiffs were the executors and trustees of the will of one John Reynolds Gwatkin, deceased. The land and houses in question were formerly the property of one Peter Gascoigne, who devised them to his daughter for life, with power to grant leases. Under this power the daughter demised the land and premises in question to the defendant Alfred George Bird by two indentures of lease, dated respectively the 28th of December, 1881, and the 16th of February, 1882, for terms of thirty-one years, at rents of 95*l.* 10*s.* and 300*l.* respectively, payable quarterly on the four usual quarter-days. The leases contained covenants to pay the rent and to repair, and also a proviso for re-entry by the lessors or their assigns, or the person or persons for the time being entitled to the rent, in case of non-payment of rent, whether demanded or not, or in the event of any other breach of covenant. The tenant-for-life died on the 2nd of April, 1882, and thereupon the land and premises and the reversion expectant on determination of the terms created by the said leases vested in the plaintiffs as executors and trustees of the will of the said John Reynolds Gwatkin.

The premises were sublet by the defendant Bird in numerous small holdings to tenants at weekly rents. The leases were assigned by way of mortgage to other persons.

No rent having been paid since the date of the leases either to the tenant-for-life or the plaintiffs, and the premises being out of repair, the plaintiffs on the 16th of November, 1882, commenced an action for recovery of possession of the land and premises, arrears of rent and mesne profits, and damages for breach of covenant, and for the appointment of a receiver pending the action. The lessee, the mortgagees and the sub-tenants were all made defendants to the action. The lessee and mortgagees alone entered appearances; the other defendants suffered judgment by default.

The plaintiffs, on the 23rd of November, 1882, applied to Mr. Justice Mathew at chambers by summons for an order that a receiver should be appointed of the rents and profits of the premises pending the trial, and that the sub-tenants be ordered to attorn and pay their rents to such receiver. The form of the summons appears from the order hereinafter set out. In support of their application the plaintiffs filed affidavits setting out all the facts above stated, shewing their title and their right of re-entry. The affidavits stated that no rent had been paid at all since the leases were granted, that the executors of the tenant-for-life obtained judgment for one quarter's rent, which was still unsatisfied; that the plaintiffs had been unable to obtain payment of the rent, and that, owing to the nature of the lettings to the sub-tenants, the remedy by distress was not practically available; that the premises were out of repair, part of one of the houses having been removed by the Metropolitan Board of Works under a magistrate's order. The defendants filed affidavits denying generally the statements contained in those filed by the plaintiffs, but containing no substantial specific denial of the plaintiffs' case. The learned Judge at chambers refused the application on the ground that it was unprecedented. From this refusal the present appeal was brought by the plaintiffs.

T. Willes Chitty, for the plaintiffs, stated the facts of the case as they appear above. He contended that substantially the action was an undefended one, and that the practical effect of the appointment of a receiver as asked would be to enable the plaintiffs to get a speedy judgment, and to prevent the defendants, who already owed

arrears of rent, from continuing to reap the profits of the premises until the action could be tried. He referred to the Judicature Act, 1873, s. 25. sub-s. 8, and cited *The Real and Personal Advance Company* v. *M'Carthy* (1), and submitted that the Court had jurisdiction irrespective of the old Chancery practice to appoint a receiver whenever it appeared "just and convenient" to do so. He was proceeding to contend that it was just and convenient to do so in the present case when Lord Coleridge called on the defendants' counsel to state why a receiver should not be appointed.

Morton Daniel, for the defendant Hall, a mortgagee of the leases, contended that under the old Chancery practice that Court would not have appointed a receiver in a case such as the present, where the plaintiffs' title was a legal one, and they were proceeding to enforce it by an action of ejectment. He proposed to cite cases in support of that proposition.

[LORD COLERIDGE, C.J.—That may have been so; but there is no question of title here. The only question now is whether it is not just and convenient in the present case that the receiver should be appointed. Can you give us any reason why it is not so?]

Daniel contended that it was not just or convenient. The effect of the order would be to deprive the defendant of the means of living and of defending the action, and it might turn out that the plaintiffs were not in the right.

[LORD COLERIDGE, C.J.—But the rent is already in arrear. The appointment can do no harm. The money will be paid into Court, and the plaintiffs must give the usual undertaking as to damages.]

Daniel desired to call attention to the old Chancery authorities, but

THE COURT (2) held that they now had power to grant the order whenever it was just and convenient to do so, and they thought it clearly was so in the present case.

The appeal was accordingly allowed.

Fillan appeared for the defendant Hall.

(1) 40 L. T. 879; 27 W.R. 706 (Fry, J.).
(2) Lord Coleridge, C.J., and Stephen, J.

The order of the Court was drawn up in the following form:—

"Upon reading the summons herein dated the 21st of November, 1882, the affidavit of the defendant, &c., and upon hearing counsel, &c., on the plaintiffs' notice of motion, dated the 27th day of November, 1882, on appeal from the refusal of Mr. Justice Mathew at chambers, on the 23rd of November, 1882, for an order that Henry Collins Gould, of 7½ Gibraltar Walk, Bethnal Green, in the county of Middlesex, may be appointed without security until the 31st day of December, 1882, or until further order, to receive the rents and profits of the premises in the writ in this action mentioned: and that the tenants of the said premises may be ordered to attorn and pay their rents in arrear and growing rents to the said Henry Collins Gould so long as he shall continue to be such receiver: and that the costs of this application be costs in the cause. The plaintiffs, by their counsel, undertaking to abide by any order the Court may hereafter make as to damages in case the defendants shall have sustained any by reason of this order, and be responsible for the costs of the acts and defaults of the receiver and for the rents received by him. It is ordered that Henry Collins Gould, of 7½ Gibraltar Walk, Bethnal Green, in the county of Middlesex, be appointed (upon giving security to the satisfaction of one of the Masters of this Division) until the trial of this action receiver of the rents and profits of the premises mentioned in the writ in this action. And the tenants of the said premises are hereby ordered to attorn and pay rents in arrear and growing rents to the said Henry Collins Gould so long as he shall continue to be such receiver. And it is further ordered that the moneys so paid by the said tenants aforesaid be paid by the said Henry Collins Gould into Court to the credit of this action, with liberty to the said plaintiffs to apply. And that the costs of this application be costs in the cause.

By the Court."

Solicitors—Palmer, Eland & Nettleship, for plaintiffs; Miller & Co. and J. E. Coxwell, for defendants.

1883. March 8. } FULLER *v.* ALFORD.

Church and Clergy—District Churches—Ecclesiastical Law—6 & 7 *Vict. c.* 37. *s.* 15, *and* 19 & 20 *Vict. c.* 104. *s.* 14 (*New Parishes Acts*, 1843 *and* 1856)—*Marriages of Residents in newly constituted Parish—Rights of Vicar of New Parish as to Marriages and Fees—"Ecclesiastical Purposes"*—4 *Geo.* 4. *c.* 76. *s.* 2.

Where under the New Parishes Acts a district in which a church is built is separated from an existing parish and constituted "a new parish for ecclesiastical purposes," the law as to the publication of banns and the solemnization of marriages applies to persons who dwell in such new parish. Such persons are not entitled to resort to the old parish church for the publication of banns or solemnization of marriage, those being ecclesiastical purposes in respect of which the new district with its church has become a separate and distinct parish.

Special Case.

1. The plaintiff is vicar of the ecclesiastical parish of St. Barnabas, in the city and county of Bristol.

2. The defendant was for several years, including the period of the occurrences hereinafter mentioned, vicar of the parish of St. Paul, in the said city and county.

3. The said parish of St. Paul was constituted by or in pursuance of the statute 27 Geo. 3. c. 49, local and personal, and was separated from the ancient parish of St. James, in the said city, and was declared to be a parish for both civil and ecclesiastical purposes. The said statute was amended by 38 Geo. 3. c. 35, which (section 7) enacted that the two parishes of St. James and St. Paul should be deemed and taken to be two separate and distinct parishes, wholly independent of each other in respect to the election of churchwardens, waywardens, overseers of the poor, and all other parish officers, and also in respect to all parochial rates and assessments of every kind whatsoever.

4. The site of the church of St. Barnabas was conveyed under the provisions of the statute 1 & 2 Vict. c. 107, and after the erection and consecration of the said last-mentioned church a district was duly assigned by the Ecclesiastical Commissioners for England. The said district was taken out of the said parish of St. Paul so constituted as aforesaid.

5. The ancient parish of St. James was situate partly within and partly without the ancient city of Bristol, but by statute 5 & 6 Will. 4. c. 76, the municipal boundaries of the said city were extended so as to comprise the whole of the said ancient parish. The said parish of St. Paul was partly within and partly without the ancient city, but under the last-mentioned statute the whole of the said parish of St. Paul was included within the city. The parish or district of St. Barnabas was taken partly from the portion of the parish of St. Paul originally within the city, and partly from the portion originally without the city, but afterwards included as aforesaid.

6. By statute 2 Will. 4. c. 89, so much of the said parishes of St. James and St. Paul as were then outside the said city were constituted into a district for rating and other civil purposes under the name of the district of the united out-parishes of St. James and St. Paul, in the county of Gloucester, and the said district (although now within the city) is still managed by commissioners appointed under the said statute for rating and such other civil purposes as are not under the control of the corporation of Bristol.

7. In the year 1843 the church of St. Barnabas was consecrated, and in the year 1851 the same church was, in pursuance of the statute 6 & 7 Will. 4. c. 85. s. 26, licensed by the Lord Bishop of Gloucester and Bristol for the celebration of marriages, and in the month of May, 1868, an order was made by the Ecclesiastical Commissioners for England in pursuance of the statute 19 & 20 Vict. c. 104. s. 11.

8. The plaintiff was instituted to the vicarage of St. Barnabas in the month of December, 1870, and the defendant was instituted to the vicarage of St. Paul in the year 1871.

9. The defendant, as the vicar of the parish of St. Paul, published banns and solemnized marriages at the church of St. Paul for persons residing within the parish of St. Barnabas, and received and appro-

priated to his own use the fees payable for such offices.

10. The plaintiff contends that under the circumstances hereinbefore set forth and under the provisions of the statute 19 & 20 Vict. c. 104. ss. 14 and 15, persons residing within the parish of St. Barnabas are not entitled to resort to the parish of St. Paul for the publication of banns or the celebration of marriages, and that the vicar for the time being of the parish of St. Paul is not entitled to publish such banns or to celebrate such marriages, and is not entitled to receive or retain the fees for so doing, and that the plaintiff is entitled to recover such fees in this action.

11. The defendant, on the other hand, contends that parties residing in the parish of St. Barnabas are entitled to resort to the church of St. Paul for the purposes aforesaid, and that he was bound to perform the said offices, and that the plaintiff is not entitled to recover the said fees.

12. This action was commenced on the 15th day of June, 1882, by a writ, the indorsement on which was as follows:

"The plaintiff's claim is for money received by the defendant to the use of the plaintiff. The following are the particulars:

"To amount of marriage fees wrongfully received by the defendant while vicar of St. Paul's, Bristol, which ought to have been received by the plaintiff as vicar of St. Barnabas, 21*l.*"

13. The plaintiff contends that he is entitled to recover the sum of 21*l.* for fees received by the defendant as aforesaid, and the defendant admits that he has received 21*l.* under the circumstances aforesaid, but insists that the plaintiff is not entitled to recover the same or to maintain this action.

14. This Special Case is stated for the opinion of the Court by consent of the parties, pursuant to Order XXXIV. rule 1. The questions for the opinion of the Court are:

First. Whether or not the defendant as vicar of the parish of St. Paul, Bristol, was authorised to solemnize the marriage of persons residing within that portion of the said parish which for ecclesiastical purposes now forms the parish or district of St. Barnabas.

Secondly. Whether or not the plaintiff can maintain an action for recovery of the sum of 21*l.* admitted to have been received by the defendant as fees for the solemnization of such marriages as aforesaid.

15. Such judgment shall be entered in the action as to the Court shall seem proper, having regard to the answer to be given to the above questions.

[The second question was not argued, Mr. Jeune, for the defendant, stating that his client was desirous of having the first question, which dealt with the substantial ground of difference between the parties, decided. The Court therefore expressed no opinion as to whether the action was maintainable in the form of money had and received.]

The plaintiff in person.—The question is, whether the vicar of the mother church can marry parishioners of a district created under Lord Blandford's Act and take the fees for so doing. It is contended that by virtue of the statutes under which parishes have been divided into new and separate parishes for ecclesiastical purposes, the rights of the incumbents and the duties of the parishioners of such new parishes in respect of the publication of banns and the solemnization of marriages are clearly defined. Each new parish is constituted so as to be complete in itself, and the law applies just as if it were an old one. The earliest of the Church Building Acts is 58 Geo. 3. c. 45, and that provided for the division of parishes into ecclesiastical districts, to become separate district parishes for all ecclesiastical purposes. And the Acts of Parliament, laws and customs relating to publishing banns and marriages were to apply to such district parishes. So that from the first these were considered ecclesiastical purposes. In *Tucknies* v. *Alexander* (1), Kindersley, V.C., gave a judgment upon 59 Geo. 3. c. 134, which, though not decisive, has a bearing on the present question. The present case rests upon section 15 of 6 & 7 Vict. c. 37 (Peel's Act), primarily, and it is submitted that there is really no ambiguity in the words which confer upon the incumbent of the

(1) 32 Law J. Rep. Chanc. 794.

new district the exclusive right to publish the banns and perform the marriages of his parishioners. As the existing law as to the publication of banns applies, it follows that the banns must be published in the parish in which the person to be married dwells, and that is the new parish. But any possible ambiguity is removed by the later Act, 19 & 20 Vict. c. 104. s. 14; and it was under section 11 of that Act that the order of the commissioners authorising marriages in St. Barnabas' was made. If the parishioners of St. Barnabas were also parishioners of St. Paul they would belong to two parishes, and would be subject to liabilities accordingly. But in *Jones* v. *Gough* (2) it was held that where a church rate had been laid in a mother parish the parishioners of the daughter parish were not liable to it, and it is contended that the parishioners of St. Barnabas have no rights in St. Paul's parish at all.

Jeune, contra.—The question turns on whether the solemnization of marriage is purely an ecclesiastical purpose within the meaning of the Act. It is admitted that by Lord Blandford's Act when certain conditions are fulfilled, as they have been here, a new district becomes a parish for ecclesiastical purposes within the meaning of the earlier Act. That Act, 6 & 7 Vict. c. 37, has a proviso in section 18, and it is therefore by no means clear that by the constitution of a district as a separate parish for ecclesiastical purposes the persons living in that district lose their rights of being married in their old parish church. Rights cannot be taken away without express words, and where the Legislature intends to do this express words are used; the judgment of Kindersley, V.C., in *Tuckniss* v. *Alexander* (1) draws attention to this; and it is contended that the inhabitants have a right to go to either church. It has been held that the inhabitants of a district can vote in the election of churchwardens of the mother parish; and the ground of that is, that it is not a wholly ecclesiastical office. So the performance of marriage is not purely ecclesiastical—the fee is paid for registration; the right of marriage is a civil right of all persons, though when solemnized in a church there is a religious ceremony superadded. A clergyman is in just the same position as to burials; it is a civil right of being buried accompanied by an ecclesiastical ceremony.

[DAY, J.—There is a difference between a civil right and an ecclesiastical purpose.]

Yes; but the Court must hold marriage to be a purely ecclesiastical purpose to be within the Act.

[DAY, J.—Is not the solemnization of marriages mentioned among ecclesiastical purposes in section 15 of 6 & 7 Vict. c. 37? CAVE, J.—It was then the law to publish banns in the parish where the person dwells, and section 15 applies that law to the new parish.]

Those words were necessary in order to provide that a marriage in the new parish should be lawful; they would on any construction be required; but they do not take away any existing independent right.

[CAVE, J.—Section 13 of Lord Blandford's Act directs that compensation may be given. How, if the place of marriage is optional, could this be done?]

The compensation would be estimated upon the ground that a lawful rival had been set up, which might take away some of the fees.

The plaintiff, in reply, was stopped.

CAVE, J.—I am of opinion that the plaintiff is entitled to our judgment. I think that he is so both by the language of 6 & 7 Vict. c. 37, and, if that leaves the matter in any doubt, also by that of 19 & 20 Vict. c. 104. The former Act in section 15 provides that "where any church shall be built in any district constituted as aforesaid, and shall have been approved by the said commissioners by an instrument in writing under their common seal, and consecrated as the church of such district for the use and service of the minister and inhabitants thereof, such district shall from and after the consecration of such church be and be deemed to be a new parish for ecclesiastical purposes, and shall be known as such by the name of the new parish of ——, . . . and it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize

(2) 3 Moo. P.C. Cas. N.S. at p. 20.

therein marriages, . . . and to require and receive such fees upon the solemnization of such offices or any of them as shall be fixed by the chancellor of the diocese, ... and the several laws, statutes and customs in force relating to the publication of banns of matrimony and to the performance of marriages, baptisms, ... and the registering thereof respectively, and to the suing for and recovering of fees, oblations or offerings in respect thereof, shall apply to the church of such new parish and to the perpetual curate thereof for the time being." Now in that Act the new district is spoken of as a parish, and the church as the church of the parish, and the law as to banns of matrimony and the performance of marriages is to apply. Looking back, therefore, to the Act 4 Geo. 4. c. 76, the 2nd section says, "All banns of matrimony shall be published in the parish church or in some public chapel of or belonging to such parish or chapelry wherein the persons to be married shall dwell." It seems to me that the language of these two sections does require that in the case of a new district constituted a new parish under 6 & 7 Vict. c. 37, banns must be published in the church of the new parish and not in that of the old.

If there could, however, be any doubt as to what was meant the matter is made perfectly clear by 19 & 20 Vict. c. 104, an Act passed to make "better provision for the spiritual care of populous parishes and further to provide for the formation and endowment of separate and distinct parishes."

By section 11, the commissioners may, with the consent of the bishop, upon the application of the incumbent of any church or chapel to which a district shall belong, "make an order authorising the publication of banns of matrimony and the solemnization therein of marriages . . . . according to the laws and canons now in force in this realm, and all the fees payable for the performance of such offices . . . . shall be payable and be paid to the incumbent of such district."

Now I do not suppose that this was an enabling section authorising those offices to be performed indifferently in either parish, but a distinct assignment to the incumbent and the church of the district of those offices of the church the occasion for which should arise within his district.

Then the next section, 12, goes on to provide for the fees, where reserved, belonging to the old incumbent of the original parish until the first avoidance, and then going to the new parish. Section 13 provides for compensation being given for the diversion of fees; and then we come to section 14, which seems to me to be clear and precise upon the point now before us. It says, "Wheresoever or as soon as banns of matrimony and the solemnization of marriages . . . . according to the laws and canons in force in this realm are authorised to be published and performed in any consecrated church or chapel to which a district shall belong, such district being not at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising for the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of 6 & 7 Vict. c. 37, and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of 6 & 7 Vict. c. 37, and of 7 & 8 Vict. c. 94, as amended by this Act, relative to new parishes upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last-mentioned Acts."

Now this constitutes the district a parish for ecclesiastical purposes, that is, a parish for the purposes to which the laws relating to marriages are to apply; that is a distinct recognition that marriages are ecclesiastical not civil purposes, and they are to be performed in the new church, not in the old. Is there anything which compels us to say that the solemnization of marriages is not an ecclesiastical purpose? I think not. No doubt recent legislation has brought forward into prominence the civil aspect of the contract of marriage, and enabled marriages to take

place without any religious ceremony; but I cannot feel any hesitation in holding that when a marriage takes place in a church it is an ecclesiastical office performed by the vicar.

I therefore answer the first question in favour of the plaintiff.

DAY, J.—I concur in the judgment just given, and will only add that, without deciding whether marriage is necessarily ecclesiastical or civil, I am quite clear that the solemnization of marriage in a church is an ecclesiastical purpose within the Act.

Judgment for the plaintiff.

Solicitors—Plaintiff in person; Whites, Renard & Co., agents for Henry Brittan & Co., Bristol, for defendant.

[IN THE COURT OF APPEAL.]

1883. Feb. 28. } KEARSLEY *v.* PHILIPS AND OTHERS.*

Practice—Inspection of Documents in joint possession of Party and Stranger to the Action—Rules of Court, Order XXXI. rule 11.

A defendant stated in his affidavit of documents that certain documents were in the joint possession of himself and another person not a party to the action. The affidavit further stated that he objected to produce the documents, but did not state that he was unable to do so, or that he could not obtain the consent of the other party to their production:—Held (*affirming the judgment of the Queen's Bench Division*), *that the affidavit was sufficient, and that production of the documents ought not to be ordered.*

Murray *v.* Walter (Cr. & Ph. 114) *followed.*

Appeal by the plaintiff from a judgment of the Queen's Bench Division.

*Coram, Brett, L.J.; Cotton, L.J., and Bowen, L.J.

The case is reported *ante*, p. 8.

The question raised by the appeal was, whether the defendant Philips, who had made an affidavit of documents, was bound to produce for inspection certain documents which in his affidavit of documents he stated were in the joint possession of himself and another person not a party to the action. His affidavit did not state that he was unable to produce the documents, or that he could not obtain the consent of the other party to their production.

The Queen's Bench Division refused to make an order for inspection.

The plaintiff appealed.

Bigham and *C. A. Russell*, for the appellant.—The defendant does not allege in his affidavit that he cannot produce the documents, he does not state that he has asked for permission to do so and been refused. Such an allegation is necessary (1), and it is found in the affidavit set out in *Bovill* v. *Cowan* (2). The decision of the Court below overrules the case of *Hutchinson* v. *Glover* (3).

[COTTON, L.J.—If that was a case where the document was in the possession of one person, although another was interested in it, it is not in point here.]

[BOWEN, L.J.—There must be some mistake in the print of that case, for Blackburn, J., is reported to have said, "It is not necessary to say what our decision would be if the person in possession of this document objected," but the case was one in which the document was *ex hypothesi* in the possession of the defendant; probably the phrase should be "the person interested."]

The Court has power to order inspection under Order XXXI. rule 11.

[BRETT, L.J.—Is not *Murray* v. *Walter* (4) conclusive?]

The practice is now governed by the Rules of Court, so that cases decided before the Judicature Act do not bind the Court.

Smyly, for the defendant, was not called on.

(1) Seton on Decrees, 4th ed. 152.
(2) 39 Law J. Rep. Chanc. 768; Law Rep. 5 Ch. App. 495.
(3) 45 Law J. Rep. Q B. 120; Law Rep. 1 Q.B. D. 138.
(4) Cr. & Ph. 114.

Kearsley v. *Philips, App.*

BRETT, L.J.—I must repeat what I have before had occasion to say, that the principle which governs the construction of the Rules of Court, is that they apply to procedure, and that they do not increase or diminish rights; but I have never said, and I do not now say, that the Court is not entitled and bound to look at decisions of the Court of Chancery in order in appropriate cases to construe and interpret the Rules of Court made under the Judicature Acts. The present appeal must fail, for *Murray* v. *Walter* (4) shews that when a party applies for inspection of such a document as was in question in that case, and such as is the subject of controversy in this case, there is no right in the circumstances of such a case as this to inspection, and that the party who objects to produce it for inspection is not bound to swear that he has asked the party in whose custody it is, and who is not before the Court, to produce it or to give him leave to produce it, and that he has met with a refusal to such a request. That case is an authority on this very point, and it has been acted on for a long period; there is, moreover, nothing in the Rules and Orders which is inconsistent with it, so that it must be held to lay down the law on this question.

COTTON, L.J.—I am of the same opinion. Rule 11 of Order XXXI. provides that the Court or a Judge may order the production by any party to an action of documents in his possession or power; but it does not give any directions as to documents in the joint possession of two persons, one of whom is not a party to the action. No doubt, prior to the Judicature Act, the Court of Chancery required the production of certain documents in the possession or power of parties to the suit; but the case of *Murray* v. *Walter* (4) decided that the principle did not apply to documents which were in the joint possession of one of the parties to the suit, and of a third party not before the Court. That decision covers this case; so that the defendant Philips here is not bound, in order to protect himself from being ordered to produce these documents, to allege that he has sought the permission of the third party to produce them for inspection, and that that permission has been refused.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors—Pritchard, Englefield & Co., agents for Storer & Lloyd, Manchester, for plaintiff; Johnson & Weatherall, agents for Wigglesworth & Rogerson, Manchester, for defendants.

1883. Feb. 23, 24.

LOWE *v.* HOLME AND ANOTHER.

Practice—Entry of Judgment on Findings of Referee—Counter-claim and Set-off exceeding Amount of Claim—Balance on Claim and Counter-claim—Costs—Order LV.

The plaintiff claimed the balance of money due under a contract with the defendants for asphalting certain roads. The defendants alleged that the work had been so badly done by the plaintiff that they had been compelled to do it again at an expense to them greater than the amount claimed; and they pleaded by way of set-off and counter-claim the expense they, by his default, had been so compelled to incur.

Upon the trial of the issues by an official referee, they were found as follows:—For the plaintiff on his claim for 32*l.* 18*s.* 6*d.*, *and for the defendants on their counter-claim for* 34*l.* 10*s.* 6*d.*

On motion for judgment,—Held, *that judgment ought to be entered for the defendants for the balance* 1*l.* 12*s.*, *with costs.*

The defendants had in proving their counter-claim, which arose out of the subject-matter of the plaintiff's claim, established a defence to such claim. The plaintiff was therefore not entitled to any judgment, having been wholly unsuccessful.

Order LV. also applied to such a case, and enabled the Court to give the really successful party his costs.

This was an application on the part of the plaintiff to enter judgment on the findings of the official referee, to whom the

issues had been referred for trial. The action was by the plaintiff to recover from the defendants the price of work done and materials supplied in asphalting some roads for the defendants under a contract with them. The defence was that the plaintiff had done the work so badly that it became necessary to have the greater part of it done over again, and the defendants claimed by way of set-off and counter-claim the expense so incurred, to an amount somewhat greater than the amount of the plaintiff's claim.

The official referee found for the plaintiff on his claim 32*l.* 18*s.* 6*d.*, and for the defendants on their counter-claim for 34*l.* 10*s.* 6*d.*

Bigham, for the plaintiff.—The judgment should be entered for the plaintiff for the amount found in his favour and the costs of the action; and for the defendants for the amount found due on their counter-claim and costs. This is exactly the course that was pursued in *Baines* v. *Bromley* (1), where the verdict for the defendant overtopped the plaintiff's claim. Here the defendants' counter-claim is in the nature of a cross-action, and not a set-off. They have raised it in order to get something more than will enable them to pay the plaintiff his claim. The plaintiff is therefore entitled to the benefit of his judgment, as he was obliged to go on with the action because of the counter-claim being larger than a mere set-off.

Gully, Q.C., and *McConnell, contra.*—The judgment here ought to be for the defendants for the balance they have been declared entitled to receive from the plaintiff. The case falls within the principle of the decision in *Chatfield* v. *Sedgwick* (2). The defendants claim in reduction of damages so much of the expense as they incurred by reason of the bad work of the plaintiff as is equivalent to the amount of his claim. The finding is that they were right in so doing. The plaintiff is therefore not entitled to any judgment in his favour. The defendants have further established a right to be paid 1*l.* 12*s.* by the plaintiff. They ought, therefore, to have judgment for that amount, with costs.

Bigham in reply.

HUDDLESTON, B.—I think that judgment should be entered for the defendants for 1*l.* 12*s.* and costs. I think the rule stated by Mr. Gully is correct. If two persons had each a cause of action against the other, then, before the Judicature Act, each having a right to proceed, could do so by means of a separate action, and each would if he succeeded get his costs. Since the Judicature Act, which gave the power to a defendant to counter-claim, instead of two actions being brought, the two causes of action are both considered and dealt with in one action, and each party is entitled to judgment and costs if he gets a verdict on his cause of action. If the amount of one verdict overtops that of the other, the winner of the greater verdict gets judgment for the balance. All that is perfectly intelligible, and a party is not to be deprived of the costs of successfully proving his case merely because his opponent has proved a distinct claim against him which happens to be a little larger in amount.

This, however, is a perfectly different case. Look at the findings of the referee, for this is an application to us to enter judgment properly upon them. He awards to the plaintiff 32*l.* 18*s.* 6*d.*, and to the defendants 34*l.* 10*s.* 6*d.*—that is to say, a rather larger sum to the defendants than to the plaintiff, and he tells us the ground on which he does so. He says that by reason of the imperfect negligent way in which the plaintiff did the asphalting work, the defendants are entitled against him to recover this larger sum. He gives this extra 1*l.* 12*s.* to the defendants because the plaintiff did his work so badly that the defendants have had to spend more in materials and labour to put it right than he ought to be paid for doing it. It seems to me, therefore, that the defendants have an answer in this which is a ground of defence to the plaintiff's own claim, and one which arises directly he tries to enforce his claim.

I think that there should be entry of judgment for the defendants for 1*l.* 12*s.* and costs.

I also think that the case falls within

(1) 50 Law J. Rep. Q.B. 465; Law Rep. 6 Q.B. D. 691.

(2) Law Rep. 4 C.P. D. 459.

Lowe v. *Holme.*

Order LV., so that under it we can give the defendants their costs as a matter of discretion, and the Court accordingly do give them to the really successful party.

NORTH, J. — I agree. The plaintiff claimed a certain sum of money for work done under a contract with the defendants; and the defendants say in their defence, "You did the work so badly that we have had to spend more money than the amount of your claim in making your bad work good." That is a complete defence, and shews that the action should never have been brought. The case of *Baines* v. *Bromley* (1) does not apply. The question there was, whether the taxation upon the judgment which had been entered by Mr. Baron Cleasby was right; but here we are not considering the mode of taxation under a given judgment, but the mode of entering judgment upon certain findings. It should, in my opinion, be for the defendants for the balance 1*l.* 12*s.* and costs.

Judgment accordingly.

Solicitors—Pritchard, Englefield & Co., agents for John Leigh, Manchester, for plaintiff; Morley & Shireff, agents for Snowball, Smith & Co., Liverpool, for defendants.

1883. March 8.

RICHARDS *v.* MAY.

Building Contract, Construction of—Powers of Surveyor named in Building Contract—Certificate as to Extras and Omissions.

A contract for the building of some houses by the plaintiff for the defendant contained the clause "all extras payment for which the contractor shall become entitled to under the conditions shall be paid at the prices as shall be fixed by L., the surveyor appointed by the proprietor." One of the conditions attached to the contract said, "The contractor to be paid on the certificate of surveyor, at the surveyor's discretion, during the progress of the works, in payments on account of the rate of eighty-five per cent. value of works executed, and the balance of such contract to be paid on completion of works to surveyor's satisfaction."

On completion of the works the surveyor gave a certificate, in which the plaintiff was allowed a certain sum for "extra work measured and valued":—

Held, *that such certificate was conclusive against the parties, not only as to the prices, but also as to whether the items for which such prices were allowed were extras or not.*

This was a Special Case stated by an official referee under Order XXXV. rule 34, to obtain the opinion of the Court upon a question arising during the trial before him.

The action was brought by a builder to recover from the defendant the balance certified to be due to him in respect of the erection of two houses, under a contract containing, among others, the following clauses:—

"1. The proprietor does hereby engage the contractor to construct and do, and the contractor does hereby agree to construct and do, all and every the works mentioned, described and set forth in the drawings Nos. 1 and 2 and the specification, which have been prepared by Mr. S. J. Lethbridge, and have been signed by him and by the contractor, or reasonably to be inferred therefrom in accordance with the conditions attached to these presents, for the sum of 3,525*l.*, to be paid by the proprietor to the contractor, in the manner and at the time mentioned in the said conditions.

"4. All extras or additions, payment for which the contractor shall become entitled to under the said conditions, and all deductions which the proprietor shall become entitled to, shall be respectively paid or allowed for at the prices as shall be fixed by Mr. S. J. Lethbridge, the surveyor appointed by the proprietor."

"Conditions of Contract.

"15. The contractor to be paid on the certificate of surveyor, at the surveyor's discretion, during the progress of the works, in payments on account of the rate of 85 per cent. value of works executed, and the balance of such contract to be paid at the completion of works to surveyor's satisfaction."

During the progress of the works the

Richards v. *May*.

defendant paid to the plaintiff, upon the certificates of the surveyor, sums amounting to 2,800*l.*, and after the completion of the works the surveyor gave to the plaintiff a final certificate in writing, as follows:—"I hereby certify that in my opinion Mr. Richards is entitled to receive the sum of 875*l.* in settlement of contract, and for extras and omissions, for erecting two houses, &c., such extras and omissions having been measured and valued by the surveyor.

(Signed) "S. J. Lethbridge,
"Surveyor."

"To amount of contract		£3,525
Received on account of certificates		2,800
Balance due on contract		£725
Extra work measured and valued	£431	
Omission do. do.	281	
		150
Balance due		£875

Certificate granted for same as above."

The question for the opinion of the Court was whether the certificate was final and conclusive against the defendant as to the amount thereby stated to be due from him.

Yelverton, for the plaintiff.—The parties have constituted the surveyor the judge between them; he is, by the express terms of the contract, to fix the price of the extras; he must therefore be empowered to decide what comes within the term "extras," and should be allowed for as such.

S. Woolf, for the defendant.—There are no express words saying that this certificate is conclusive. The defendant is entitled to investigate the items, and he ought to be allowed to shew, if he can, that many of them described as extras and omissions are really not so. I admit that he cannot dispute the price of each item as fixed by the surveyor; but there is the preliminary question, whether each item is one which the surveyor has any power to price—that is, whether it is an extra or omission.

He referred to *Goodyear* v. *The Mayor of Weymouth* (1) and *Westwood* v. *The Secretary for India* (2).

(1) 35 Law J. Rep. C.P. 12.
(2) 7 Law Times, N.S. 736.

CAVE, J.—I am of opinion that the plaintiff is entitled to our judgment upon the question raised in this case. The question is, shortly, whether the certificate of the surveyor is conclusive, not only as to the prices which he has allowed in respect of certain items, but also in deciding whether certain items under the head of extras which he has allowed as such are extras. The important clause in the contract is No. 4, which says that all extras shall be paid for at the prices fixed by the surveyor. That undoubtedly gives him the power to fix the price of each item, and I think it impliedly empowers him to decide what are extras to this contract. There is no other clause shewing how extras are to be ascertained, and it cannot have been intended that the parties should resort to an action to determine what are extras, and then go back before the surveyor to have the price fixed to each item. It seems, therefore, to me that by necessary implication the parties have agreed that the surveyor should decide this point, and so his certificate is conclusive and binding on the defendant.

DAY, J., concurred.

Judgment for plaintiff.

Solicitors—W. A. Smith, for plaintiff; Hogan & Hughes, for defendant.

1883. Jan. 26.

HUMMINGS *v.* WILLIAMS.

Practice—Rules of Supreme Court, 1875, *Order XXXI. rules* 1, 5 *and* 10—*Interrogatories—Action for Penalties.*

The Judicature Acts and Rules have only altered the procedure and not the rights of parties, and interrogatories will not be allowed in cases where, as when a penalty is the gist of the action, the Court of Chancery before those Acts would not have allowed interrogatories to be administered.

This was an appeal from Master Butler, referred by Mathew, J., at chambers to the Divisional Court.

Hummings v. *Williams.*

The plaintiff brought an action against the defendant under section 54 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120) (1), as a vestryman who, "being concerned or interested in a contract or work made with or executed for his board or vestry," had become disqualified to act, but being so disqualified had acted as such vestryman. The plaintiff administered interrogatories, which the defendant refused to answer. The plaintiff then took out a summons to shew cause why the defendant should not answer on oath. The Master made an order directing that the defendant do make answer on oath. Against this the defendant appealed.

R. Vaughan Williams.—The defendant is not bound to answer where the whole gist of the action is for penalties. The principle on which the rule in ejectment—that though you may have discovery of documents you may not interrogate—is founded, applies to cases of actions for penalties. *Lyell* v. *Kennedy* (2) establishes that the effect of the Judicature Act is only to alter procedure and not the rights of parties. The cases decided before the Judicature Act as to the rights of parties are still binding. Therefore, to see when interrogatories should now be allowed, it is necessary to consider in what cases they would formerly have been allowed in a Court of equity. The allowance of interrogatories depends on whether the penalty is the gist of the action or is only involved in it with other matters that admit of interrogatories—*Chadwick* v. *Chadwick* (3), *Story on Equity Pleading* (4), *Day's Common Law Procedure Act* (5), *May* v. *Hawkins* (6), *Horton* v. *Bott* (7), *Pye* v. *Butterfield* (8) and *The United States of America* v. *McRae* (9).

In *Fisher* v. *Owen* (10) interrogatories could be administered as to some things, and when that is so the proper course is to object in answer. The rule in equity had nothing to do with the particular interrogatory, but went to the whole suit—*Atherly* v. *Harvey* (11).

Lumley Smith, Q.C. (with him *Edward Pollock*).—The words of Order XXXI. rule 1 (12), are perfectly general. And rule 5 (12) says that any objection must be taken in the affidavit in answer. Since *Fisher* v. *Owen* (10), rule 5 (12) has been altered by the Rules of the Supreme Court, November, 1878, rule 3 (12), and the only

(1) 18 & 19 Vict. c. 120. s. 54: "In case any member of the Metropolitan Board of Works, or of any district board of works, or of any vestry for any parish mentioned in schedule (A) or (B) to this Act . . . . in any manner be concerned or interested in any contract or work made with or executed for such board or vestry, in every such case such person shall cease to be such member or auditor as aforesaid . . . . and any person who acts as a member of any such board or vestry, or as auditor of the accounts thereof, after ceasing to be such member or auditor as aforesaid . . . . shall for every such offence be liable to a penalty of fifty pounds, which may be recovered by any person who may sue for the same in any of the superior Courts of law with full costs of suit . . . ."

(2) 51 Law J. Rep. Chanc. 409; Law Rep. 20 Ch. D. 484.

(3) 2 Atk. 241; 2 Ves. 492; 22 Law J. Rep. Chanc. 330.

(4) Story's Equity Pleading, 7th ed. 470 *et seq.*

(5) Day's Com. Law Proc. Act, 1854, 3rd ed., 4th ed., p. 306.

(6) 11 Exch. Rep. 213.

(7) 2 Hurl. & N. 253; 26 Law J. Rep. Exch. 297.

(8) 5 B. & S. 829; 34 Law J. Rep. Q.B. 17.

(9) 36 Law J. Rep. Ch. Ch. 722; Law Rep. 4 Eq. 337.

(10) 47 Law J. Rep. Chanc. 681; Law Rep. 8 Ch. D. 645.

(11) 46 Law J. Rep. Q.B. 518; Law Rep. 2 Q.B. D. 5.

(12) Order XXXI. rule 1: "The plaintiff may, at the time of delivering his statement of claim, or at any subsequent time not later than the close of the pleadings, and a defendant may, at the time of delivering his defence, or at any subsequent time not later than the close of the pleadings, without any order for that purpose, and either party may at any time, by leave of the Court or a Judge, deliver interrogatories in writing for the examination of the opposite party or parties, or any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose."

Rule 5: "Any party called upon to answer interrogatories, whether by himself or by any member or officer, may, within four days after service of the interrogatories, apply at chambers to strike out any interrogatory, on the ground that it is scandalous or irrelevant, or is not put *bona fide* for the purpose of the action, or that

ground on which application may be made to strike out an interrogatory is that it is unreasonable or vexatious. Here the Master has made an order under rule 10 (12).

The old practice is altered by the Judicature Act, which dispenses with the leave formerly necessary to interrogate and demurrers to bills of discovery. In *Lyell* v. *Kennedy* (2) the defendant had answered and objected. That is all we want the defendant to do in this case. In *Scott* v. *Miller* (13) it was held that the party interrogated must swear to his belief.

The penalty given by 18 & 19 Vict. c. 120. s. 54, is not criminal, and comes within *Pye* v. *Butterfield* (8).

Williams, in reply.—The words in the statute are, "for every such offence shall forfeit."

MANISTY, J.—This is an action to recover a sum of money from the defendant by way of penalty for his having voted as a vestryman while having an interest in a certain contract to which the vestry were parties. The plaintiff administered interrogatories to the defendant, who however did not answer them; whereupon the plaintiff obtained an order calling on the defendant to answer. The defendant appealed to Mr. Justice Mathew at chambers, who referred to this Court the question whether in an action solely for penalties interrogatories could be administered. It was contended for the defendant that in such a case there is no right of interrogating, and he depends on the case of *Chadwick* v. *Chadwick* (3), as shewing that unless there has been an alteration of the law since that case was decided, the Court of equity would not allow interrogatories "where the sole object is to convict and not any incident discovery." *Story's Equity Pleading* (4) and *Day's Common Law Procedure Act* (5) were relied on also as shewing that when the gist of the action is penalties there was no right to interrogate. But it was argued for the plaintiff that the Judicature Acts have altered this practice, and the case of *Fisher* v. *Owen* (10) was quoted as an authority for the plaintiff. The defendant, however, contends that that case is distinguishable from this, in that *Fisher* v. *Owen* (10) was a case in which for some purposes interrogatories might be administered, and the question only arose as to one or more interrogatories among a number. *Lyell* v. *Kennedy* (2), quoted by the plaintiff, decided since the Judicature Act, shews clearly that the Judicature Act only altered the procedure and not the law. That case is binding on us, and I think it would be a strange proceeding to order a man to answer, if he may, as I think he might, rightly refuse to answer at all any interrogatories. This appeal should be allowed.

STEPHEN, J.—I am of the same opinion. The words of Order XXXI. rule 1 (12), are perfectly general, and, omitting the particulars as to time, &c., read thus: "A plaintiff or defendant may deliver interrogatories to the opposite parties." According to the 5th rule of this Order before its repeal by the Rules of the Supreme Court, November, 1878, rule 3, it was necessary to apply in chambers to strike out any interrogatory on the ground that it was scandalous or irrelevant or not put *bona fide* for the purposes of the action, or of non-materiality, or on any

the matter enquired after is not sufficiently material at that stage of the action, or on any other ground. And the Judge, if satisfied that any interrogatory is objectionable, may order it to be struck out."

R. S. C. Nov. 8, 1878, rule 3: Rules 5 and 8 of Order XXXI. are hereby repealed; the following rule is substituted for the same:—

"Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bona fide* for the purpose of the action, or that the matters enquired into are not sufficiently material at that stage of the action, or on any other ground, may be taken in the affidavit in answer.

"An application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories, on the ground that it or they is or are scandalous, may be made at chambers within four days after service of the interrogatories."

Rule 10: "If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Judge may direct."

(13) 28 Law J. Rep. Chanc. 584.

other ground. Then the case of *Fisher* v. *Owen* (10) was decided, which was the cause of the new rule that directs that the objections which before required an application at chambers were to be taken in the affidavit, and substantially enacts that if you object to an interrogatory on the ground that it is scandalous, irrelevant or not put *bona fide* for the purpose of the action, you must object in your affidavit in answer; but that if it be objected to as unreasonable or vexatious, application to strike it out must be made at chambers. It was argued for the plaintiff that there was no restriction by the words of the rule to the right of a party to interrogate; but I am of opinion that *Lyell* v. *Kennedy* (2) shews that the old law as to the admissibility of interrogatories in such cases as this is not altered. The effect of this is that the words in rule 1 (12) have attached to them a sort of technical meaning, and the rule is modified by implication, as though the words "whensoever the Court of Chancery would have allowed interrogatories" were added to it. The authorities seem to establish some such rule as this—When the whole object is to obtain a penalty, no interrogatories are allowed; but in other cases, where there is some other object allowing of interrogatories being administered, the person interrogated cannot refuse to answer, but must take the objection in his answer. I cannot say that I think it is very clear, but I cannot construe the later cases without putting some such strained construction on the Judicature Act and Rules.

Appeal allowed. Defendant's costs in any event.

Solicitors—Angell, Imbert, Terry & Page, for plaintiff; Clapham & Fitch, for defendant.

1883. Feb. 27. } WESTFIELD *v.* THE GREAT WESTERN RAILWAY COMPANY.

Carrier—Consignor and Consignee—Contract of Carriage—Special Condition—Lien—Refusal of Consignee to accept Goods.

The plaintiff consigned certain goods for carriage by the defendant company to the consignee's address. The consignment note, which was signed by the plaintiff, contained a condition that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges," &c.:—Held, *that the lien continued so long as the company held the goods, and was in no way affected by the refusal of the consignee to accept the goods after they had arrived at their destination.*

Appeal from a decision of the Judge of the High Wycombe County Court.

The plaintiff was trustee under the liquidation of a person named Collins, who had carried on business at High Wycombe as a chair manufacturer under the firm name of "W. H. Collins & Son."

Prior to the liquidation Collins consigned three parcels of goods to consignees at Cheltenham, Banbury and Grimsby.

With respect to each parcel he signed a consignment note, headed "Consignment of goods to be carried at owner's risk," and containing the following condition: "All goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges; and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods, the same will be sold by the company by auction or otherwise, and the proceeds of sale will be applied to the satisfaction of such lien and expenses."

The consignment notes in each case stated that the carriage was to be paid by the consignee.

The goods were refused by the respective consignees, and remained in the hands of the defendant company, who refused to deliver them up to the plaintiff, claiming

to retain them under their general lien in respect of an account rendered to the plaintiff subsequent to the conveyance of the goods in question.

The plaintiff thereupon sued the defendants in the High Wycombe County Court for 33*l.*, the value of the goods, and damages for their detention.

The County Court Judge gave judgment for the plaintiff for 33*l.*, and 2*l.* damages for the detention.

The defendants appealed.

Fitzroy Cowper shewed cause.—The defendants are not entitled to claim any lien upon these goods as against the plaintiff. The contract in question was not with the consignor, but with the consignees. It was entered into by the consignor as agent for the consignees for that purpose—See *Dawes* v. *Peck* (1) and *The Cork Distilleries Company* v. *The Great Southern and Western Railway Company* (2). But even if the right of lien ever existed as against the plaintiff, such right was determined as soon as the contract of carriage was at an end by reason of the refusal of the consignees to accept the goods. *Heugh* v. *The London and North Western Railway Company* (3) shews that after such refusal the company held as involuntary bailees and not as carriers. The lien could only last so long as the goods were held by the defendants as carriers, which is the true interpretation of the condition upon the carriage note.

J. Digby appeared in support of the rule, but was stopped by the Court.

HUDDLESTON, B.—I entertain no doubt here that the contract was between the plaintiff and the defendants, and must be construed in accordance with the conditions and regulations which are contained in the consignment note, one of which is as follows: "All goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges; and in case the general lien is not satisfied within a reasonable time from the day when the company first received the goods the same will be sold by the company by auction or otherwise, and the proceeds of sale will be applied to the satisfaction of such lien and expenses." The contract is in existence so long as they carry and hold the goods, and the lien claimed by the company must therefore prevail. If the principle contended for on behalf of the plaintiff were allowed to prevail, it would entail great hardship and inconvenience. What reasons can there be for so construing this contract as to enable a consignee by some act of his for which the defendants are in no way responsible to deprive the defendants of their lien and thus defeat the very object of the conditions and regulations which formed part of the contract between themselves and the plaintiff? I think that the judgment of the County Court Judge was wrong, and that this appeal must consequently be allowed.

NORTH, J.—I am of the same opinion.

Rule absolute.

Solicitors—A. T. Cox, agent for Clarke, High Wycombe, for plaintiff; R. Nelson, for defendants.

(1) 8 T.R. 330; 3 Esp. 12.
(2) Law Rep. 7 H.L. Cas. 269 (Irish).
(3) 39 Law J. Rep. Exch. 48; Law Rep. 5 Exch. 51.

[IN THE COURT OF APPEAL.]

1883. March 16, 19. } CHAMBERLAIN *v.* BOYD.*

Slander—Words not Actionable without Special Damage—Insufficiency of Damage alleged—Remoteness.

The plaintiff, in a statement of claim in an action for damages for slander for defamatory words not in themselves actionable spoken of him by the defendant, alleged that the defendant was a member of a club for which the plaintiff had been rejected, that there had been a proposal to alter the rules as to the election of members to the club, that after this proposal had been made the defendant had falsely and maliciously spoken the words complained

* *Coram* Lord Coleridge C.J.; Brett, L.J., and Bowen, L J

of by which he "induced or contributed to induce a majority of the members of the club to retain" certain regulations under which the plaintiff had been rejected when a candidate for membership of the club, "and thereby prevented the plaintiff from again seeking to be elected to the said club," whereby he "lost the advantage which he would have derived from again becoming a candidate with a chance of being elected," and suffered in his reputation and credit. On demurrer to this statement of claim,— Held, *that the words not being in themselves actionable, the statement of claim did not disclose any cause of action, for that there was no allegation of any sufficient legal special damage, nor was the alleged damage the natural, direct and reasonable consequence of the words spoken.*

Appeal by the defendant from the judgment of Field, J., disallowing a demurrer to paragraphs 4, 5 and 7 of the following statement of claim :—

1. In May, 1882, the plaintiff, together with his brother Walter Chamberlain, was a candidate for membership of the Reform Club.

The defendant was a member of the said club.

2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

3. Subsequent to the said ballot a meeting was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

4. With a view to retaining the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say, "the conduct of the Messrs. Chamberlain" (meaning the plaintiff and his said brother) "was so bad at a club in Melbourne that a round-robin was signed urging the committee to expel them. As, however, they were there only for a short time the committee did not proceed further" (meaning thereby that the plaintiff had been guilty of conduct which would justify his expulsion from a club in Melbourne, and which unfitted him for membership of the Reform or any other similar club).

5. The plaintiff says that the defendant falsely and maliciously spoke and published of the plaintiff the words above set out, substituting the word Adelaide for Melbourne, meaning thereby as in the said paragraph mentioned.

6. The plaintiff further says that the defendant falsely and maliciously wrote and published, or caused to be written and published, of the plaintiff, together with his said brother, the words in paragraph 4 set forth (meaning thereby as in the said paragraph mentioned).

7. By reason of the said defamatory publication the defendant induced, or contributed to induce, a majority of the members of the said club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage which he would have derived from again becoming a candidate, with a chance of being elected, and the plaintiff suffered in his reputation and credit. The plaintiff claims 5,000*l.*

The defendant demurred to paragraphs 4, 5 and 7 of this statement of claim on the ground that they were bad in law, so far as oral slanders were therein alleged, on the ground that no cause of action was therein disclosed, and that there was no sufficient allegation of damage.

Field, J., disallowed the demurrer.

The defendant appealed.

Russell, Q.C., and *Houghton*, for the appellant.—The statement of claim discloses, as far as the oral slander is concerned, no ground of action. There is no sufficient allegation of special damage to make words actionable which are not in themselves actionable. The allegation of the special damage alleged is not connected with the alleged slander and is too remote. These words were not spoken of the plaintiff in respect of his trade or profession, and the question of motive has no bearing on the case, unless if and when it should become necessary to consider the question of malice.

The damage alleged is too remote; there

is no allegation that the plaintiff intended to be a candidate; it is not averred that the substituted tribunal would have been more favourable to him, or that he would have a better chance; all that he seems to hint at is a possibility on a possibility if he possibly took a certain course.

[LORD COLERIDGE, C.J. — Since the Judicature Act we must not too slavishly follow the mere words if we can reasonably see what the pleader could reasonably mean; and, if necessary, an amendment could be made.]

None has yet been applied for, but no amendment could be made which could avail the plaintiff. It is not shewn that the non-alteration of the rules was caused by the defendant; to render him liable, what was done must be the reasonable probable direct consequence of his words, and the damage suffered must be a positive loss of temporal pecuniary benefit—*Vicars* v. *Wilcox* (1), *Lynch* v. *Knight* (2), *Roberts* v. *Roberts* (3) and *Davies* v. *Solomon* (4) were cited.

The Attorney-General (*Sir H. James, Q.C.*) and *Crump*, for the plaintiff.—Demurrers are not favoured since the Judicature Act, and a demurrer is idle unless it is set up in answer to a pleading every part of which is bad; for unless a demurrer puts an end to the action it only leads to useless expenditure of costs—*Leyman* v. *Latimer* (5).

In a declaration or statement of claim the principle is that the pleading will be allowed if by any reasonable intendment it can be made to establish a cause of action: in a plea or statement of defence it is different; but this claim sets up what may be a cause of action, and that is enough.

No doubt special damage must be shewn, but that is established, for anything which may be a temporal advantage will if lost constitute special damage.

[LORD COLERIDGE, C.J.—Loss *consortium vicinorum* is not enough.]

If by such words a man was prevented from being elected to Parliament, that would be special damage; if at a test ballot a man was in this way prevented from being selected as a candidate for a constituency he could maintain an action; so also if he were prevented from being a candidate for the Civil Service.

[BRETT, L.J.—In two of these hypotheses there is more than a mere chance of election.]

[BOWEN, L.J.—The allegation is that the "defendant induced or contributed to induce." Now if one of these alternatives is bad what is the effect?]

The contention is that both are good, and that whether it is as put in the statement of claim, or whether the words were "and caused," there is no difference.

[LORD COLERIDGE, C.J.—But the plaintiff himself caused his own loss. Is it not too remote, as in *Ashley* v. *Harrison* (6)?]

Russell, Q.C., in reply.—The hypothetical cases suggested do not assist the plaintiff, for the cases of Parliamentary candidature do not refer to any temporal material pecuniary damage, granting that in one of those cases there might be a definite event produced of necessity by the words spoken; as to the Civil Service, it might be that the words would be held to be spoken of a man in his profession or employment. To contribute is not to cause; but if it were, the statement of claim would still be bad.

Knight v. *Gibbs* (7) was cited.

LORD COLERIDGE, C.J.—Several points have been raised in this case, some of which depend upon mere verbal criticism, while others raise matters of substance. If I thought there could be any use in dealing with minute criticisms on the language of the statement of claim I would do so, as I am of opinion that some of these criticisms would prove not to be well founded if such amendments as have been suggested were to be made as they could be made; while others are, I think, well founded. But whether the objections be well or ill founded, an amendment would, if anything turned upon such verbal alterations, be made at once at any stage

(1) 8 East, 2.
(2) 9 H.L. Cas. 577.
(3) 5 B. & S. 334; 33 Law J. Rep. Q.B. 249.
(4) 41 Law J. Rep. Q.B. 10; Law Rep. 7 Q.B. 112.
(5) 47 Law J. Rep. Exch. 470; Law Rep. 3 Ex. D. 352.
(6) 1 Esp. 48.
(7) 1 Ad. & E. 46.

of the action at which it was necessary, and the fault of the pleading would thus be cured; so that it is not, in my opinion, worth while to deal with merely verbal criticisms of details in the statement of claim.

I base my decision upon two grounds. I assent to the proposition which has been advanced on behalf of the defendant that this statement of claim does not shew any damage in respect of which the law allows an action to be brought. Taking it most favourably for the plaintiff it amounts to this—that the defendant maliciously spoke certain words whereby the existing mode of election of members to a London club was retained instead of being altered, in consequence of which the plaintiff thought that his chance of being elected would be less than it would be if the mode of election were changed. That is the outside statement which the plaintiff can make, and I am clearly of opinion that it would be dangerous to extend the grounds on which actions for defamatory words not in themselves actionable are allowed, to a damage so shadowy, so uncertain, so non-estimable in point of money as that which is alleged by this statement of claim. It is acknowledged that this is a new case, and that there is no direct authority exactly in point; but it seems to me to be contrary to the principles on which the decisions have hitherto been based, and that it is not desirable to extend the limits laid down by those decisions, and therefore that this demurrer must be sustained.

I also base my decision upon another ground. I do not think that the alleged result was the natural and reasonable result of the words spoken. The allegation is that words derogatory to the character of the plaintiff were spoken with respect to something which is supposed to have occurred in Australia. Assuming that the members of the club believed that the charge was true, I do not believe that the members of a London club would be influenced in their decision as to the manner in which they should elect members in future by their belief in such a statement as this. It would, I think, be irrational to suppose that a body of men would be so influenced; different considerations would influence them in such a matter—in a political club political considerations might have an influence, in a social club social considerations would have an influence; but the allegations contained in this statement of claim bring it, as it seems to me, distinctly within the authority of the judgment of Lord Campbell in *Lynch* v. *Knight* (2); and therefore I am of opinion, on this broad ground also, that this demurrer must be allowed, and that this appeal must succeed.

BRETT, L.J.—I cannot feel any sympathy with this demurrer; but I am of opinion that if all the allegations contained in this statement of claim were fully proved at the trial, still the plaintiff ought in this case to be nonsuited. What the plaintiff intends to allege in this case is that the defendant spoke certain words with intent to injure the plaintiff, and that by the use of those words he persuaded the majority of the Reform Club to refuse to alter the mode of election and to insist upon retaining the existing mode of election; but I will go further, and I will assume that it could be proved the defendant uttered the words with the object and effect alleged, and that if the mode of election had been changed, that the committee to whom the election of members was under the proposed change to be committed, which committee would itself be elected by the members of the club—that that committee would, although it believed that the derogatory words spoken of the plaintiff were true, yet elect him a member of the club, although the club itself had, according to the old system of election, declined to do so; and I will further assume that the fact that the majority of the club refused to alter the system of election was the fact which induced or caused the plaintiff not to be again a candidate for election. Assuming all this to be proved, I am, I repeat, of opinion that it would be the duty of the Judge at the trial to nonsuit the plaintiff. It is alleged that the plaintiff was thus prevented from offering himself as a candidate for election; but such an injury is too vague and shadowy to be such damage as will in point of law turn derogatory words into legal slander such as will

support an action. The main foundation of my judgment is, that if it were proved that the actual effect of the words spoken was to cause the injury alleged, still that the injury is not sufficiently the result of the words so as to make them actionable. It is not proved and cannot be proved that the act complained of was the "natural, probable and direct consequence of the imputation," to use the words of Lord Campbell in *Lynch* v. *Knight* (8). Lord Wensleydale in the same case said (9), "that to make words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words;" and the editors of *Smith's Leading Cases* add that, "in reason and common sense," there must be a "connection between the imputation levelled at the plaintiff, and the damage said to have been the result of it"; and "that words for which an action is maintainable must have in common sense and reason some connection with the damage said to have ensued from them." Those are three different forms of expressing the proposition within which I think this case falls.

Now, assuming that the majority of the club were induced to act, as it is alleged they were, and that it were proved that they in consequence refused to alter the mode of election, still I say that the consequence alleged is palpably fanciful, and that it is not the natural, probable, reasonable result of the derogatory words spoken. To suppose otherwise would be, in my opinion, to charge the members of this club with an amount of fancifulness which one can hardly conceive. To assume that for the reasons alleged the members of this club refused to alter the rules, or to assume that if a majority of the club did alter the rules, a committee of the club elected by that majority would, though believing the derogatory words to be true, come to a different conclusion, and would elect as a member a candidate previously rejected, appears to me to be certainly fanciful, if not absurd. In order, therefore, to arrive at that special damage which is in law required to sustain this action, it is necessary to make one's way through two fantastic, unreasonable and improbable contentions, so that the case falls within the authority of *Lynch* v. *Knight* (2); and I am of opinion that the action cannot be maintained, that the demurrer must be allowed, and that there must be judgment for the defendant on this appeal.

BOWEN, L.J.—I am of the same opinion, and I decide this case on no ingenious verbal criticism of what a pleader has said or what he has intended to say. The Court has, since the passing of the Judicature Act, large powers of amendment, and it would be sad at this time of the legal day could we not, and did we not, make all such amendments as may be necessary to brush away all the fringe which may obscure the case, and thus enable us to get at the real meaning of the pleading. But assuming an amendment to be made, in no view of the case could the pleader, in my opinion, make out a cause of action. It is obvious, as it seems to me, that this declaration can disclose no legal liability on the part of the defendant; for even assuming all the facts alleged in it to be true, still the Judge would be bound to nonsuit the plaintiff at the trial, so that there would be no advantage gained by allowing this case to go to trial.

The gist of this action is, that the defendant uttered words which induced, or contributed to induce, a majority of the members of a club not to alter certain rules, whereby the plaintiff was prevented from again seeking to be elected a member of the club.

Assume this to be true, still there is no such loss of temporal profit or benefit as would render actionable, words in themselves not actionable. The allegation is not even that the defendant by uttering the words actually prevented the election of the plaintiff to a London club; if that were the allegation one would have to consider whether it would sustain an action. I do not now say that it would not. But the weak point in this statement of claim is that there is and could be

(8) 9 H.L. Cas. at p. 590.
(9) Ibid. at p. 600.

no such allegation. I do not think that the statement of claim alleges that the defendant prevented the alteration of the rules of the club, and if it is carefully scanned I am not sure that it alleges that he, or what he said, had any substantial effect on the votes of the majority. I am of opinion that this cloudiness was of purpose allowed to remain, and thus to render obscure this vital allegation. But, as I have said, supposing that one can get over this and can go to the heart of the matter, and assuming that the vote of the majority was substantially affected by the words spoken by the defendant, still it does not follow that the plaintiff would have been elected by the committee which it was proposed to substitute for the existing electoral body, nor indeed does the statement of claim so say; and if the defendant did not deprive the plaintiff of all chance, but only of a chance, or of a chance of a chance, we must be careful to see what it is the statement of claim really means, and what the real cause of action is which it asserts.

Putting the case most strongly in favour of the plaintiff, all it comes to is that the defendant brought the plaintiff within the operation of a cause which might or might not affect his election. This goes far beyond the limit laid down by the law; the chance of an advantage is not an advantage, and the chance of an injury is not equivalent to the injury itself; if it were so, then the limit fixed by the law as to damage necessary to support an action for spoken words not in themselves actionable would be idle.

I also agree that the damage is too remote, as if it were proved as laid in this statement of claim, it still would not be the natural and reasonable result of the words spoken by the defendant; but on this point I do not wish to add anything to what has been said by the other members of the Court.

Appeal and demurrer allowed.

Solicitors—Lewis & Lewis, for plaintiff; Johnsons, Upton, Budd & Atkey, for defendant.

[IN THE COURT OF APPEAL.]

1883. Feb. 20.

PAINE *v.* SLATER.*

Practice—Mayor's Court—Removal of Judgment from Mayor's Court into Superior Court—Execution—Mayor's Court Act, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 48—35 & 36 *Vict. c.* 86. *s.* 6—*Schedule, clause* 9.

The provisions of section 6 *of* 35 & 36 *Vict. c.* 86, *by which a final judgment obtained in any action in a Court of Record for a sum not exceeding* 20*l.*, *exclusive of costs, may be removed into any County Court for the purpose of execution, and the provisions of clause* 9 *of the schedule to that Act, by which any final judgment obtained for not less than* 20*l.*, *exclusive of costs, may for the same purpose be removed into the Superior Court, are not inconsistent with, and therefore do not repeal section* 48 *of the Mayor's Court Act*, 1857, *whereby a judgment obtained in the Mayor's Court for any sum, whether over or under* 20*l.*, *may be removed into the Superior Court for the purposes of execution.*

Appeal by the defendant from the refusal of the Divisional Court (Denman, J., and Manisty, J.), to set aside the entry in the High Court of Justice of a judgment recovered in the Mayor's Court and the execution thereon.

The plaintiff had recovered judgment for 12*l.* odd in the Mayor's Court, London, and thereupon removed the same for the purposes of execution into the High Court, under the provisions of 20 & 21 Vict. c. clvii. s. 48 (1). The defendant took out a

* *Coram* Brett, L.J.; Cotton, L.J., and Bowen, L.J.

(1) 20 & 21 Vict. c. clvii. s. 48: "In every case where final judgment shall have been obtained in the Mayor's Court . . . . any writ of execution upon such judgment . . . . shall be sealed by the sealer of writs of any of the Superior Courts, upon a precipe of the same being lodged with him, together with an affidavit verifying the judgment, . . . and that the same remains unreversed and unsatisfied; and immediately thereupon such writ of execution and such judgment . . . . shall become and be of the same force, charge and effect as a writ of execution or judgment recovered in . . . . such Superior Court . . . : provided always that no such judgment . . . . when so removed as afore-

summons to set aside the entry of the judgment and execution in the High Court, upon the ground that the judgment, being for less than 20*l.*, ought to have been removed into the County Court and not into the High Court.

Day, J., at chambers, referred the application to the Court, who refused the same.

The defendant appealed.

Proudfoot (with him *Mirams*), for the defendant.—Under the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), s. 48, a successful party could remove a final judgment into the Superior Court, irrespective of the amount actually recovered. But by the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 6 (2), in all cases where final judgment shall have been obtained in any action brought in the Court wherein the debt or damage does not exceed 20*l.* exclusive of costs, such Court shall be at liberty to send a writ or precept for the recovery of the same to the Registrar of any County Court within the jurisdiction of which the defendant may possess any goods or chattels. Then by clause 9 of the schedule to the Act, in all cases where final judgment shall have been obtained in any action in the Court where the sum recovered, exclusive of costs, is not less than 20*l.*, any Judge of the Superior Court may direct such judgment to be removed to the Superior Court, and the judgment, when so removed, will have the same effect as a judgment recovered in the Superior Court. Section 6, coupled with clause 9, which has been applied to the Mayor's Court by an order in Council made under section 2, is wholly inconsistent with, and has therefore repealed, section 48 of the Mayor's Court Act, which gives unlimited power to transfer any final judgment into the Superior Court for the purposes of execution. A judgment for less than 20*l.* can therefore only be removed into a County Court, and not into the Superior Court.

[BRETT, L.J.—The words of section 6 of the Act of 1872 are affirmative, and not negative; and would give power, if the rules are applicable to the Mayor's Court, to send a judgment which is under 20*l.* to any particular County Court in which it may be desired that the judgment should be executed.]

Richard Nevill, for the plaintiff, was not called on.

BRETT, L.J.—The only question is, whether section 48 of the Mayor's Court Act, 1857, has been repealed or not. It was asserted that it was repealed by the Act of 1872; but it certainly has not been repealed in express terms, so that it must come within some rule as to repeal by implication. A statute can only be im-

said, shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, any further than the same would have done if the same had remained a judgment . . . . of the Mayor's Court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same."

(2) 35 & 36 Vict. c. 86. s. 6: "In all cases where final judgment shall have been obtained in any action brought in the Court wherein the debt or damage does not exceed 20*l.*, exclusive of costs, . . . such Court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any County Court within the jurisdiction of which the defendant may possess any goods or chattels; and the registrar of such County Court shall stamp or seal the same, and thereupon the high bailiff of such County Court shall execute the same in the same manner as if such writ or precept had been issued out of such County Court. . . ."

Schedule, clause 9: "In all cases where final judgment shall be obtained in any action brought in the Court where the sum recovered, exclusive of costs, is not less than 20*l.* . . . it shall be lawful for any Judge of any of the Superior Courts, either in term or vacation, upon the application of any person entitled to the benefit of such judgment . . . . and upon the production of such judgment . . . . under the seal of the Court and signature of the proper officer, to direct such judgment . . . . to be filed with the clerk of the judgments of one of the Superior Courts, and thereupon such judgment . . . . shall be of the same effect as a judgment recovered in . . . . such Superior Court, and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered . . . . had been originally recovered in or made by the Superior Court; and all the reasonable costs and charges of such application and removal shall be recovered in like manner as if the same were part of such judgment."

By an order in Council, dated June 26, 1873, published in the *Gazette* of the 27th of June, the provisions of clause 9 were extended and applied to the Mayor's Court, London,

Paine v. *Slater*, *App.*

pliedly repealed where the enactment contained in the second Act is inconsistent with that in the first Act. Now, by the Mayor's Court Act, any final judgment for a sum either under or over 20*l.* which has been obtained in the Mayor's Court may be removed into the Superior Court for the purpose of getting execution. Then the Act of 1872 says that any judgment where the debt or damage does not exceed 20*l.*, exclusive of costs, may be removed into the County Court; and clause 9 says, if the sum recovered is not less than 20*l.*, exclusive of costs, the judgment may be removed into the Superior Court. The enactments are not inconsistent, for the judgment may be removed from the Mayor's Court either to the County Court or to the Superior Court. The appeal must be dismissed.

COTTON, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Wetherfield & Sons, for plaintiff; W. R. Philp, for defendant.

1883. March 14. } SHOWELL AND COMPANY *v.* BOURON.

Practice—Motion for Judgment on Admissions in the Pleadings—No Defence—Counterclaim—Order XL. rule 11.

In an action for goods sold and delivered, by writ specially indorsed, leave being given to defend, the defendant did not plead any defence, but set up a counterclaim for damages in respect of goods sold to the defendant which were alleged to be not according to sample:—Held, *on motion for judgment, under Order XL. rule* 11, *on the admissions in the pleadings, that the plaintiffs were entitled to judgment, but upon the terms that if the defendant brought the debt into Court, execution should be stayed until after the trial of the counterclaim.*

This was an action for goods sold and delivered, the claim being for 33*l.* 15*s.* 6*d.* In answer to an application to sign judgment under Order XIV., the defendant filed an affidavit that set up no defence, but alleged circumstances which the defendant contended entitled him to counterclaim for damages in respect of certain goods sold and delivered by the plaintiffs to the defendant which it was alleged were not according to sample. Leave being given to defend, the defendant by his pleading admitted the plaintiffs' claim, and counterclaimed for damages in respect of the said goods. The plaintiffs applied, without success, to strike out the counterclaim.

Winch, for the plaintiffs, moved for judgment on the admissions in the pleadings, under Order XL. rule 11 (1), on the terms that execution should not issue until after the trial of the counterclaim if the amount of the claim be paid into Court by the defendant.

Chitty, for the defendant.—The plaintiffs are not entitled to judgment until the defendant's counterclaim has been decided, because it may be that in the result the defendant would recover enough to overtop the plaintiffs' claim. The plaintiffs cannot be prejudiced by judgment being delayed, as the writ claims interest; whereas, on the other hand, if the plaintiffs recover judgment now they might register it, and so injure the credit of the defendant, although he may be proved to have a just claim against the plaintiffs for a larger amount than the plaintiffs' claim. A counterclaim should be treated as being in the same position as two actions ordered to be consolidated—*Mostyn* v. *The West Mosty Coal and Iron Company* (2).

(1) Order XL. rule 11: "Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to without waiting for the determination of any other questions between the parties. The foregoing rules of this Order shall not apply to such applications, but any such application may be made by motion so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may on any such application give such relief, subject to such terms, if any, as such Court or Judge may think fit."

(2) 45 Law J. Rep. C.P. 401; Law Rep. 1 C.P. D. 145.

Showell v. *Bouron.*

HUDDLESTON, B.—I think that there being no defence the plaintiffs are entitled to judgment, but on the terms that execution shall not issue thereon till after the trial of the counterclaim if the defendant pays the amount of the claim into Court.

Solicitors—Mozly & Denison, agents for Tyler & Tanner, Birmingham, for plaintiff; William Vant, for defendant.

1883. Feb. 1.

MOORE AND OTHERS (*petitioners*) *v.* KENNAIRD (*respondent*). *In re* SALISBURY ELECTION PETITION.

Election Petition—Discovery of Documents—Vouchers for Payments to Voters alleged to be colourably employed—Parliamentary Elections Act, 1868 (31 & 32 *Vict. c.* 125), *ss.* 2, 25 *and* 26.

The general power over the proceedings in an election petition given by the Parliamentary Elections Act, 1868, *to the Judges is subject to the modification created by sections* 25 *and* 26 *of that Act, and in the absence of any rules to that effect the Judges have no power to order the production of documents before the trial of the petition.*

Wells *v.* Wren, the Wallingford Election Petition (49 Law J. Rep. C.P. 681; Law Rep. 5 C.P. D. 546), *followed.*

This was a summons, referred to the Court by Manisty, J., for the discovery and inspection of certain vouchers for the payment to clerks, messengers and porters of the sum of 124*l.* 6*s.*, to bill-posters of the sum of 168*l.* 3*s.* 6*d.*, to sandwich-men and boys of the sum of 29*l.* 8*s.* It was sworn in the affidavit in support of the application that, according to the information and belief of the deponent, a large majority of the messengers, bill-posters and others were voters, and that the charge of bribery against the respondent was largely founded on the alleged colourable employment of voters as messengers, &c., by the respondent.

Yarborough Anderson, for the petitioner. —These vouchers should have been filed under 26 & 27 Vict. c. 29. s. 4 (1), but have not been. The only way that the petitioner therefore can get at them is by the order prayed for. The Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), s. 2 (2), gives

(1) 26 & 27 Vict. c. 29, section 4: "A detailed statement of all election expenses incurred by or on behalf of any candidate, including such excepted payments as aforesaid, shall, within two months after the election (or in cases where by reason of the death of the creditor no bill has been sent in within such period of two months, then within one month after such bill has been sent in), be made out and signed by the agent, or if there be more than one by every agent, who has paid the same (including the candidate in case of payments made by him), and delivered, with the bills and vouchers relative thereto, to the returning officer, and the returning officer for the time being shall, at the expense of the candidate, within fourteen days, insert or cause to be inserted an abstract of such statement, with the signature of the agent thereto, in some newspaper published or circulating in the county or place where the election was held; and any agent or candidate who makes default in delivering to the returning officer the statement required by this section shall incur a penalty not exceeding five pounds for every day during which he so makes default; and any agent or candidate who wilfully furnishes to the said returning officer an untrue statement shall be guilty of a misdemeanour, or in Scotland of an offence punishable by fine and imprisonment, and the said returning officer shall preserve all such bills and vouchers, and during six months after they have been delivered to him permit any voter to inspect the same, on payment of a fee of one shilling."

(2) 31 & 32 Vict. c. 125, section 2: "The expression 'the Court' shall, for the purposes of this Act, in its application to England mean the Court of Common Pleas at Westminster, and in its application to Ireland the Court of Common Pleas at Dublin, and such Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with reference to an election petition and the proceedings thereon as it would have if such petition were an ordinary cause within their jurisdiction."

Section 25: "The Judges for the time being on the rota for the trial of election petitions in England and Ireland may respectively from time to time make, and may from time to time revoke and alter, general rules and orders (in this Act referred to as the Rules of Court), for the effectual execution of this Act, and of the intention and object thereof, and the regulation of the practice, procedure and costs of election petitions, and the trial thereof and the certifying and reporting thereon. Any general rules and orders made as aforesaid shall be deemed to be within the

the election petition Judges full and absolute power over the proceedings, and they can make such orders as they have power to make in ordinary actions. The only restriction is as regards the power to order interrogatories, which it is admitted *Wells* v. *Wren, the Wallingford Election Petition* (3), shews they have not; but the discovery of documents differs from interrogatories—*The Stafford Election Petition* (4), where vouchers were ordered to be produced, and *The Coventry Election Petition* (5), where discovery of telegrams was ordered. The practice of the Committees of the House not to order discovery till the trial was because until the hearing the committees had no seisin of the petition; but the Judges have full seisin of the petition from the very first. The Parliamentary Election Petition Act, 1868, s. 26 (2), does not therefore apply.

Moulton, for the respondent.—*The Wallingford Election Petition* (3) is a direct authority against the power of the Judges to order interrogatories; and discovery and inspection of documents stand on the same footing as interrogatories.

POLLOCK, B.—In view of the decision in the *Wallingford Case* (3) I do not think it necessary to give my reasons for deciding this case at any great length. In that case the distinction between what was formerly the power of the Committees of the House and what is now the jurisdiction of the Judges in election petitions is very clearly pointed out. Section 2 of the Parliamentary Elections Act, 1868 (2), is very general in its terms, but is made subject to the provisions of that Act. By this section if it stood alone I should have no doubt that we should have power to make the order for production asked for, but section 25 (2) provides that the Judges may make general rules for the effectual execution of that Act, and section 26 (2), that until such orders are made, the principles, practice and rules on which Committees of the House of Commons before that statute acted shall be observed as far as may be. There is no instance of committees having ordered production of documents before trial; it may be because till the meeting of the committee they had nothing to do with the petition. The question is, what was the practice of committees before the Act of 1868? It is evident they had no power to make any such order. Before the Wallingford election petition the Judges had made such orders, but that was because their attention had not been called to the effect of section 26 (2) and the practice of committees before the Act of 1868. It is true the *Wallingford Case* (3) related to interrogatories, but there is really no distinction to be drawn between interrogatories and discovery of documents. I therefore think we cannot grant the application.

MANISTY, J., concurred.

Application refused.

Solicitors—Kingsford, Dorman & Co., agents for Hill & Royle, Salisbury, for petitioners; Clarke, Rawlins & Clarke, agents for F. Hodding, Salisbury, for respondents.

powers conferred by this Act, and shall be of the same force as if they were enacted in the body of this Act. Any general rules and orders made in pursuance of this section shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament."

Section 26: "Until rules of Court have been made in pursuance of this Act, and so far as such rules do not extend, the principles, practice and rules on which Committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the Court and Judge in the case of election petitions under this Act."

(3) 49 Law J. Rep. C.P. 681; Law Rep. 5 C P. D. 546.

(4) 20 Law Times, N.S. 237.

(5) 19 ibid. 742.

1883. Feb. 14.

GAGE *v.* ELSEY.

Adulteration of Food—Notice that Spirits sold are diluted—"Gin" more than thirty-five per cent. under proof—Printed Notice—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 8—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 6.

[For the report of the above case, see 52 Law J. Rep. M.C. 44.]

1883. March 13. THE FORE STREET WAREHOUSE COMPANY (LIMITED) *v.* DURRANT AND COMPANY.

Practice—Action—Writ of Summons—Business carried on by Lunatic in the Name of a Firm—Mode of Service of Writ—Rules of Court, Order IX. rules 5, 6 *and* 6*a—Judgment in Default of Appearance—Solicitor—Locus Standi.*

Order IX. rule 6*a, of the Rules of Court, which permits in certain cases the service of a writ at the principal place of business carried on by one person in the name of a firm apparently consisting of more than one person does not apply where such person is a lunatic or of unsound mind. In such a case the proper mode of service is that laid down in Order IX. rule* 5.

This was an appeal from an order made by Hawkins, J., at chambers, rescinding an order of Master Pollock, by which a judgment was ordered to be set aside under the following circumstances:—

It appeared that the defendant, Madame Durrant, carried on business on her own account under the title of "Durrant & Co.," having no partners. On the 25th of November, 1882, Madame Durrant became seriously ill, and was incapacitated from attending to business; she was, in fact, suffering from religious mania, and was admitted as an inmate of a private lunatic asylum. In December, 1882, application was made on behalf of the plaintiffs for payment of 86*l.* 6*s.* 8*d.*, which they alleged to be due for certain goods supplied to the firm of Durrant & Co. The solicitors who had acted for Madame Durrant up to the time when she became insane, thereupon wrote to the plaintiffs' solicitors, informing them of the defendant's illness, but not mentioning that she was confined in a lunatic asylum. On the 29th of December, 1882, in reply to enquiries from the plaintiffs' solicitors, the defendant's former solicitors mentioned for the first time that Madame Durrant was confined in a private lunatic asylum, and that they could not accept service of process. On the same day the plaintiffs issued their writ against Durrant & Co., and this writ was on the 30th of December served on a clerk in charge of the warehouse. No appearance being entered, judgment was on the 8th of January, 1883, signed and execution issued, whereupon certain property of Madame Durrant was seized by the sheriff. The judgment was afterwards set aside by an order of Master Pollock on the ground that there had been no proper service of the writ; but Hawkins, J., upon appeal, rescinded the Master's order. Whereupon the defendant appealed to the Divisional Court (1).

(1) By Order IX. rule 5, of the Rules of the Supreme Court: "When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic or on the person with whom the person of unsound mind resides or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant." By rule 6: "Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having at the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm." By rule 6*a*: "Where one person, carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued." By Order XIII. rule 1: "Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition, the plaintiff may apply to the Court or a Judge that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of such application was, after the expiration of time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person to whom or under whose care the defendant was at the time of serving such writ of summons." By Order XVIII.: "In all cases in which lunatics and persons of unsound mind not so found by inquisition might respectively, before the passing of the Act, have sued as plaintiffs, or would have been liable to be sued as defendants in

Fore Street Warehouse Co. v. *Durrant & Co.*

E. G. Man, for the appellant.—The contention on behalf of the defendant is that there has been no proper service of the writ. Service should have been effected on the manager of the asylum—see Order IX. rule 5 (1)—and not on the clerk at the place where Madame Durrant carried on business. Order IX. rule 6*a* (1), has no application to a case like this, where the defendant is a lunatic. The plaintiffs' remedy is, after due service of the writ, pointed out in Order XIII. rule 1 (1). As regards the objection made at chambers that Madame Durrant's former solicitors, who had acted for her until the time of her illness, had no *locus standi*, it is a sufficient answer to say that their authority continued until it was revoked.

R. Vaughan Williams, for the plaintiffs.—The defendant's former solicitors have no *locus standi* upon an application like the present, and are acting without proper authority. Apart from this it is contended that the service of the writ has been perfectly regular. The next friend might, under Order XVIII. (1), have applied to have been appointed guardian to protect the defendant's interests. The fact that a defendant is a lunatic does not oust the application of Order IX. rules 6 and 6*a*.

[LOPES, J.—These rules were merely intended to facilitate service on partners, and do not deal with the case of persons of unsound mind.]

Rule 6*a* does not contain any express provision that it shall not apply to a lunatic, and it can only be held not to apply by implication. As regards rule 5, that is only an enabling provision, and does not affect the plaintiffs' contention that proper service of the writ has been effected by leaving the writ at the defendant's place of business. The fact of her lunacy did not come to the plaintiffs' knowledge until after the writ had been actually served.

GROVE, J.—In this case I am of opinion that the order made by Master Pollock setting aside the judgment was perfectly right, and that the order made by my brother Hawkins at chambers, rescinding the order of the Master, was wrong. The facts appear to be as follows: The business carried on under the title Durrant & Co. was, it appears, really carried on by Madame Durrant alone, and in December, 1882, there was due, or alleged to be due, from her to the plaintiffs a sum of money for goods supplied by them. In November, 1882, Madame Durrant became seriously ill, and was unable to attend to business, being in fact confined in a private asylum as a lunatic. On the 29th of December, after an application had been made by the plaintiffs for the moneys which they alleged to be due, a writ was issued for the recovery of the same, and this writ was, on the following day, served at the place of business of Madame Durrant, who, as I have already said, traded under the title of Durrant & Co. On the day when the writ was issued, the 29th of December, it appears a letter was written to the plaintiffs communicating to them the fact that the lady was confined in a lunatic asylum; but the plaintiffs deny that they ever received that letter until after the writ had been served. I am willing to accept that statement as being correct, inasmuch as the writ may have been served at an early hour of the morning of the 30th of December, before the letter in question reached the plaintiffs' hands in due course of post. No appearance was ever entered to the writ, and shortly afterwards the judgment was obtained which it is now sought on behalf of the defendant to set aside. Whether this ought to be done depends, in my judgment, upon whether under the circumstances there has been a proper service of the writ, as regulated by certain Rules of Court, to which I will now advert. Order IX. rule 6*a*, runs as follows: "Where any person carrying on business in the name of a firm consisting of more than one person shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there; and, subject to any of the Rules of the Supreme

any action or suit, they may respectively sue as plaintiffs in any action by their committee or next friend in manner practised in the Court of Chancery before the passing of the said Act, and may in like manner defend any action by their committees or guardians appointed for that purpose."

Court, such service shall be deemed good service on the person so sued." Now I think that if Madame Durrant had been sane, service effected in the manner pointed out by rule 6*a* would have been good service; but she was not sane—and, indeed, the evidence on that point has not been contraverted. Again, had there been no other provisions in the Rules of Court relating to a case like the present it might well have been contended that rule 6*a* applied to an insane person. But there is a rule expressly applicable—namely, Order IX. rule 5—which states that "when a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic or on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or Judge otherwise orders, be deemed good service on such defendant." Therefore proper service here, would, I should say, have been on the keeper of the lunatic asylum. Then it has been said that this procedure is only permissive, and not obligatory—a fair argument, but one which does not, in my judgment, get rid of the difficulty. Then comes Order XIII. rule 1, which provides that "where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind not so found by inquisition (which is the case here), the plaintiff may apply to the Court or a Judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action." No such order, however, is to be made "unless it appears on the hearing of such application that the writ of summons was duly served," &c. The whole question whether this judgment can stand depends entirely on whether the writ of summons was properly served. Now, was this writ duly served on the defendant? Is it proper service to serve a writ upon a person who knows nothing about the matter, and is probably even not aware that the defendant is a lunatic? Order XIII. rule 1, completes the procedure pointed out in Order IX. rule 5. How can the Court say that it is satisfied that this writ has been duly served, when, as a fact, probably it never reached the lunatic at all? I think to uphold a judgment obtained under such circumstances as these would be inconvenient, and frequently result in great failure of justice. When a writ has been duly served the keeper of a lunatic asylum can communicate with the lunatic's relatives; and if he fail to do so the plaintiff may get an appearance entered by means of the appointment of a guardian. These two rules together exclude the application of Order IX. rule 6*a*, which, to my mind, would be most inequitable and unjust were it to permit in a case like this judgment to be got by a mere nominal service. It has been argued that rule 6 must be read with rule 6*a*. It may very well be that if one out of four partners was a lunatic, service on the manager at the place of business would be sufficient; but that state of facts does not exist here, the lunatic being the only person who attends to the business. It appears to me to be quite clear, upon the construction of the Rules, that this judgment ought to be set aside. There is one other matter upon which I desire to observe. It has been said that Mr. Man has no *locus standi* here, because the solicitors who instruct him had no authority to act on her behalf. But those gentlemen were the lunatic's former solicitors, and had acted as such, and their authority had never been revoked. Considering this lady's unfortunate position I think that they have acted most properly in taking steps to protect her interests until a guardian had been appointed; and that Mr. Man would have signally failed in his duty had he declined to appear. For these reasons I think that the order originally made by the Master was correct, and that it was wrongly rescinded by my brother Hawkins.

LOPES, J.—I also am of opinion that the order appealed against must be set aside, on the ground that there has been no proper service of the writ. The defendant is admittedly a lunatic; it is admitted that though she carried on business under the name of Durrant & Co., she had in fact no partners, and nobody but she carried on the business. She was really in the same position as if she had been sued in her individual capacity. Now the proper mode of service on a lunatic is pointed out

in Order IX. rule 5 (1). If the defendant is not a lunatic, and had, or apparently had, other partners, service may be effected as pointed out by rules 6 and 6*a* (1). It is clear to my mind that there has been no proper service of the writ here; and upon this question must depend whether the judgment which has been obtained is or is not a valid one. I must not be understood as deciding that if the defendant, though a lunatic, had had other partners who were not lunatics, proper service might not have been effected under the procedure laid down in Order IX. rules 6 and 6*a*. That point is not before the Court now, and it is not therefore necessary for me to express any opinion upon it. I think that this appeal must be allowed, and the order of the Master restored.

Appeal allowed.

Solicitors—Saxelby & Faulkner, for appellants; Ashurst, Morris & Co., for respondent.

[IN THE COURT OF APPEAL.]

1882. Dec. 8, 9. 1883. March 6.

BELL AND SALVIN *v.* LOVE AND ANOTHER.*

Mines—Right to let down Surface—Enclosure of Commons—Reservation of Mining Rights to Lord of Manor—Compensation for Damage—11 *Geo.* 3. *c. xcix.*

By an Enclosure Act passed in 1771, *certain commons within a manor were enclosed, and allotments were made to various persons in respect of ownership of tenements within the manor. All rights of common were extinguished, and the land so allotted was to be held on the same tenure as the tenements in respect of which it was allotted. The Act provided that nothing therein contained was to prejudice, lessen or defeat the right and interest of the lords of the manor and their successors of, in or to the royalties incident or belonging to the manor; but that they and all persons claiming under them should for ever thereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever, to the owners of the manor belonging (other than the right of common), in as full, ample and beneficial manner to all intents and purposes as they could have held and enjoyed them in case the Act had not been made.*

The Act further provided that if the lords of the manor or any one claiming under them should work any mines lying under any of the allotments so to be made, or lay, make or use any ways in, through, over or along any part of the allotments, then the person so working should make satisfaction for the damage and spoil of the ground so occasioned, to the person in possession of the ground at the time of the damage, such satisfaction not to exceed the sum of 5*l. yearly during the time of such working for every acre of ground so damaged or spoiled.*

There were under the manor coal mines, portions of which had for two centuries been worked by the lords or their lessees without leaving any support for the surface. There were in the manor no special customs as to working mines under the commons of the manor.

In 1875 *the defendants became entitled, as lessees of the lords of the manor, to work coal mines and to get minerals under part of the enclosed common which had been allotted under the Act in respect of a freehold tenement to a predecessor in title of the plaintiff S.; and in* 1877 *they, by working a mine which was in part under a house which had been built more than twenty years before action on part of the land so allotted, let down the surface, and damaged the house, but their workings would have caused the surface to subside even if there had been no house upon it. In an action by the owner and the tenant of the house for damages for the injury thus caused,—*

Held (*affirming the judgment of the Queen's Bench Division*), *that the lords of the manor and their lessees were not entitled so to work the mines under this house and land as to let down the surface; that the compensation clause was limited to tem-*

* *Coram* Lord Coleridge, C.J.; Baggallay, L.J., and Lindley, L.J.

porary damage caused by works on the surface, and that the Act reserved to or conferred on the lords of the manor no right to let down the surface of the enclosed common land.

Appeal by the defendants from the judgment of the Queen's Bench Division upon a Special Case stated under an order of Court in an action. The Special Case set out the following facts:—

The plaintiff Charles Salvin (1) is the owner, and the plaintiff Charles Bell is the occupier and tenant for twenty-one years, from November, 1876, of a dwelling-house, land and premises, known as Park House. The defendants are colliery owners, who have, under the following circumstances, worked the coal under the land and part of the house above mentioned. The removal of such coal by the defendants has allowed the house and the land on which it stands, and the lands adjacent thereto, in the occupation of the plaintiff Bell, to subside, and owing to such subsidence the house has been damaged. The land on which the house now stands, and a large extent of the adjacent land, formed, at the time of the passing of the Enclosure Act hereinafter mentioned, part of the moor or waste of the manor, barony or borough of Elvet, in the county of Durham. The dean and chapter of Durham were lords of the manor of Elvet, and as such were seised of and entitled to the soil of the moor and waste, and to the mines and minerals lying under the moor and waste; certain persons, of whom Thomas Phillipson was one, being entitled, in respect of certain ancient freehold or leasehold dwelling-houses within the manor of Elvet, to certain rights of common upon the moor and waste.

In 1772 the moor and waste were allotted and enclosed by an award duly made in pursuance of a private Act of Parliament, 11 Geo. 3. c. xcix., entitled "An Act for dividing and enclosing the moor or common called Elvet Moor, in the parish of St. Oswald, in the county palatine of Durham, and for extinguishing all right of common in certain enclosed intercommon lands in the said parish."

That Act recited that Elvet Moor, containing about 400 acres, yielded little profit; that the dean and chapter of Durham were lords of the manor and owners of the soil, inheritance and royalties of the moor; that Thomas Phillipson and certain other persons therein named were entitled, in respect of freehold or leasehold dwelling-houses within the manor, to right of common upon Elvet Moor; that the lords and the commoners were desirous that the moor should be enclosed; that the enclosure would be an advantage to all persons interested in it; and then enacted that certain commissioners should determine the claims to rights of common, and allot and divide the moor amongst the several persons having a right of common.

The Act also enacted "that immediately after finishing the said division and allotments, and the execution of the said award or instrument, all right of common upon the said moor or common shall cease and be extinguished, and the lots and parcels of land so to be allotted as aforesaid shall be held and enjoyed by the persons to whom the same shall be so allotted respectively in the same manner and by the same tenure, estates and terms of years as the respective dwelling-houses in right of and for which the said lots or parcels of land shall be so allotted are now holden."

"Provided also, and it is hereby further enacted, that nothing in this Act contained shall prejudice, lessen or defeat the right, title and interest of the said dean and chapter and their successors of, in or to the royalties incident or belonging to the said manor, barony and borough of Elvet; but that the said dean and chapter and their successors, and all and every person or persons claiming under or in trust for them, as owners of the royalties of the said manor, barony or borough, and all succeeding owners thereof, for the time being, shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony or borough, incident, appendant and

(1) The name of Salvin, the landlord, was added in the Special Case as a plaintiff in the action at the suggestion of the Court of Appeal, and those portions of the Case which refer to him as a plaintiff were inserted after the argument, but before the judgment was delivered.

belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be enclosed as aforesaid), in as full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made."

"Provided also, and it is hereby further declared and enacted, that in case the said dean and chapter, or their successors, or any person or persons claiming under them, shall, after such division made as aforesaid, work any mines lying within or under any of the said allotments so to be made, or shall lay, make or use any way or ways in, through, over or along any of the said allotments, or any part thereof, then, and in any of the cases so happening, such person or persons so working such mines, or laying, making or using any such way or ways, shall make satisfaction for the damages and spoil of ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled by two indifferent persons, to be nominated and appointed to settle the same, one of them to be nominated and appointed by the person or persons so working such mines or laying, making or using any such way or ways, and the other of them to be nominated and appointed by the person or persons who shall be in possession of such ground at the time or times of such damage or spoil being made, and such satisfaction not to exceed the sum of 5*l.* yearly during the time of working such mines or continuing or using such way or ways for every acre of ground so damaged or spoiled."

The land in the occupation of the plaintiff Bell, including the land on which his house now stands, was, in pursuance of the above Act, set out and allotted in 1772 to Thomas Phillipson, in respect of his right of common and of an ancient freehold tenement within the manor of Elvet. The plaintiff Salvin is the successor in title of Thomas Phillipson in respect of this land. At the time of the award no house stood upon the land so allotted to Phillipson.

At some time prior to 1826 a dwelling-house was built on that land and on part of the site now occupied by the plaintiff Bell's house. In 1836 this dwelling-house contained four or five rooms, and a barn had been built at the rear of the house. Shortly before 1854 a drawing-room and two rooms were added to the house, and a kitchen was built on the site of the barn. From this date until 1877 no substantial alterations were made in the house. In 1877 the plaintiff Bell became tenant to the plaintiff Salvin of this house, which was then in good repair, and he covenanted with him to keep it in repair. Shortly after the commencement of his tenancy he pulled down part of the house, and erected, partly on the site so cleared and partly on land not before built on, additional rooms forming part of the house in respect of the damage to which the action was brought.

Underlying the manor of Elvet are certain seams of coal and other minerals, some portions of which have been worked by the lessees of the dean and chapter of Durham since a date prior to 1623 without leaving support for the surface.

At the time of the passing of the Enclosure Act there were no mining or manorial customs in any of the manors of the dean and chapter in the county of Durham, which enlarged or cut down the common law rights of the lords and their lessees to search for, work and carry away the coals and other minerals under the open commons and wastes of the manor.

In 1870 a lease of these coal mines and minerals was granted by the chapter to Joseph Love. The coal mines included in the lease underlie in part certain ancient freehold lands of the chapter, and in part certain portions of the moor and waste enclosed and allotted by the Enclosure Act.

In 1875 the defendants became entitled to the rights of Love under the lease, and in 1877 the defendants began to work the coal in that part of the mine which was under Bell's house and land, and removed all the coal from under part of his house without leaving any support, in consequence of which the land subsided, and Bell's house was damaged. The land would have subsided whether there had been any house on it or not. The mine was properly worked

according to the customary method adopted in the district.

Before Salvin was joined as a plaintiff, the defendants paid into Court a sum of 82*l.* 10*s.* as being sufficient to satisfy the claim of Bell under the proviso for compensation of the Enclosure Act above set out; and on Salvin being joined they, while denying all liability, paid into Court the further sum of one shilling. The questions for the opinion of the Court are:—

Whether the defendants are liable to pay to the plaintiffs, or either of them, any, and if so what, compensation beyond that in the Enclosure Act mentioned?

Whether the plaintiff Salvin is entitled as against the defendants to have the house and land supported by the mines and minerals comprised in the lease?

Whether the plaintiff Bell is entitled as against the defendants to have the said house and land supported by the mines and minerals comprised in the said lease?

The Queen's Bench Division gave judgment in favour of Bell, Salvin not then having been added as a plaintiff.

The defendants appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *F. Meadows White, Q.C.*, and *J. Edge*, for the appellants.—The Act regulates the rights of the parties; but the position of the parties when that Act was passed must be considered. The only rights then existing were rights of common over the land in question. There were then existing seams of coal which had long been worked by the lords of the manor without leaving any support. The lord has a right at common law to get the minerals, provided that he does not interfere with the surface rights. The subsidence of the surface does not interfere with the right to feed cattle on the common. By the Act, the lord's rights over the surface were transferred to the commoners; but his right of working under the common was not interfered with. The proviso shews that the rights of the lord were not to be diminished; he cannot now be prevented from working the mines as he has always done; and the rights given to the commoners must not be so construed as to interfere with his pre-existing and preserved rights.

The compensation clause in *The Duke of Buccleugh* v. *Wakefield* (2) was in but little wider terms than the compensation clause in this case; and under that Act it was held the lord had a right to let down the surface. In that case the lord got an allotment, in the present he has none; so that his rights here can hardly be presumed to be less than they were in that case, nor can the words of this Act be construed in a way less favourable to the lord. Compensation is given here while the mines are being worked; and it covers, as in *The Duke of Buccleugh* v. *Wakefield* (2), damage both above and below ground. *The Ecclesiastical Commissioners* v. *Rowe* (3), *Rowbotham* v. *Wilson* (4), *Hall* v. *Byron* (5) and *Smith* v. *Darby* (6) were also cited.

Russell, Q.C., and *Edward Ridley*, for the plaintiff.—The house of the plaintiff has been standing for more than twenty years, and yet the defendants claim a right to destroy it by removing the support. It is for those who deny that there is a right of support to shew how it has been taken away. The Court will not construe a clause in a statute as taking away such a right, unless the words can bear no other meaning. The compensation clause may well apply to temporary surface disturbance; but it cannot cover permanent damage such as this caused by subsidence. The defendants rely on *The Duke of Buccleugh* v. *Wakefield* (2); but that decision is explained by Mellish, L.J., in *Hext* v. *Gill* (7), and it is shewn that the judgment of the House of Lords turned on the compensation clause. In *Rowbotham* v. *Wilson* (4) there was a proviso which is not found in the present case. Lord Campbell lays down the true principle in *Roberts* v. *Haines* (8); but it lies on the defendants

(2) 39 Law J. Rep. Chanc. 441; Law Rep. 4 H.L. E. & Ir. App. 377.

(3) 49 Law J. Rep. Q.B. 771; Law Rep. 5 App. Cas. 736.

(4) 6 E. & B. 593; 8 ibid. 123; 8 H.L. Cas. 348; 25 Law J. Rep. Q.B. 362; 30 ibid. 49.

(5) 46 Law J. Rep. Chanc. 297; Law Rep. 4 Ch. D. 667.

(6) 42 Law J. Rep. Q.B. 140; Law Rep. 7 Q.B. 716.

(7) 41 Law J. Rep. Chanc. 761; Law Rep. 7 Ch. App. 699.

(8) 6 E. & B. 643; 7 ibid. 625 25 Law J. Rep. Q.B. 353; 27 Law J. Rep. Exch. 49.

in such a case as this to shew that they have some right conferred upon them which the common law does not give.

[LINDLEY, L.J.—Is this an action by the landlord as well as by the tenant?]

It is intended to so be considered.

[LORD COLERIDGE, C.J.—We think that Salvin, the landlord, should be made a party, and the defendants can deny liability and pay 1*s.* into Court.]

Buchanan v. *Andrew* (9), *Bonomi* v. *Backhouse* (10) and *Aspden* v. *Seddon* (11) were also cited.

The Solicitor-General, in reply.—The statute does not give the allottees unincumbered and unlimited freehold rights; they do not acquire under it any right to be free from intrusion. The distinction suggested between temporary and permanent damage cannot be supported. In *Roberts* v. *Haines* (8) there was an absolute prohibition, so that it is no authority in this case.

[LORD COLERIDGE, C.J.—The amendment suggested must be formally made, and then we will deliver judgment.]

Cur. adv. vult.

The following judgments were read on March 6:—

BAGGALLAY, L.J.—The defendants in this action are lessees, under the Dean and Chapter of Durham, of certain coal mines in the neighbourhood of that city. In the course of their mining operations the defendants have worked the coal underlying a dwelling-house and lands, of which the plaintiff Salvin is the owner and the plaintiff Bell is tenant and occupier. Such coal was worked without sufficient support being left for the roof of the mine; and from want of such support the surface subsided, and the house became cracked and damaged.

In the present action the plaintiffs claimed damages in respect of the injury so sustained by them; and the defendants, having denied the right of the plaintiffs to have their surface lands supported, and having insisted that they were entitled to get the coal underlying the plaintiffs' lands in the manner and by the method of working adopted by them, the questions of law arising in the action have been raised by a Special Case finding the necessary facts.

The Special Case was argued in the Queen's Bench Division, when judgment was given in favour of the plaintiffs. From that judgment the present appeal is brought.

The origin as well of the present right of the plaintiffs to the surface as of the present right of the defendants to the underlying minerals, is an award made in the year 1772 under an Enclosure Act passed 11 Geo. 3.

At the time of the passing of that Act the Dean and Chapter of Durham were lords of the manor of Elvet in the county of Durham, within the limits of which manor there was a considerable tract of waste land comprising about 400 acres, and commonly known as Elvet Moor or common. Over this moor certain persons, including one Thomas Phillipson, through whom the plaintiffs claim title, were entitled to rights of common in respect of ancient freehold or leasehold dwelling-houses held by them within the manor. The dean and chapter, as such lords of the manor, were owners of the soil of the moor, subject to the rights of the commoners, and were absolutely entitled to all the coal and other minerals underlying the manor.

It would appear, though it is not expressly so found by the Special Case, that the owners of ancient dwelling-houses were the only commoners having rights of common over the moor; and that such rights of common were limited to pasturage. The general scheme of the Act of Parliament was the enclosure and division of the moor, the allotment of certain portions of it to the commoners, and the extinguishment of all rights of common over it.

I propose to consider, in the first place, the respective rights at the time when the Enclosure Act was passed, of the dean and chapter as lords, and of the commoners, in respect of the getting of the minerals underlying the manor; and, in the next place, the effect of that Act as regards the minerals underlying the several portions

(9) Law Rep. H.L. 2 Sc. App. 266.

(10) 9 H.L. Cas. 503; 34 Law J. Rep. Q.B. 181.

(11) 44 Law J. Rep. Chanc. 359; Law Rep. 10 Ch. App. 394.

of the moor which were allotted to the commoners.

The respective rights of the owners of surface lands and of the owners of minerals underlying such surface have of late years been the subject of much discussion; and it has been clearly established by a series of decisions, and particularly by the decisions of the House of Lords in the cases of *Rowbotham* v. *Wilson* (4), *The Duke of Buccleugh* v. *Wakefield* (2) and *Buchanan* v. *Andrew* (9), that although the *prima facie* right of the owner of the surface is to have his surface supported, and the *prima facie* right of the owner of the minerals to get them is limited to getting them in such a manner as not to occasion injury to the owner of the surface, such *prima facie* rights may nevertheless be materially modified to the extent even of authorising the owner of the minerals to disturb or let down the surface, by contract between the respective owners or those through whom they claim; and that it is immaterial whether such contract arises out of a covenant or reservation in a deed, or out of the provisions of an Act of Parliament giving legislative effect to arrangements come to, or presumed to have been come to, by the parties.

In every case, however, in which the owner of the minerals claims any rights in respect of getting them in excess of or other than the *prima facie* right of getting them without causing injury to the owner of the surface, the origin and the nature and extent of such rights must be clearly defined by some grant or equivalent assurance, in the absence of which the presumption is in favour of the right of the owner of the surface to support. It was held in the Exchequer Chamber, and afterwards on appeal in the House of Lords, in the case of *Bonomi* v. *Backhouse* (10), that such a right of support is an ordinary right of enjoyment of property, and not in the nature of an easement.

Now there is no trace or suggestion of any grant or other assurance of the minerals underlying the ancient dwelling-houses within the manor of Elvet which could confer upon the lords as owners of such minerals the right to disturb or let down the surface in getting them; and it has not been and cannot be disputed that the lords and their lessees would have been at the time of passing of the Act responsible to the owners of the ancient dwelling-houses for any injury occasioned to them by getting such minerals.

As regards, however, the minerals underlying the moor, the case at the time of the passing of the Enclosure Act was different. The dean and chapter were owners of the surface as well as of the underlying minerals, but subject, as to the former, to the rights of common of the commoners. It has been contended on behalf of the defendants that the dean and chapter, as owners of such minerals, or their lessees, were at liberty to get them in any manner they might think fit, and in so doing to let down the surface, provided they left sufficient pasturage for the commoners. This contention is, in my opinion, well founded. It appears to have been acted upon by the Judges in the Queen's Bench Division; it is supported by the judgment of Lord Chelmsford in *The Duke of Buccleugh* v. *Wakefield* (2); and in the case of *Hall* v. *Byron* (5) Vice-Chancellor Hall held that the lord of a manor might remove the subsoil of the waste and apply it to his own use, provided he did not infringe upon the rights of the commoners, and that his right to do so was quite independent of his right of approvement under the statute of Merton or at common law, and existed by reason of his ownership, subject only to the interests of the commoners; and further, that upon the question whether the subsoil has been removed to such an extent as to interfere with the rights of common, the *onus probandi* is on the commoners and not on the lord, as in the case of approvement.

From the considerations to which I have adverted, it is clear that whilst in respect of getting the minerals underlying the moor the dean and chapter and their lessees had the right at the time when the Enclosure Act was passed to get such minerals in any manner they might think fit, provided they left sufficient pasturage for the commoners, their right to get the minerals underlying the other portions of the manor, including those underlying the ancient dwelling-houses, was limited to getting them in such a manner as to occasion no injury to the surface owners.

There are, however, certain statements in the Special Case which, for the reasons which I will mention presently, do not appear to me to affect the question now under consideration, but which I am unwilling to pass over without comment, as they have been referred to, and to some extent relied upon, in the course of the arguments.

It is found by the Special Case that some portions of the coal and other minerals underlying the manor have been worked by the lessees of the dean and chapter since a date prior to the year 1623 without leaving any support to the surface, and that the method pursued by the defendants of working the coal underlying the lands of the plaintiffs (by which, I presume, is meant a method of working the coal by which the surface is disturbed or let down) had for many years been the usual proper and customary method of working in the district in which the manor was situate. These statements were probably introduced into the Special Case with the view of putting them forward as evidence of a custom for the lords to work the minerals underlying the surface of the manor without leaving any support, and so as to let down the surface, and to do so without making compensation for the injury occasioned to the owner of the surface.

The facts, however, thus stated, fall far short of establishing the existence of any such custom as that suggested. There is no indication or suggestion as to the portion of the manor under which such workings had been carried on, or whether any portion of the surface had by reason of such working been disturbed or let down; working under the moor would, as already pointed out, have been within the rights of the lord, even though the surface had been let down, provided the rights of the commoners had not been infringed—and it must be assumed that they had not, as the commoners had not complained.

Moreover, as regards the coal underlying the surface of the manor other than the moor, such a custom would have been unreasonable and bad, according to the decision in *Hilton* v. *Lord Granville* (12), a decision which, notwithstanding some doubts intimated by Lords Hatherley and Chelmsford in *The Duke of Buccleugh* v. *Wakefield* (2), has not, so far as I am aware, ever been overruled. It was followed in *Blackett* v. *Bradley* (13), the learned Judges in that case feeling themselves bound by *Hilton* v. *Lord Granville* (12); but *Blackett* v. *Bradley* (13), which was decided in 1862, was not carried further.

It is quite true that a *dictum* in the course of the judgment in *Hilton* v. *Lord Granville* (12), that a grant by deed to the like effect as the alleged custom would be unreasonable and bad, must be treated as overruled by the decisions in *Rowbotham* v. *Wilson* (4) and *Buchanan* v. *Andrew* (9), though in neither of these cases was *Hilton v. Lord Granville* (12) referred to either in the course of the arguments or in the judgments.

If it were necessary for me to express an opinion with reference to the decisions in *Hilton* v. *Lord Granville* (12) and *Blackett* v. *Bradley* (13), it would be to the effect that they were rightly decided. The reason why the custom should be held unreasonable and bad, whilst a grant to the like effect should be upheld, may well be that suggested by Mr. Justice Blackburn in *Blackett* v. *Bradley* (13), "that though the parties may legally have made such a compact it would not be reasonable to presume that they had done so." As regards the minerals underlying the moor, the right of the lords to get them in a way that would let down the surface, depends upon their ownership of the surface and not upon any custom.

We have also the statement in the Special Case that at the time of the passing of the Enclosure Act there were no mining or manorial customs in the manor of Elvet which enlarged, restricted or cut down the common law rights of the dean and chapter as lords of the manor, or their lessees, to work the coals and other minerals in and under the open commons and wastes of the manor.

Such, then, being the respective rights at the time when the Enclosure Act was passed of the dean and chapter and of

(12) 5 Q.B. Rep. 701; 13 Law J. Rep. Q.B. 193.

(13) 1 B. & S. 940; 31 Law J. Rep. Q.B. 65.

the commoners in respect of the getting of the minerals underlying the manor, we have next to consider the effect of that Act as regards the minerals underlying the second portions of the moor which were allotted to the commoners. Now the Act which we have to examine is one by which the dean and chapter, as the owners of both the surface of the moor and the underlying minerals, part with their interest in the surface, reserving to themselves the minerals, with power to get them; and the current of authority is clear that if in such a case the original owner of both intends to retain to himself the power of destroying the surface in getting the minerals it is essential that the intention of the Legislature should be expressed in language as to which there can be no reasonable question or doubt.

Thus in *Rowbotham* v. *Wilson* (4) the award under the Act of Parliament contained a clause which the House of Lords construed as equivalent to a grant that the mines should be worked and gotten without any molestation, denial or interruption by the owners of the surface, and without being subject or liable to any actions for damage on account of working and getting the mines, for or by reason that the surface of the lands might be rendered uneven and less convenient to the occupiers thereof, by sinking in hollows, or being otherwise defaced or injured where such mines should be worked. Thus the instrument provided in terms as to which there could be no question or doubt that the surface might be let down.

So again in *Buchanan* v. *Andrew* (9) a feu of land was granted, with a reservation of the whole of the subjacent minerals to the superior, and with a stipulation that the superior should have full power to work the minerals, and also to remove as much stone and other matter as might be necessary for the proper working of the minerals, and that free of all or any damage that might be occasioned to the feuars, and that he should not be liable for any damage that might happen to the buildings thereon by or through the working of the minerals.

The Lord Chancellor, in moving the judgment of the House, first directed attention to the words reserving the minerals to the superior, with full power to get them and to remove all such matters as might be necessary for the proper working of the minerals; and, dealing with such reservation alone, apart from the words freeing the superior from claims for damage in respect of the workings, he expressed himself as follows (14):—"The effect of such a reservation standing alone, according to the law of both countries, would have been that the whole property in the mineral strata would have been reserved to, and would have remained in, the previous owner, and he would have had an unlimited power of dealing with that as his own; but he would have been subject to the general restriction which every owner of property is under, expressed by the maxim '*Sic utere tuo ut alienum non lædas.*'"

He then proceeded to consider the effect of the additional words freeing the superior from all claims for damage, and added: "Can anything possibly be more clear than that the intention of the parties on both sides was that the superior was to have the unrestrained right of taking out the whole and every part of the reserved minerals, the whole risk of any subsequent damage being undertaken and to be sustained by the feuar?"

The distinction thus drawn by the Lord Chancellor between the effect of the general power to get all the minerals and to remove all such matters as might be necessary for the proper working them, and of language freeing the party entitled to get the minerals from all claims for damage in respect of getting them, is one most important to be borne in mind in dealing with cases of a similar character.

I pass on to apply the principles to which I have referred to the construction of the Act of Parliament by the provisions of which the present case must be determined. After various recitals, to which I deem it unnecessary to refer, and after various provisions for dividing and allotting, amongst the owners of ancient dwelling-houses within the manor, the residue of the moor which should remain after making certain specific allotments thereby directed, and for the execution of an

(14) Law Rep. H.L. 2 Sc. App. 286, at p. 290

award in respect thereof, it is enacted as follows :—

"That immediately after finishing the said division and allotments, and the execution of the said award or instrument, all right of common upon the said moor or common shall cease and be extinguished, and the lots and parcels of land so to be allotted as aforesaid shall be held and enjoyed by the persons to whom the same shall be so allotted respectively in the same manner, and by the same tenure, estates and terms of years as the respective dwelling-houses, in right of and for which the said lots or parcels of land shall be so allotted, are now holden."

Now the effect of these words, apart from the provisoes which follow, and to which I will direct attention presently, is to extinguish all rights of common over the moor, including, of course, any rights of common which could be claimed by the dean and chapter or other the owners for the time being of the soil and inheritance of the moor; and to vest in the commoners, in lieu of their extinguished rights of common, freehold or leasehold estates, as the case might be, in the designated and enclosed portions of the moor allotted to them.

The house of the plaintiffs, which has been cracked and damaged by the letting down of the surface occasioned by the defendants' workings, stands upon a portion of the lands allotted to Thomas Phillipson in respect of his ancient freehold dwelling-house; the lands so allotted to him accordingly became vested in him as freehold, and *prima facie*, being freehold, with the right not only to the freehold surface, but to all the minerals beneath. If, therefore, it was the intention of the parties to reserve to the dean and chapter as lords any rights in respect of the minerals underlying the several allotments of the surface of the moor, it was essential, according to the general principles enunciated in the case of *Rowbotham* v. *Wilson* (4), that the nature and extent of such reservation should be indicated by the Act of Parliament, and to indicate the same the provisoes were inserted. Before, however, proceeding to examine the terms of these provisoes, I may observe that if there were any doubt as to the words above quoted carrying *per se* not only the surface of the freehold allotment, but the minerals underlying such surface, the utmost that could be drawn from them in favour of the defendants would be that the allotted lands, though they became vested in the commoners in fee-simple were nevertheless subject as to the minerals thereunder to a right of the dean and chapter of the same nature and extent as their right before the passing of the Act in respect of the minerals underlying the ancient freehold dwelling-houses—that is, to an absolute right to the minerals underlying the allotments, but with a right to get them limited to such getting as should occasion no injury to the owners of the allotments. Such a construction, however, of the Act of Parliament would in no respect assist the defendants on the present appeal.

I pass on to consider the provisoes, upon the first of which the defendants mainly rely. It is in the following terms :—

"Nothing in this Act contained shall prejudice, lessen or defeat the right, title and interest of the said dean and chapter and their successors of, in or to the royalties incident or belonging to the said manor, barony and borough of Elvet; but that the said dean and chapter and their successors, and all and every person or persons claiming under or in trust for them, as owners of the royalties of the said manor, barony or borough, and all succeeding owners thereof for the time being, shall and may at all times for ever hereafter hold and enjoy all rents, courts, perquisities, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever to the owner or owners of the said manor, barony or borough, incident, appendant and belonging or appertaining (other than and except such right of common as could or might be claimed by them as owners of the soil and inheritance of the said moor or common so to be enclosed as aforesaid), in as full, ample and beneficial manner to all intents and purposes as they could or might have held and enjoyed the same in case this Act had not been made."

The language of this proviso is very comprehensive, and, at first sight, would appear to support the contention of the

defendants; but this view of its effect will not stand the test of a critical examination of its terms.

And first, as regards its general scope and effect. Not only had all rights of common over the moor been extinguished by the preceding clause, but it was at least doubtful whether the rights of the dean and chapter as lords of the manor, in respect of the minerals underlying the moor, had not been interfered with. Had, therefore, the proviso been intended to secure to the lords all those rights in respect of the minerals underlying the moor to which they had previously been entitled, we should have expected to find some specific allusion to such minerals, and a reservation of the rights of the dean and chapter in respect of them. But such is not the case. On the contrary, we find that the reservation in respect of royalties and mines is extended to the whole of the manor, without any special reference in this respect to the moor as part thereof, and without any suggestion, except such, if any, as may be inferred from the words which I shall next deal with, that the dean and chapter had reserved to themselves any rights in respect of the getting of minerals underlying the manor other than the *prima facie* rights of an owner of minerals as against the owner of the surface. But the defendants rely upon the distinction in the proviso that the enjoyment of the reserved royalties is to be in as full, ample and beneficial manner as if the Act had not been passed. Now if the Act had not been passed the dean and chapter would have been entitled to get the minerals as they might think fit, subject only to the restriction that they must leave sufficient pasturage for the commoners; and the contention of the defendants is that the rights of common having been extinguished by the Act, they, as lessees of the dean and chapter, are entitled to get the minerals as they may think fit, without any restriction whatever; in other words, that the dean and chapter having granted the freehold of the surface, they, or their lessees, are entitled, if they deem it necessary or expedient, to destroy the freehold thus granted. That a grant may be so worded as to confer such a power of depriving it of all value is clear from the authorities which have been cited, but, as has been before observed, the language in which the power is reserved must be clear and beyond all doubt. Can it be so said of the terms of the proviso which we are considering? I think not. It would be a much more reasonable construction of the language used to hold that, whereas before the Act the lords were entitled to work the minerals subject to the then rights of the commoners, they were entitled under the Act to work them subject to the substituted rights of the commoners—that is, to their rights as owners of a freehold surface to have that surface supported.

Upon the whole I have come to the conclusion that the rights reserved by this proviso to the dean and chapter or other the owners for the time being of the royalties of the manor are the fullest and most ample rights of getting the minerals underlying the several allotments of portions of the moor which are consistent with the tenure by which such allotments are held; but that such rights do not extend to authorise them in getting such minerals to disturb or let down the surface of freehold allotments. This appears to have been the view adopted by Mr. Justice Manisty in disposing of the case in the Queen's Bench Division.

Having formed this opinion as to the proper construction of the proviso which I have just examined, I have but few observations to make as to the further proviso which follows it.

It provides that in case the dean and chapter, or any persons claiming under them, shall work any mines lying under any of the allotments, or shall lay or use any ways through or over any of the allotments, the satisfaction for the damage or spoil of ground occasioned thereby is to be made by the persons working such mines or laying or using such ways to the persons in possession of such ground at the time of such damage or spoil; and it further provides as to the manner in which the amount of such satisfaction is to be ascertained, but with the limitation that it is not to exceed 5*l.* per annum during the time of working the mines, or continuing or using the ways, for every acre of ground damaged or spoiled.

This provides for compensation to the

occupier of the surface only in respect of damage occasioned to him by working the mines underlying his surface, or by the use of ways over his surface in connection with workings under his surface or under other allotments; it evidently points to temporary and not to permanent damage. If the mines are no longer worked, and the ways are no longer used, compensation cannot be recovered under the terms of this proviso, even though the injury to the surface may remain; the proviso cannot, therefore, cover the case of a letting down of the surface, which would be a permanent damage; nor does it in any way provide for damage or injury occasioned to the owner of the freehold. It was this that led us to suggest that the owner of the freehold should be made a party to the action and to the Special Case, and that the facts as to the respective interests of the freeholder and of the occupying tenant should be found; and this has accordingly been done.

The view, however, which I have taken of the effect of the provisions of the Act of Parliament which precede the proviso now under consideration, is unaffected by the provisions of the latter. They define the nature and extent of the compensation to be made to the occupier of the surface for the temporary use of the surface so occupied by him, but they do no more—they leave both the freeholder and the occupier claiming through him to assert all other rights required by the former, or which he can claim by reason of his freehold title, and which include a right to compensation for any permanent injury to the surface.

Under these circumstances I am of opinion that the appeal should be dismissed.

I am requested to state that the Lord Chief Justice concurs in this judgment, and that he was prepared at the conclusion of the argument to give judgment for the respondents.

LINDLEY, L.J.—In this case the main point discussed was the true construction of the Enclosure Act set out in the Special Case; and reference was made to several authorities bearing on the construction of Enclosure Acts more or less similar to that which we have to interpret. These authorities may be conveniently divided into two groups—namely, first, *Rowbotham* v. *Wilson* (4), *Smith* v. *Darby* (6), *The Duke of Buccleugh* v. *Wakefield* (2), *Aspden* v. *Seddon* (11) and *Gill* v. *Dickinson* (15), in all of which the mineral owner was held entitled to let down the surface; and, secondly, *Roberts* v. *Haines* (8), *Blackett* v. *Bradley* (13) and *Hext* v. *Gill* (7), in which he was held not so entitled.

These cases appear to me to establish two propositions—namely, first, that an Enclosure Act is not to be construed so as to allow the lord of the manor to let down the surface of allotments by working mines under them, unless the language of the Act is clearly and unmistakably to that effect; and, secondly, that the absence of all provisions for compensation for injury sustained by letting down the surface tends strongly to indicate that the Legislature did not intend by general words to reserve to or confer upon the lords of the manor the right to work his mines so as to let the surface down.

Now in this case there are several important matters to be borne in mind.

1. The lords of the manor had not in fact worked under the common in question before the Enclosure Act was passed.

2. Although the lords of the manor had worked mines in the manor without leaving any support for the surface, it is not stated that the surface was in fact let down by such working.

3. The words in the Enclosure Act reserving the mines to the lords of the manor are mere general words. There is no clause (as there often is) specially dealing with mines and the mode of working them.

4. The compensation clause is clearly confined to the persons in possession of the ground injured. There is no clause for compensating the owners of allotments injured unless they are also in possession of them.

5. This circumstance and the curious wording of the compensation clause leads to the conclusion that the compensation clause is limited to temporary damage

(15) 49 Law J. Rep. Q.B. 262; Law Rep. 5 Q.B. D. 159.

done by works on the surface, and does not deal with permanent injury to the surface by letting down. The words "spoil of ground" may possibly include permanent damage by spoil banks, but it is by no means clear that they do; and this ambiguity is not enough to serve as a basis for the conclusion that permanent damage by letting down was contemplated.

The words which created the difficulty are those which reserve to the lords of the manor "all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays and all other royalties and jurisdiction . . . . in as full, ample and beneficial manner to all extents and purposes as they could or might have held and enjoyed the same in case this Act had not been made." Now, the only words here used applicable to mines and their working are mines, and using and granting wayleaves. Passing over the wayleaves, and confining myself to mines, I find nothing reserved except the right to hold and enjoy them in as full and ample manner as if the Act had not passed. But the right to hold and enjoy them is merely incidental to their ownership. The mines are reserved, but no right to work them otherwise than as ordinary owners is either reserved or conferred by the words now under consideration. The words "in as full and ample a manner, &c.," occurred in *The Duke of Buccleugh* v. *Wakefield* (2), and it was there pointed out that these words cannot be construed literally (16). Before the Act the right to work the mines was subject to the rights of the commoners. After the Act there are no commonable rights to restrict the right to work the mines. It is impossible, therefore, to hold that the Act has made literally no difference in the right to work them. But if this is impossible, it follows that, notwithstanding the words of the Act, the right to work the mines must be somewhat more or somewhat less extensive after the Act than before; and the authorities seem to me to shew that an interpretation which restricts them rather than an interpretation which enlarges them is the proper interpretation, in the absence of some context leading to an opposite conclusion. Construing the statute by the light of former decisions, I am of opinion that the short legal effect of the Act is to convert the commoners into owners of the surface, subject to such rights of interference as are clearly reserved to or conferred by the Act upon the lords of the manor. On the other hand, the Act reserves to the lords the mines and the right to hold and enjoy them as owners, but with no additional rights, except such as are clearly reserved or conferred by the Act itself; and I cannot find any right to let down the surface reserved or conferred in sufficiently clear language to justify the lords in so working their mines as to let the surface down.

There is another point in the case which ought not to be passed over—I mean the fact that the house let down has been erected more than twenty years. It was originally built before 1826; it was altered and enlarged in 1854, and again in 1877; but the case shews that the land on which the house stood would have been let down whether any house had been on it or not. In other words, the alterations and additions made within twenty years before the commencement of the action did not cause the house to subside. The mines under the house were worked out in 1877, and such working occasioned the injury complained of. It appears to me that under these circumstances the plaintiffs are entitled to damages for the injuries done to the house even if the Enclosure Act ought to be construed as contended by the defendants. *Dalton* v. *Angus* (17) shews that as the house had existed more than twenty years before it was undermined the defendants had no right to let it down.

An Enclosure Act might no doubt be so worded as to confer a right to let down a house even after it had stood for twenty years; but whatsoever doubt there may be as to the true construction of the Act before us in other respects, I can find no such right as this conferred by it.

I agree with the other members of the

(16) 39 Law J. Rep. Chanc. at pp. 454, 455; Law Rep. 4 H.L. 396, at pp. 406, 407.

(17) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.

Bell v. *Love, App.*

Court that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors—Munns & Longden, agents for E. G. Marshall, Durham, for plaintiffs; White, Borrett & Co., for defendants.

1882. Nov. 13. } LAWSON *v.* WALLASEY LOCAL BOARD.

Contract—Covenant for Extension of Time for Performance in case of Non-removal of a Staging—Implied Contract that the Staging would be moved without unnecessary Delay—Certificate of Engineer—Reference to or Award by Engineer.

The plaintiff contracted with the defendants to remove a certain quantity of the bed of the river Mersey within a certain time, but in case a temporary staging erected in the river was not removed by the defendants in sufficient time to enable the plaintiff to complete his contract within the time agreed upon, he was to be entitled to such extension of that time as the engineer should deem reasonable. The plaintiff was to be paid eighty per cent. of the value of the work certified by the engineer as having been completed each month, and the balance when the work was finished, but if any "difference" arose between the defendants and the plaintiff "concerning the work contracted for or concerning anything in connection with the contract, such difference" was to be "referred to the engineer, and his decision" was to be final and binding on the local board the defendants, and the contractor the plaintiff. The work was not completed till some time after the date stipulated for by the contract, but this the plaintiff alleged to be due to the non-removal of the staging. The engineer admitted that the plaintiff was entitled to compensation for the time (thirty-eight days) during which he incurred expenses by the delay caused by the non-removal of the staging, but the full amount for extra work and expenses could not be agreed on between him and the plaintiff. After some correspondence the engineer certified that the work was finished to his satisfaction, and the plaintiff was entitled to 1,065*l.* 10*s.*, *which was paid; but the plaintiff claimed* 2,489*l.* 13*s.* 11*d. beyond that amount*:—Held, *that the engineer had no authority to make an express contract on behalf of the defendants that no unreasonable delay should occur in removing the staging, but that there was an implied contract to that effect, and that if the plaintiff was in fact prevented from completing the contract in time by reason of any such unreasonable delay he was entitled to damages.* Held, also, *that this was not a difference concerning a matter in connection with the contract such as to make the engineer's certificate final and binding, and that in fact there had been no reference to, or award by, the engineer.*

This was a Special Case stated for the opinion of the Court.

The following facts appeared from the Special Case:—

The plaintiff by articles of agreement of the 2nd of May, 1878, under the common seal of the defendants, who constitute a local board under the Public Health Act, 1848, and are an urban authority under the Public Health Act, 1875, contracted to dredge, excavate and remove 10,000 yards more or less of the bed of the river Mersey immediately contiguous to Seacombe Ferry. The contractor was to "complete the work at such time or times as he thinks right, and leave the same free from obstruction of any kind whatever on or before the 1st day of October, 1878, subject, however, to an extension of time in case the temporary staging," at the date of the contract, "erected on the site of the said work in connection with a new ferry at Seacombe aforesaid, should not be removed within such a time" as would "enable the contractor to complete the work by the said 1st of October, 1878," in which case he was "to be entitled to such an extension of time as the engineer may think reasonable." There was also an arbitration clause in the following terms: "If any difference shall arise between the local board and the contractor concerning the work hereby contracted for or any part thereof, or concerning anything in

connection with this contract, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor." The said temporary staging was not in fact removed in time to enable the plaintiff to complete, and the defendants' engineer practically extended the time; but the plaintiff claimed for expenses incurred by him in consequence of the delay. The engineer certified for a sum as being due to the plaintiff, which included an amount to cover a certain portion of those expenses. The plaintiff instituted an action, which resulted in this Special Case, in which the questions left for the opinion of the Court were—

1. Does the correspondence between the plaintiff and the defendants' engineer (the material parts of which appear in the judgment) constitute a contract by the engineer on behalf of the defendant board to compensate the plaintiff for any and what expenses incurred by him in consequence of the delay therein mentioned? And if so, was the engineer under the circumstances duly authorised to make such contract on behalf of the defendant board? And if so, is such contract legally enforceable in this action?

2. If the said correspondence does not constitute a contract enforceable against the board, does it constitute (*a*) a reference to the engineer of the difficulties at that time existing between the plaintiff and the defendant board within the meaning of the arbitration clause and the engineer's decision thereon; or (*b*) a submission of the plaintiff's claims to the arbitration of the engineer, and an award by the engineer thereon? And if so, is such decision or award (if any) binding upon the plaintiff and upon the defendant board and legally enforceable in this action?

3. Were the plaintiff's claims for expenses caused by delay "differences" within the meaning of the aforesaid arbitration clause?

4. Did the facts and documents set forth in paragraphs 8 to 11 of the Special Case (substantially set forth in the judgment) constitute (*a*) a reference to the engineer of the differences between the plaintiff and the defendant board and his decision thereon within the meaning of the arbitration clause; or (*b*) a submission of the plaintiff's claims to the arbitration of the engineer, and an award by the engineer upon the same? And if so, was such decision or award (if any) binding upon the plaintiff and upon the defendant board and legally enforceable in this action?

5. Is the defendant board on any other ground liable to the plaintiff in this action for any, and what, expenses or damages he may have incurred or sustained owing to the delay in the removal of the staging above-mentioned, if that delay was unreasonable and due to the defendant board?

6. If on any ground the defendant board is liable to the plaintiff, do any of the documents set forth constitute an assessment of the expenses or damages binding on the plaintiff and defendant board? And if so, which of those expenses or damages are now recoverable by the plaintiff in this action?

Webster, Q.C. (*F. R. Y. Radcliffe* with him), for the plaintiff, contended—first, that there was an express contract binding upon the defendants to pay such amount as might be reasonable by way of compensation for the delay and expense caused by the non-removal of the staging, and that such contract was entered into by the engineer on the defendants' behalf in such a way as to be binding on them, looking at the nature of the claim and the course of business adopted as well as the objects of the defendants' incorporation; secondly, that if there were no such express contract there was an implied contract to be gathered from the nature of the contract under seal, that the plaintiff should not be unreasonably delayed in his work and put to expense by the non-removal of the staging referred to in the contract. Further, that a claim for damages incurred by the plaintiff by reason of such unreasonable delay was not "a difference concerning the work contracted for, or concerning anything in connection with the original contract," which under the contract under seal was agreed to be referred to the engineer, and upon which his decision was to be final, but that if it were such a difference there had been no such reference or decision as to be binding on the

plaintiff—*Young* v. *The Corporation of Leamington* (1) and *Roberts* v. *The Bury Commissioners* (2).

Russell, Q.C. (*Ashton Cross* with him), for the defendants, contended that such an express contract as was alleged by the plaintiff to have been entered into could not have been made by the defendants except under seal, and that the engineer could not bind them to such a contract. That no such contract was implied. That if there were a contract express or implied, a claim for damages caused by such unreasonable delay (if any) would be a difference "concerning a matter in connection with the contract," and therefore the decision given by the engineer should, according to the terms of the contract, be binding and conclusive on and against all parties—*Sharpe* v. *The San Paulo Railway Company* (3) and *The Dunabery Railway Company* v. *Hopkins* (4).

The judgment of the Court (5) was delivered (on Dec. 15) by—

DENMAN, J.—This was a Special Case in which several questions were stated for the opinion of the Court.

The defendants were a local board under the Public Health Act, 1848, and an urban authority under the Public Health Act, 1875, and by Acts of 1858 and 1871 were authorised to hold, use and work Seacombe Ferry and receive tolls for its use, and by the latter Act were incorporated and given a common seal. Under the powers of the Acts of 1858 and 1871, the defendants acquired the fee-simple of the ferry with the foreshore and the appurtenances thereto, and purchased all steamboats and plant necessary to work it as a ferry, and had received from the public the tolls permitted to be levied by the said Acts, but the moneys received had not been sufficient for the working of the ferries, and the deficits have been made good out of the rates.

On the 2nd of May, 1878, the plaintiff entered into an agreement with the defendants under the seal of the defendants, the material parts of which are set out in paragraph 4 of the Case. The plaintiff was to dredge and remove 10,000 yards of the bed of the Mersey immediately contiguous to the ferry. He was to find labour of all kinds necessary in the work, and all plant, &c., and to bear all costs of labour and appliances during the execution and fulfilment of the work. He was to execute and completely finish the work under the direction and to the satisfaction of Mr. Carson, the engineer of the board. Clause 6 of the contract was as follows:—"The contractor is to complete the work at such time or times as he thinks right, and leave the same free from obstruction of any kind whatsoever on or before the 1st day of October, 1878, subject however to an extension of time in case the temporary staging now erected on the site of the work in connection with a new ferry at Seacombe aforesaid should not be removed within such a time as will enable the contractor to complete the work by the said 1st day of October, 1878, in which case he is to be entitled to such an extension of time as the engineer may think reasonable. But should the contractor fail to complete the said work within the aforesaid time or such extension of time as aforesaid, he is to pay the local board as compensation for such delay 5*l.* for every week during which the work shall so remain unfinished, and the local board are to be entitled to recover the same either by proceedings at law or by way of reduction from any moneys remaining due from the local board."

By clause 8 the defendants were to pay on account of the engineer's certificate instalments of eighty per cent. of the value of the work done during each month, and the balance of 5,000*l.* (the contract price) on the completion of the work. Clause 9 was as follows:—"If any difference shall arise between the local board and the contractor concerning the work hereby contracted for, or any part thereof, or concerning anything in connection with this contract, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."

The general superintendence of the

(1) 51 Law J. Rep. Q.B. 292; Law Rep. 8 Q.B. D. 579.
(2) 39 Law J. Rep. C.P. 129; Law Rep. 5 C.P. 310.
(3) Law Rep. 8 Ch. App. 597.
(4) 36 Law Times, 733.
(5) Denman, J., and Manisty, J.

work at Seacombe Ferry was entrusted to Carson, the engineer, subject to the control of a Ferry Works Committee appointed under the Public Health Act, 1875. He reported to the committee at each of its meetings as to the progress of the contract. His reports were discussed and entered on the minutes of the committee, which were subscribed and confirmed (or not) at the next board of the defendants. The plaintiff's dealings were all through the medium of the engineer, and not directly with the defendants.

The plaintiff did not commence his dredging operations under the contract until the 9th of September, 1878; and on the 7th of January, 1879, he wrote to the engineer that he had fulfilled his contract, and claimed payment of a balance. A correspondence ensued, in which the engineer insisted that the plaintiff had not fulfilled his contract, and disputed his measurements; and on the 15th the plaintiff wrote, stating that he had withdrawn his notice that he had fulfilled his contract, and proceeding as follows: "I am now ready to remove the remainder of the excavations as shewn on tracing. To enable me to do so it is necessary that the timber staging now on the ground be removed, as no dredging can be done until this is taken down. I must, however, unwillingly charge you all costs from this date until I am enabled by the removal of the timber erections to resume operations." The engineer answered: "I am urging Messrs. Brassey to remove the staging, so as to enable you to proceed with the dredging. I note that you are put to extra expense consequent on this delay, and I am prepared to compensate you for it on settlement."

The engineer reported these transactions and letters to the Ferry Works Committee, and added, "Inasmuch as he (plaintiff) is not able to complete his contract until the piles used by Messrs. Brassey have been removed, you (the board) will be liable for the rent of the dredges until he (the plaintiff) can re-commence." The committee thereupon ordered "that Mr. Carson take care that all speed is used by Messrs. Brassey in the removal of the piles." This minute was confirmed by the board on the 8th of February.

It must be taken for the purpose of raising the questions of law submitted to us, although not admitted for any other purpose, that the staging and piles referred to in these minutes and correspondence were "temporary staging," which rendered it impossible for the plaintiff to complete his dredging until they were removed; that they were not in fact removed until September, 1879, and that the plaintiff was put to considerable expense in consequence of this delay by the detention of his plant and the hire of dredges and machinery, and for wages and other necessaries.

From the date of the engineer's letter of the 15th of January, 1879, the plaintiff periodically sent in to him accounts or invoices of the amounts claimed by him for such detention. A specimen is set out in the Case, headed "Statement of expenses incurred from the 15th of January to the 1st of February, 1879, on account of dredger waiting for removal of temporary staging from site still to be dredged." It then states the sums assigned to each item, amounting to 15*l.* 10*s.* per day. The account so sent in up to the 28th of February, 1879, amounted to 588*l.* 4*s.* 6*d.*

It does not appear clearly from the Case what was being done between the 28th of February and October, but early in October the dredger originally employed by the plaintiff having left the Mersey he employed another dredger belonging to the London and North Western Railway; and on the 11th of November the works were completed. A correspondence thereupon took place between the plaintiff and the engineer as to a settlement. On the 10th of December the plaintiff writes that he wishes to see the engineer about the form in which his account is to be sent in, and intimates that he has paid nearly 8,000*l.*; that the hire of the London and North Western dredger, &c., will bring up the cost to more, and that to give a fair profit he will require 10,000*l.* less sums paid on account. The engineer replies on the 15th, "I am surprised at the figures you state." On the 30th the plaintiff writes referring to the contract, and stating that he had been delayed by the non-removal of the staging for 107 days, and enclosing an account for 10,612*l.*

3*s.* 10*d.*, which included a claim for dredging more than the amount provided for in the contract, and the 588*l.* 4*s.* 6*d.* claimed down to the 28th of February, and a large sum for delay and hire of the London and North Western dredger.

On the 7th of January, 1880, the engineer wrote a letter acknowledging the receipt of this account, disputing the claim for dredging, except for the 10,000 cubic yards provided for by the contract. [This claim in excess was afterwards withdrawn.] In this letter he says, "You suffered from delay on our part in the completion, for which you are entitled to have an extension of time, and also for any money out of pocket due to this cause. It is clear that the hire of the dredger during the time we prevented her working is of the latter nature, and the rate we arranged for her, and at which your account of the 4th of March, 1879, was made out, was at 15*l.* 10*s.* per day, and this fixes your compensation." He then offered to allow at that rate for thirty-eight days, down to the 28th of February, 1879, and added, "Then your contract was prolonged, and for this you ought to have a consideration; and then there is the contract amount in full; and these three items will make up your total." Both the plaintiff and the engineer expressed an opinion that they would be able to come to an agreement, and it appears that on the 21st of January, 1880, a statement was handed by the plaintiff to the engineer, in which the former claimed first the contract amount, then 2,800*l.* for damage caused to the plaintiff by non-removal of Brassey's staging until July, 1879, causing the work to be done in the winter months and the dredger to be lying idle for more than 100 days. This item appears also to have included a charge (afterwards abandoned) for dredging more than 10,000 cubic yards. The rate per diem charged for the dredger and other matters was 26*l.* 4*s.* 9*d.* This account also included the 588*l.* 4*s.* 6*d.* mentioned above, and a sum of 473*l.* 4*s.* 1*d.* for the hire of the London and North Western dredger, and concluded as follows—"In consideration of the longer period of time spent on the work and plant lying idle that might have been employed elsewhere, superintendence, &c., I ask to be allowed the sum of 500*l.*—total, 9,639*l.* 3*s.* 10*d.* On the 9th of February the plaintiff writes to the engineer, "I trust that you have found my account correct in every particular, and that I may receive the sum due shortly." On the 26th the engineer wrote, "Without prejudice to the rights of either party to the contract, I suggest the arrangement on the back for your consideration as being a suitable settlement of the questions raised in your statement of account." The account on the other side allowed 5,000*l.* for the contract, 588*l.* 4*s.* 6*d.* for detention of the Clyde dredger, 150*l.* for ten days in respect of the London and North Western Railway dredger, 367*l.* 15*s.* for fifteen days for the Clyde dredger (that is, at the rate of 24*l.* odd per day), 100*l.* allowance for plant and one or two smaller allowances; and on the other debited the plaintiff with the 5,000*l.*, and also with 420*l.* for the London and North Western Railway bill for their dredger, and with sums for the hire of tugs and hoppers, &c., and brought out a total of 6,334*l.* 10*s.* 2*d.* for the items on the credit side, and a balance of only 575*l.* 19*s.* 4*d.* as due to the plaintiff. The plaintiff on the 28th of February wrote: "I have yours of the 26th. You have quite surprised me by the results you have arrived at. I must insist upon being paid the sum named in the last account rendered to you." Nothing more occurred until the 1st of May, 1880, when the plaintiff wrote, "I really wish you would certify for the sum due for dredging at Seacombe." On the 5th of May the engineer wrote a letter saying that he had carefully considered the explanations and statements of the plaintiff; and added, "I have no doubt of being able to advise you whether I have seen any reason to depart from that decision early next week." On the 26th of May the plaintiff wrote as follows: "This account must now be settled. To facilitate matters I enclose statement of what I am now, after mature consideration, prepared to accept. Please to read the explanations I have already made, and take into consideration the time spent on the work. I will expect a certificate for the 3,451*l.* 10*s.* 1*d.* before the end of this week." In this account the plaintiff re-

models his claim, admitting most of the reductions suggested in the engineer's account, reducing the number of days for which he claimed for the detention of the dredger (beyond the 588*l.* 4*s.* 6*d.*), and, after making other reductions, bringing out a balance of 3,451*l.* 10*s.* 1*d.*

The engineer sent no answer to this note, but on the 16th of June sent in to the Ferry Works Committee a document as follows: "I certify that Mr. G. Lawson has completed to my satisfaction the work which he contracted to execute at Seacombe Ferry for the Wallasey Local Board, and that he is therefore entitled to the sum of 500*l.*, being the balance of the sum of 5,000*l.* mentioned in his contract, after deducting 4,500*l.* already paid on account; and I further certify that Mr. G. Lawson is entitled to the further sum of 565*l.* 19*s.* 2*d.* for extra work executed by him at Seacombe Ferry in connection with the said contract, being the balance of 1,324*l.* 10*s.* after deducting 758*l.* 10*s.* 10*d.* paid by the Wallasey Local Board at his request for the hire of dredgers, tug, hoppers and insurance; and that such several balances of 500*l.* and 565*l.* 19*s.* 2*d.* are to be received by Mr. G. Lawson in full satisfaction of all his claims on the Wallasey Local Board for work executed at Seacombe Ferry pursuant to the contract and in connection with it. Dated the 16th of June, 1880.

"(Signed) W. Carson,

"Engineer to the Wallasey Local Board."

"To the Wallasey Local Board.

"I certify that the sum of 1065*l.* 19*s.* 2*d.* is due to Mr. G. Lawson, being the last instalment on account of contract and extras Seacombe Improvement Contract, No. 8, as per particulars attached hereto.

	£	s.	d.
"Previous disbursements .	4,500	0	0
This Instalment . .	1,065	19	2
Paid by the Board . .	758	10	10
"£6,324	10	0	

"W. Carson, Engineer."

The defendant board sent a cheque to the plaintiff's solicitor in accordance with the above certificate. The plaintiff's solicitor wrote repudiating the certificate, and announcing an action, and that he had placed the cheque to the defendants' credit as a further payment on account. The writ was issued on the 29th of October, 1880, claiming 2,489*l.* 3*s.* 11*d.*, being the balance claimed on the 26th of May, 1880, minus the amount of the cheque. After the pleadings were closed, the parties stated this Case in order to raise certain questions of law, which were argued before my brother Manisty and myself. It was admitted that none of the forms required by the Public Health Act, 1875, s. 174, were complied with, and that there was no consideration for any contract entered into or action taken by the defendant board except as appears in the Case, and that no document other than the original contract was under the seal of the board.

In the above circumstances it was contended for the defendants—first, that beyond the original contract for the excavation of 10,000 cubic yards there was no contract binding on the defendants; secondly, that if there was any such contract it was only in respect of a matter "in connection with" the original contract, and therefore that any difference concerning it was matter for the decision of the engineer; and, thirdly, that the engineer had decided the only matters in difference by his certificate of the 16th of June, and that the plaintiff could have no right to recover beyond the amount certified by him.

The plaintiff contended—first, that there was an express contract binding upon the defendants to pay such amount as might be reasonable by way of compensation for the delay and expense incurred by him, and that such contract was entered into by the engineer on their behalf and with their knowledge, and in such a way as to bind them, looking at the nature of the claim, and the course of business adopted, and the objects of the defendants' incorporation. He also, in the second place, contended that if there was no express contract between the parties there was an implied contract to be gathered from the very nature of the contract under seal that the plaintiff should not be unreasonably delayed in his work and put to expense by the non-removal of the staging referred to in the contract; and that a claim for damages incurred by the plaintiff by reason of such unreasonable delay was not a difference concerning the work con-

tracted for, or concerning anything in connection with the original contract, which must be referred to the engineer, and upon which his decision was to be final. It was further contended that, even if it was such a difference, there had been no such reference or decision as to be binding upon the plaintiff.

Upon full consideration of the facts above stated, we are of opinion that the plaintiff will be entitled to recover damages from the defendants if it should be established in evidence that the plaintiff was prevented from proceeding with the work owing to unreasonable delay in the removal of staging, without the removal of which he could not proceed. We do not think that this liability arises from any contract made by the engineer on behalf of the defendants. The engineer had no authority to bind the defendants by any such contract. He merely had authority to extend the time for the performance of the contract (which he appears to have considered as done, though he had not extended it for any definite period), and to decide differences concerning the work contracted for or concerning anything in connection with the contract (not to make bargains on behalf of the defendants as to the amount to be paid for preventing the plaintiff from proceeding), and to certify for amounts due under the contract for contract work and extras. But we think that, looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as long as he should think reasonable in case of the non-removal of the staging, there is an implied contract on the part of the defendants that the removal of the staging should not be unreasonably delayed. We think that this is the legitimate inference to be drawn from the case of *Roberts* v. *The Bury Commissioners* (2), which was fully discussed in the argument before us.

But it was contended that, if this be so, a claim for damages caused by such unreasonable delay would be a difference "concerning a matter in connection with the contract," and therefore a matter as to which the decision of the engineer was conclusive.

We think that there are two clear answers to this contention. First, we think that such a dispute is not "a difference concerning a thing connected with the contract." When the parties contracted they never contemplated that the engineer would have to decide any such dispute. The dispute is one arising from a breach of an implied contract, which is not part of or necessarily connected with the contract under seal. In order to bind a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract—*Roberts* v. *The Bury Commissioners* (2). In the present case we fail to find any such language. But, secondly, we are of opinion that the correspondence set out in this case does not shew that the certificate of the engineer was a decision by which the plaintiff would be bound. He no doubt appears to have been under the impression that it might be important for him to obtain a certificate for this claim as well as for sums due under the contract, but we can find no evidence in the letters that he agreed to be bound by what the engineer might certify.

We therefore think that we ought to answer the fifth question in the affirmative, on the ground that the defendants would in the case supposed be liable, on the ground that there was an implied contract arising out of their contract with the plaintiff that they would not be guilty of unreasonable delay in the removal of the staging, and so prevent him from proceeding with the work. And in answer to the sixth question, we say that none of the documents set out in the Case amount to an assessment of the expenses or damages binding on the plaintiff or defendants, but that the proper measure of such damages is what the plaintiff has unavoidably sustained in consequence of any such unreasonable delay.

The answers we have given to the fifth and sixth questions put to the Court render it unnecessary to answer categorically the other questions. But it may be as well shortly to state the view we entertain upon those questions.

Our answer to the first is that we do not think that the engineer entered into any

contract on behalf of the board. We think that the documents set out merely amount to an expression of opinion on the part of the engineer that the defendants would be liable to pay damages such as those here sought to be recovered. We do not find any evidence that the board authorised the engineer to agree to any such amounts as those claimed by the plaintiff.

To the second question we answer that there is no evidence, in our opinion, of a reference to the engineer of or an award by him as to the claims of the plaintiff within the meaning of the arbitration clause referred to in the question.

To the third question we think the plaintiff's claims in the action are not differences within the meaning of the arbitration clause, not being differences concerning the work contracted for, nor concerning anything in connection with the contract under seal; but differences concerning claims arising out of a breach of an implied but independent contract to do something essential to the commencement of the work by the contractor. Our answer to the fourth question is covered by that to the second. We think that, looking at the whole evidence in the Case, there is nothing to shew any such reference, submission or award (6).

Judgment accordingly.

Solicitors—Radcliffe, Cator & Martineau, for plaintiff; J. J. & C. J. Allen, agents for Simpson & North, Liverpool, for defendants.

1882. Nov. 28. } LANGRISH (*appellant*) *v.* ARCHER (*respondent*).

Gaming—Vagrant Act Amendment Act, 1873 (36 & 37 *Vict. c.* 38), *s.* 3—*Open Place to which the Public have Access—Railway.*

[For the report of the above case, see 52 Law J. Rep. M.C. 47.]

(6) The defendants appealed from this judgment, and such appeal was heard on the 11th of April, 1883, when the Court of Appeal, without calling on counsel for the plaintiff, dismissed the appeal with costs.

1883. Jan. 27. } ABOULOFF *v.* OPPENHEIMER AND ANOTHER.

Practice—Parties—Married Woman—Next Friend—Staying Proceedings till Husband joined—Order XVI. rule 8.

The plaintiff, a married woman resident abroad, recovered judgment in her own name against the defendants in the Court at Tiflis, and, on giving security for costs on account of such residence beyond the jurisdiction of the High Court, commenced an action on the said judgment in her own name against the defendants. The husband was not joined, nor was any leave to sue without a next friend applied for. The defendants applied to the Master for a stay of proceedings until such time as the husband should be joined. The Master made no order, and the Judge in chambers refused to reverse the Master's decision:—Held, *by* MANISTY, J. (STEPHEN, J., *dissentiente*), *that the practice in Chancery before the Judicature Acts was not to make the husband a party to the exclusion of a "next friend"; that under Order XVI. rule* 8, *the defendants had only a right to ask that the proceedings should be stayed until a "next friend" should be appointed; and that a married woman has a right to bring an action by a next friend, if she chooses, without joining her husband.*

This was an appeal from Mathew, J., at chambers, who refused to reverse the decision of the Master, on an application by the defendants under Order XVI. rule 8 (1), to stay all proceedings in an action

(1) Order XVI. rule 8: "Married women and infants may respectively sue as plaintiffs by their next friends in the manner practised in the Court of Chancery before the passing of this Act, and infants may in like manner defend any action by their guardians appointed for that purpose. Married women may also, by leave of the Court or a Judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a Judge may require."

Rule 13: "No action shall be defeated by reason of the misjoinder of parties, and the Court may in every action deal with the matter in controversy, so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order

brought by a married woman resident abroad on a judgment recovered by her in her own name at Tiflis, in Russia, until such time as the husband should be joined. The plaintiff had given security for costs on account of her residence out of the jurisdiction, but had not obtained the leave of the Court to sue without a next friend. The Master made no order, and the defendants appealed.

Cohen, Q.C., and *Horne Payne*, for the defendants.—The rule says that a married woman may sue by her next friend "in the manner practised in the Court of Chancery." What that manner was is plainly shewn by the judgment of Lindley, L.J., in *Hancocks* v. *Lablache* (2):—"Before the Married Women's Property Act, 1870, it was well settled in Chancery as an inflexible rule, to which there were only special exceptions, such as in a case where a husband might be beyond the jurisdiction, that a suit could not be instituted by or against a married woman without the husband being a party. If she was suing by herself or next friend, the husband was made plaintiff, and where she was sued, he was made defendant." Therefore, without the leave of the Court, which the plaintiff has not obtained, a married woman cannot sue without a next friend, and the practice in Chancery is to make the husband a co-plaintiff—see *Daniell's Chancery Practice*, p. 162. The object of the defendants, who have impeached the validity of the judgment sued on, as the Court of Appeal has held them entitled to do, is to interrogate the husband about this judgment, and this Court will give its aid for the purpose of getting persons who are alleged to have joined in a fraud into such a position as to be subject to interrogation—*Ebsworth* v. *The Alliance Insurance Company* (3).

A plea in abatement by reason of non-joinder of the husband would formerly have been a good plea. In *Kendall* v. *Hamilton* (4), the Lord Chancellor (Earl Cairns) says, "Although the form of objecting by means of a plea in abatement to the non-joinder of a defendant who ought to be included in the action is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or acted." This application, therefore, ought to have been granted. But it was refused on the ground of delay on the part of the defendants, whereas the delay has arisen from—first, the defendants exercising their undoubted right to prosecute their appeal on the demurrer to the Court of Appeal; and, secondly, by the more important delay of the plaintiff in delivering a reply.

Sidney Woolff, for the plaintiff.—This is not in any way connected with the question of fraud, but simply a question under Order XVI. rule 8. The learned Judge has decided that the application was made too late in the course of the proceedings; and that by the proceedings to make the plaintiff give security for costs there had been a waiver of the non-joinder of the husband. Under Order XVI. rule 8 (1), a married woman may bring an action, subject to an application by the defendant to add a next friend or make her give security for costs. But there is nothing either in the Rules or in the former practice in Chancery to shew that the next friend must be the husband. Rule 13 (1) says that no one shall be added as a plaintiff or a next friend without his consent; but if this application be granted, the husband would be joined as a plaintiff

that the name or names of any party or parties, whether as plaintiffs or as defendants, improperly joined, be struck out, and that the name or names of any party or parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent thereto. All parties whose names are so added as defendants shall be served with a summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such summons or notice."

(2) 47 Law J. Rep. C.P. 514; Law Rep. 3 C.P. D. 197.

(3) 42 Law J. Rep. C.P. 305; Law Rep. 8 C.P. 596.

(4) 48 Law J. Rep. C.P. 705; Law Rep. 4 App. Cas. 504.

without his consent. The only order that can be made under Order XVI. rule 8, is that the proceedings be stayed until a next friend is joined or the plaintiff gives security for costs. Moreover, under the Married Women's Property Act, 1882, which being an Act affecting procedure is retrospective in its effect, the plaintiff could sue alone.

Cohen in reply.

STEPHEN, J.—I think this appeal should be allowed. On the whole I think the point in this case arises entirely on the first three lines of Order XVI. rule 8 (1). A married woman may bring an action by her next friend or an infant by his guardian in the manner practised in the Court of Chancery. Now I think, and in this opinion I am upheld by the judgment of Mr. Justice Lindley, in the case of *Hancocks* v. *Lablache* (2), as well as by the passage quoted from *Daniell's Chancery Practice* (3), that the practice of the Court of Chancery was to make the husband co-plaintiff, and this though there might be a next friend other than the husband joined. No doubt when that practice grew up, and before any such changes as have been introduced by recent legislation, the wife was considered to be subject to such control that she ought not to be allowed to sue without the superintendence of the husband. I agree that rule 13 of the same Order (1) applies also to this case. Upon that it was argued that we have no power to do more than grant or refuse leave to sue to a married woman on her finding a next friend or finding security for costs, and that under rule 13 the husband cannot be added as a next friend without his consent. That is true; but here we are only asked to stay the action until he adds himself—not to add him. Then arises the question, whether we ought to interfere with the discretion exercised by my brother Mathew. I cannot but think that we ought so to do. Mr. Justice Mathew thought there was undue delay in making the application, and that taking further steps for the purpose of getting security for costs since the time accrued at which the application might have been made, amounted to a waiver of the non-joinder of the plaintiff's husband. But, looking at the dates and nature of the various proceedings in this case, I cannot say I see any unnecessary delay on the part of the defendants, who were, it seems to me, entitled to take the opinion not only of a Divisional Court, but also that of a Court of Appeal, on the questions which were in fact decided by that Court—I see no delay by the defendants after that decision, and I do not think they should be debarred from making this application. A further point raised by the defendants is, that there would be nothing to prevent the husband, if not joined in this action, bringing an action on the judgment here sued on. I think it only right that the husband, who could, unless joined, bring a second action, should be joined as a party to this, and thus be bound by the decision. I therefore think this appeal should be allowed; but as my brother Manisty is not of the same opinion, I shall, as is the ordinary course, withdraw my judgment, and the order will stand.

MANISTY, J.—I regret to differ from my brother Stephen, but cannot come to the same conclusion. This is an action by a married woman on a judgment obtained by her abroad in her own name. That judgment was impeached, and it was decided by the Court of Appeal that the defendants had a right to impeach it. The defendants by this application seek to have the proceedings stayed until the husband is made a party. But it did not suit them to apply to stay the action "until the husband or a next friend was joined," as the admitted object of the application was to enable the defendants to interrogate the husband. But what right have we to deprive a married woman of her right to bring an action by a next friend? Rule 8 is as follows: "Married women and infants may respectively sue as plaintiffs by their next friends in the manner practised in the Court of Chancery before the passing of this Act, and infants may in like manner defend any action by their guardians appointed for that purpose. Married women may also, by leave of the Court or a Judge, sue or defend without their husbands or next friend on such security (if any) for costs as a Judge may require." Can it be said that, according to the practice of Chancery, a married woman cannot bring an action without joining her husband if she has a

Aboulaff v. *Oppenheimer.*

next friend? It appears to me that the rule means that a married woman is to sue by her next friend in the manner practised in the Court of Chancery. But the application is not in the alternative to join the husband or a next friend. On the ground, therefore, that it was never the practice in Chancery to order the husband to be joined as plaintiff to the exclusion of a next friend, I think that this appeal should not be allowed.

I also think, on the ground of delay by the defendants, that the application should be refused.

Appeal dismissed, with costs to plaintiff in any event.

Solicitors—Michael Abrahams, Son & Co., for plaintiff; Emanuel & Simmonds, for defendants.

1883. Feb. 4.

LENHAM AND OTHERS (*petitioners*) *v.* BARBER (*respondent*). *In re* THE HEREFORD MUNICIPAL ELECTION PETITION.

Municipal Election—Petition—Corrupt Practices—Particulars—Time—Municipal Elections Act, 1872 (35 & 36 *Vict. c.* 60).

In election petitions, in the absence of exceptional circumstances, seven clear days before the trial is sufficient time for the delivery of particulars by the petitioners of alleged corrupt practices.

This was an appeal from an order of Hawkins, J., at chambers, whereby it was ordered that the petitioners against the return of the respondents at the municipal election in November, 1882, as town councillor for the Monmouth ward of the city of Hereford, should deliver to the respondent particulars as to the bribery, treating and undue influence, the payment of canvassers and the conveyance of voters alleged in the petition, fourteen clear days before the day appointed for the trial.

A. G. M. McIntyre, for the petitioners.—The order is too stringent in allowing so long a time for delivery of the particulars, and there are no exceptional circumstances in the case which would justify such an extension of the usual time, and at any rate the words "so far as is known" should be inserted—*Maude* v. *Lowley* (1) and *Green* v. *Hall: The Oxford Election Petition* (2).

J. C. Lewis Coward, for the respondent.—The time to be allowed is in the discretion of the Judge at chambers, and ought not to be diminished upon the ground that witnesses may be tampered with—*The Drogheda Petition* (3). The words "so far as is known" were inserted in *Maude* v. *Lowley* (1) by consent.

POLLOCK, B.—It would be very difficult to lay down anything amounting to a general rule applicable to all such cases as the present; nor do I desire to do so; but some uniformity of practice should exist. Looking at the facts of the present case, I think that fourteen clear days are not required by the respondent in which to consider the particulars; but, judging from the practice as established by former cases, and the absence of exceptional circumstances, I think seven clear days are sufficient. In my opinion, this order should not be varied by the addition of the words "so far as is known," as they do not seem to me to be necessary, because the person who gives the particulars can only do so "so far as is known," and my practice has been not to allow them to be inserted. They only afford a sort of warrant for unduly limiting the particulars. This part of the application to vary the order will therefore be refused.

MANISTY, J.—I am of the same opinion. On the first point I agree there should be some approximation to uniformity; since 1880 the practice has been practically uniform, subject to exceptional circumstances. In this case I see nothing exceptional to justify a departure from the general practice of giving seven clear days.

(1) 40 Law J. Rep. C.P. 103; Law Rep. 9 C.P. 165.
(2) W.N. 1880, p. 146.
(3) 19 Law J. Rep. C.P. 528.

I also agree on the second point. The only amendment therefore will be that seven clear days will be substituted for fourteen.

Appeal allowed.

Solicitors—Smiles & Co., agents for W. Boycott, Hereford, for petitioners; Meredith, Roberts & Mills, agents for E. L. Wallis, Hereford, for respondents.

[IN THE COURT OF APPEAL.]

1883. Feb. 24, 26, 27. } KENDALL TRUSTEE, ETC., *v.* MARSHALL, STEVENS AND COMPANY AND OTHERS.*

Vendor and Vendee—Unpaid Vendor—Stoppage in transitu—End of the Transit—Constructive Possession—Agent of Vendee to Receive and Forward Goods on Fresh Journey.

The vendee of certain goods directed the vendors to forward them by rail from B. to G. to the order of the defendants, who were shippers of goods, and who had received instructions from the vendee to receive the goods and then to forward them to Rouen. The ultimate destination of the goods was not communicated to the vendors. On the arrival of the goods at G. the railway company gave notice to the defendants that after the expiration of a certain time they would hold the goods no longer as carriers, but only as warehousemen. After the expiration of the notice, and while the goods were still in the hands of the railway company, the vendee filed a petition for liquidation. The defendants, by order of the vendors, stopped the goods in transitu and returned them to B. In an action by the trustee in liquidation of the vendee to recover the value of the goods,—Held, *that as between the vendors and the vendee, the right to stop the goods was at an end when the goods had arrived at G., and when the notice given by the railway company had expired; for the goods were then in the constructive possession of the vendee, the defendants being the appointed agents of the vendee to receive and forward the goods upon the fresh journey to Rouen.*

* *Coram* Brett, L.J.; Cotton, L.J., and Bowen, L.J.

Appeal by the plaintiff from a judgment of Mathew, J., in an action to recover damages for the conversion of fifty-five bales of waste cotton.

The plaintiff was the trustee in liquidation of one Loeffler, who traded as Higginbottom & Co.

The defendants, H. Marshall, Stevens & Co., were shipping agents and carriers at Garston. The other defendants, Peter Ward & Son, of Bolton, were the vendors of the bales in question.

On the 9th of November, 1880, Ward & Son sold the bales of cotton to Loeffler.

On the 12th of November the vendee telegraphed instructions to the vendors to send the goods to the order of Marshall & Co. at Garston.

On the same date the vendee by letter instructed Marshall & Co. that the goods were being sent to them direct from Bolton to Garston, and requested them to ship the goods as soon as possible to Durend & Co., at Rouen, in France.

On the 13th of November the goods were forwarded by the vendors by rail to the order of Marshall & Co. at Garston, where they arrived on the 15th. The railway company's advice note, which gave notice to Marshall & Co. of the arrival of the goods at Garston, contained a clause to the effect that the goods, after the expiration of a certain time, would be held by them not as common carriers, but as warehousemen, at owner's sole risk.

On the 18th of November the vendee filed a petition for liquidation.

On the 22nd of November the vendors telegraphed to Marshall & Co. to stop the goods, and that was accordingly done, the goods being returned to Bolton on the 24th of November.

The action came on for trial before Mathew, J., at Manchester, but was reserved for further consideration in London, when judgment was given for the defendants.

The plaintiff appealed.

Russell, Q.C. (with him *Samuel Taylor*).—The vendors were not entitled to stop the goods after their arrival at Garston, for at that time the *transitus* was at an end. There is no evidence to shew that when the goods were delivered to the railway company at

Bolton, the vendors knew that Marshall & Co. were instructed to forward them to Rouen. Where goods are delivered by the vendor and reach the destination named by the vendee to the vendor, there the transit is at an end, and the right to stop *in transitu* has gone. The advice-note shews that when the goods had reached Garston the transit was at an end, because the company then held the goods not as carriers but as warehousemen. The goods were delivered by the vendors to the railway company to be carried from Bolton to Garston, and so long as they were in the hands of the company for that purpose as carriers, the right to stop *in transitu* existed. The defendants contend that the delivery at Garston was only a delivery to another carrier for the purpose of carriage to the final destination—namely, Rouen. But here there were two distinct transits —namely, from Bolton to Garston, and then from Garston to Rouen; and that is not sufficient to entitle the vendors to stop the goods, because Rouen was a new destination given to enable the vendee to carry out delivery to his purchaser Durend & Co.

In *Dixon* v. *Baldwen* (1) it was held that the *transitus* came to an end as soon as the goods had reached the hands of the agent of the buyers at Hull, who had received orders from the buyers as to the ultimate place of destination of the goods. That case is in point here—see also *Leeds* v. *Wright* (2) and *Scott* v. *Pettit* (3). The vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent—*Ex parte The Rosevear China Clay Company* (4). But here Marshall & Co. were the agents of the vendee for the purpose of forwarding the goods to Rouen, so that the right of stoppage *in transitu* had ceased to exist.

The whole point of the *Rosevear China Clay Company Case* (4) would seem to be that there can be no *transitus* unless the place of destination is communicated to the vendor—*Berndtson* v. *Strang* (5) and *Valpy* v. *Gibson* (6) were also referred to.

Gully, Q.C., and *C. A. Russell*, for the defendants.—The goods here were delivered into the hands of the carriers, and were started on a journey which was to be determined at Rouen. It is immaterial whether or not there is a change of carriers during the journey, and whether the warehousing of the goods was an incident of that carriage. The contract of sale, so far as that is concerned, was satisfied by delivery of the goods at Garston. The only material thing to be considered is, what was the intended destination when the goods were started on their journey? The case of *Ex parte The Rosevear China Clay Company* (4) shews that it is immaterial whether that intention is conveyed to the vendor or not. The right to stop the goods continues until they have arrived at their ultimate destination. There was no moment at which the goods were in the hands of any person otherwise than as carrier; and, so long as that was so, the goods might be stopped, although, in the course of the transit to Rouen, it might become necessary to warehouse at Garston for a time. Marshall & Co., having received instructions to forward the goods to Rouen, were liable as carriers whilst the goods were at Garston in the control of the railway company. Where a cargo is delivered free on board a ship chartered by the purchasers, the vendor has a right of stoppage *in transitu* while the voyage continues—*Berndtson* v. *Strang* (5). That principle has since been carried further, so that a vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who can be treated as his agent, and who is not a mere intermediary. The fact that the port of destination is left uncertain, or is changed, makes no difference—*Ex parte The Rosevear China Clay Company* (4). The principles contained in that case cover the present case: for these goods were never in the hands of any agents of the purchaser, save for the purpose of carriage. Marshall & Co. never

(1) 5 East, 175, 186.
(2) 3 Bos. & P. 320.
(3) Ibid. 469.
(4) 48 Law J. Rep. Bankr. 100; Law Rep. 11 Ch. D. 560, 568.
(5) 37 Law J. Rep. Chanc. 665; Law Rep. 3 Ch. App. 588.
(6) 4 Com. B. Rep. 837; 16 Law J. Rep. C.P. 241.

received the goods as warehousemen, and therefore they never came home into the hands of the purchaser; they were merely warehoused as an incident of carriage. *Dixon* v. *Baldwen* (1) was relied on by the defendants; but there the goods were sent to Hull upon the terms that they were to remain there to the order of the purchaser, so that he had full control over them. In *Coates* v. *Railton* (7) the goods were delivered at the warehouse of the defendant, by whom they were packed and forwarded, and yet it was held that the right to stop *in transitu* existed.

In *Valpy* v. *Gibson* (6) the transit was at an end, because the purchaser had interfered and taken the goods into his own hands; but it is not a decision that the placing goods in the hands of a forwarding agent ends the transit.

[BRETT, L.J., referred to *Leeds* v. *Wright* (2).]

That case was cited in *Coates* v. *Railton* (7); the goods were there to be forwarded in the discretion of the agent to an unknown destination. Rolfe, B., lays it down as a principle that it is of the very essence of the doctrine that during the *transitus* the goods should be in the custody of some third person—*Gibson* v. *Carruthers* (8); and goods in the charge of a carrier for the purpose of forwarding them were held in *Rodger* v. *Comptoir d'Escompte de Paris* (9) to be still in transit. *Scothorn* v. *The South Staffordshire Railway Company* (10) was also referred to.

Taylor, in reply.—*Valpy* v. *Gibson* (6) is directly in point here; and is an authority to shew that the fact of there being an ulterior destination and of a subsequent transit being intended and indicated to the vendor does not make such transit a part of the transit during which the vendor has a right to stop the goods. *Ex parte Watson; in re Love* (11) was also cited.

BRETT, L.J.—This is a case of some difficulty, but in the result I have come to the conclusion, although with some hesitation, that I must differ from the judgment of Mr. Justice Mathew.

The question is, whether there has been a valid stoppage *in transitu* or not. Much has been said about the doctrine of stoppage *in transitu*. It certainly is not founded upon contract; neither is it any part of the contract of purchase and sale between the vendor and vendee. I do not know whether it is a doctrine which is founded upon any ethical principle, but it is one which is founded on the custom of merchants, and which has been established in English law as so many doctrines have been established. It is a custom and doctrine analogous to, but not the same as, the right of an unpaid vendor in the case of the insolvency of the vendee to retain goods the property in which has passed to the vendee. The doctrine is never wanted except where there has been a contract of sale, under which contract the property in the goods has passed from the vendor to the vendee. Sometimes the property in the goods passes to the vendee by the very contract itself; sometimes it does not, but passes only by reason of something which is to be done under the contract. If, under a contract for the purchase and sale either of specific goods or of goods which are afterwards to be placed within the contract by the vendor, there is delivery of those goods under such a contract either to the vendee himself or to his agent, then the appropriation or delivery of those goods passes the property in them to the vendee although it did not pass by the contract of sale. If the goods are delivered into the actual possession of the vendee the right to stop *in transitu* cannot exist. Where the property in the goods passes to the vendee under the contract, or by appropriation after the contract has been made, or by reason of the goods coming into the constructive possession of the vendee, yet in such cases if the goods are in the course of transit from the vendor to the vendee, the right of stoppage *in transitu* may arise. Where goods purchased under a contract of purchase and sale and appropriated to the vendee are delivered to a carrier named by the vendee, such delivery, for the purpose of passing

(7) 6 B. & C. 422.

(8) 8 Mee & W. 321; 11 Law J. Rep. Exch. 138.

(9) 38 Law J. Rep. P.C. 30; Law Rep. 2 P.C. 393.

(10) 8 Exch. Rep. 341; 22 Law J. Rep. Exch. 121.

(11) 46 Law J. Rep. Bankr. 97; Law Rep. 5 Ch. D. 35.

the property and of giving the vendor a right to payment, is a constructive delivery to the vendee. There is therefore a constructive possession by a vendee where there is nevertheless a right of stoppage *in transitu*. So that where goods are delivered to a carrier to be forwarded to the vendee, the goods, although in one sense in the constructive possession of the vendee, are nevertheless not in his possession for the purpose of putting an end to the right of stoppage.

A second case of constructive possession, which differs from the first, is, where goods are put in the actual possession of the vendee, or, for the purpose of ending the transit, can be said to be in the constructive possession of the vendee. Where the goods are to go by one transit only from the vendor to the vendee, it is not difficult to discover when they come into the actual or constructive possession of the vendee. That is to say, they are put into the second constructive possession of the vendee whenever they are delivered to his agent, who has to receive them and hold them for him as his possession at the end of the transit. That may be, not at the end of the transit first contemplated when the goods were started on the journey, because if the vendee persuades a person at an intermediate point to take possession, or if he actually takes possession, or his agent does so, so as to take the goods out of the transit, there the transit is at an end.

But there is a case of considerable difficulty where goods are not to be delivered into the actual possession of the vendee until after they have been in an intermediate place of deposit for transition from one carrier to another carrier.

It is not necessary that the place of destination should be named either before or at the time of the contract. I do not know whether it is absolutely necessary that anything should be said before the goods start from the possession of the vendor. But anything said to the vendor before the goods are started from his possession may be material, because it may have a considerable effect on the question as to when that transit ended. The doctrine of stoppage *in transitu* has been well laid down in *Lord Tenterden's Law of Shipping* (part 3, chap. 9), as follows: "Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee." It is clear to my mind that the constructive possession there mentioned is the second constructive possession I mean. If one may enlarge the wording of that proposition, I would venture to add the words, "when they are in any place of deposit connected with the transmission and delivery of them in this sense, that it is a place of deposit by the person who is carrying them, a place of deposit which is part of the transmission for the purpose of delivery, and until they arrive at the actual possession of the consignee (and about that there is no doubt), or at the possession of the agent of the consignee, who is his agent for the purpose of taking possession of them for him, and of dealing with them as his agent." Here the goods were purchased from the vendors at Bolton, and the place to which they were to be sent was no part of the contract. The goods were ordered by the purchaser, who directed the seller to forward them to Garston to the order of Marshall & Co. That was the only direction with regard to these goods ever given by the vendee to the vendors. It was not such an order as this; forward to Garston to Marshall & Co., and order them to send the goods on to the vendee at Rouen. In that case no order as to forwarding the goods would be given by the vendee to Marshall & Co. at all; the transit there would have been a transit from Bolton to Rouen; and the goods could have been stopped when they arrived at Garston unless some one as agent of the vendee at Garston had put an end to the transit. The goods here were to be sent to Garston to the order of Marshall & Co., who were not in any sense the agents of the vendors. The order was given by the vendees, and Marshall & Co. were to receive the goods from the railway company at Garston, and then to forward them to the vendee at Rouen.

It was said that from the time that Marshall & Co. received the goods until their arrival at Rouen, they were carrying agents; that they were agents for the purpose of sending the goods on; and that from the moment they were in their possession they were to be considered persons whose only duty was to forward them to Rouen. The truth is that in this case they were the agents of the defendants to keep the goods at Garston for a time until they had a ship in which to send them on. They were in two characters, that of agents to receive the goods for the vendee, and that of shippers of goods. But I do not rely upon that. It would make no difference if they could have sent the goods on to Rouen, instead of keeping them at Garston. The point which makes a difference here is that they are persons who receive instructions from the vendee, and act solely as agents of the vendee, and not as agents of the vendors at all. In such a case the directions given to the vendors are important, because those instructions shew when the agency as to forwarding the goods ceased, and that the vendors were bound to forward the goods to Garston, and to Garston only.

I do not think that it makes any difference whether the order as to forwarding the goods given by the vendee to Marshall & Co. was given before or after the order from the vendee to the vendors. The case is not to be determined by the intention of the vendee—which intention after all may have been in his mind only—at the time when the goods started on the journey; but it depends upon what is to be the transit of the goods from the vendors either to the actual possession of the vendee or to the possession of an agent who is to receive them at the end of the transit from the vendors to the vendee. The moment such agent receives the goods as owner for the vendee, the right to stop *in transitu* is at an end. It therefore seems to me that Marshall & Co., the moment they received the goods at Garston by the authority of the vendee and not by the authority of the vendors, held them, within the meaning of the rule, as the agents of the vendee; and the goods were in the constructive possession of the vendee so as to put an end to the transit from the vendors to the vendee. The moment the notice given by the railway company to Marshall & Co. that the goods would no longer be held by them as carriers but as warehousemen took effect, the company became the agents of Marshall & Co. to hold the goods as warehousemen to the order of Marshall & Co. The possession of the warehousemen was therefore the possession of Marshall & Co. who had control over the goods, and they held them as sole agents of the vendee. The goods were then in the constructive possession of the vendee so as to put an end to the transit; and at that moment the right of the vendors to stop *in transitu* was also at an end. It is not necessary to go through all the cases, because the present case comes within the class of cases such as *Valpy* v. *Gibson* (6) and *Dixon* v. *Baldwen* (1). It is not within that of *Rodger* v. *Comptoir d'Escompte de Paris* (9), where the whole of the transit by the directions of the vendee to the vendor was to a place named as the place of destination, and where no agent ever had possession of them in the meantime for the purpose of putting an end to that transit. Neither is the case within that of *Ex parte Watson* (11). With regard to *Coates* v. *Railton* (7), that case is somewhat difficult of explanation, but I believe it can be explained on the same lines as the other cases. If not, I do not agree with it.

I am of opinion that the judgment of Mr. Justice Mathew cannot be supported.

COTTON, L.J.—I have come to the same conclusion. The question is, whether it is too late for the vendors to exercise their right to stop the goods *in transitu*. That right can be exercised by an unpaid vendor at any time before the goods get into the possession of the vendee.

In my opinion the rule is that the right to stop *in transitu* exists until the goods are delivered to the buyer or possession has been taken by him. I say "until delivered to the buyer," because I think it is immaterial to consider what the parties have indicated as the place of delivery; and I add until "possession taken by him," because the buyer can by interfering with the goods in the course of the transit get actual or constructive possession so as

to put an end to the right. Now what within the principle is a delivery to the buyer? For the purpose of determining that question one must look at what passes between the buyer and the seller before the goods are put by the seller into the course of the journey which they must pass through before they get into the hands of the buyer. If the buyer does not take the goods there must be some journey to be performed before they get into his possession or are delivered to him; and until that has taken place the right to stop the goods *in transitu* may be exercised. In considering, therefore, the question whether the right has been exercised too late, it is most material to look at what has passed between the parties in order to see what they have contemplated. A delivery to a person who takes the goods as carrier for that voyage cannot be delivery so as to put an end to the right to stop the goods *in transitu*; for that right must exist until they are delivered to the buyer, or until constructive possession has been taken by him. Any agent to perform that cannot be an agent to take constructive possession for the buyer; he is not an agent for the purpose of taking the goods at the end of the voyage to carry out which he is employed.

That being so, the principle we get is this—that where, before the delivery of the goods by the seller to the buyer, the parties have indicated a place where delivery is to be made, the right of the vendor to stop them continues until they arrive at the place, unless the buyer comes in and interrupts the voyage.

Here one desires to guard oneself against saying that the actual place of delivery should be designated to the seller. It is sufficient if the buyer indicates to the seller that the goods are to go on a voyage before delivery to him or to his nominee standing in exactly the same position as himself.

The case of *Ex parte The Rosevear China Clay Company* (4) was an example of that. There the seller was to deliver free on board a ship at Fowey, which was the mere commencement of the transit. The case only decided that it was not necessary that the actual destination should be indicated, but only that the seller should deliver to the carrier who was to take the goods to the buyer, so that the transit from the seller to the buyer should not be at an end until the ship had arrived at her destination. Such a case as the present one is guarded against in the *Rosevear Case* (4), because I there said, "if the contract had been to deliver the clay to an agent of the purchaser at Fowey, it would have been a very different matter. The case would then have been like that of *Valpy* v. *Gibson* (6), in which the shipment was made by the purchaser, not by the vendor." Now what has been done here? The place indicated by the buyer to the seller when the goods were started on the journey was Garston; the persons who were to receive them were Marshall & Co. It is true that what the buyer intended to do was to send the goods on to Rouen; but Marshall & Co. did not receive them as agents for the purpose of carrying out the voyage to Rouen: they were agents to act under the orders solely of the buyer; and the goods, so far as the voyage from the seller to the buyer was concerned, were to remain at Garston until they received a fresh impulse from the buyer, and were to be forwarded not from the seller to the buyer, but from the buyer to the person or to his agent who had purchased them from the buyer.

Here there was a new transit; the stoppage at Garston was not a mere break in the original journey; there was a fresh voyage from the buyer to his purchaser; so that the case comes within the principle laid down in *Dixon* v. *Baldwen* (1). The only difference between that case and the present one is that there the orders were not actually given as regards the particular goods until after they were in the hands of the person who was in the same position as Marshall & Co. in this case.

In my opinion it is immaterial whether the orders to be given are orders under which goods are actually started on a fresh journey. In either case they are orders given by the buyer, who is recognising persons who are to receive the goods at the destination indicated, acting no longer on the journey from the seller to the buyer, but upon directions from the buyer for a different voyage. The transit

from the seller to the buyer is at an end when the goods reach the hands of those persons; and whether the fresh journey is in consequence of orders given by the buyer either before or after the contract is not material, if the orders given are not in any way connected with the seller as to the voyage which the goods are to take when they are delivered over to the carrier who is to deliver them to the buyer.

This case comes within the principle laid down in *Dixon* v. *Baldwen* (1), and the right of the vendors to stop the goods *in transitu* ceased to exist when they arrived at Garston and were delivered to Marshall & Co., who were acting under the orders of the buyer.

BOWEN, L.J.—I am of the same opinion. Nothing has been said more often during the last hundred years than that it is difficult to explain the principle of the right of stoppage *in transitu*.

The history of the law on the subject is stated in *Gibson* v. *Carruthers* (8); and I only allude to it in order to state clearly the grounds upon which the present case is decided. The law of stoppage *in transitu* we may assume is a mercantile rule; it does not depend upon contract; but it is a right which engrafted upon English law what was considered to be a just and fair rule by merchants with regard to the transmission of property. The English law as to passing property was at variance with the civil law, according to which goods sold upon credit might be taken even if they had found their way into the possession of the vendee, if the expectation of the vendor to be paid for them had failed.

There was certainly this variance among merchants, namely, that where goods are sold upon credit, and delivered to a carrier to be delivered to the vendee, the vendor might, if the vendee failed, interfere and get them back, if he did so before they got into the actual possession of the vendee. At the time when that rule prevailed trade was not complicated by the growth of middlemen, and it was easy enough to apply the rule in many parts of Europe because the goods passed through a simple channel direct from the hands of the vendor to the vendee. This difference existing between the custom of merchants and the English law as to the passing of the property, the Courts of equity in 1690, (12) and the Courts of common law shortly afterwards, grafted this just indulgence upon the English law; and this rule of merchants is now accepted by the English law.

That law is stated in the passage from Lord Tenterden's book on Shipping which has been read by Lord Justice Brett; a real definition is there given of what the transit is to be. It is to be observed that it is a transit to the actual or constructive possession of the consignee. What terminates that transit? It lasts until the consignee either himself or by his agent takes possession of the goods. We have only to consider when the transit of goods to a vendee comes to an end.

That question generally, and in the present case, seems to me to be a question of fact. The transit would naturally be at an end as soon as some person on behalf of the vendee takes the goods from the carrier or person who holds them for the purposes of carriage only. Then comes a difficulty, for the goods sometimes pass through the hands of more than one carrier; and the carrier may or may not be the person who receives the goods so as to determine the transit, or only in order to send them on by a fresh carrier. The question to be considered in each case is, when does the vendee take possession of the goods? One can conceive that everything that is said at the time when the contract is made about the period of the determination of the transit, and when constructive possession is to be taken, is very material. All this bears upon the question, when does the vendee take possession? If two persons bargain about the sale of goods, what one of them says about the place of delivery is material. The conclusive test, however, is not what is said, but what is done.

There may be cases where the vendee and vendor have agreed upon a place where the possession is to be given. *Ex parte Watson* (11) is such a case. If the parties agree that constructive possession is not to be taken until the goods reach

(12) See *Wiseman* v. *Vandeput*, 2 Vern. 203.

the place named, it would be idle afterwards for the party to ask the Court to say that he had a right to take constructive possession elsewhere after what he had done. It is certain that if the parties agree that the transit of the goods shall last until the goods come to a particular point, they cannot afterwards alter that. There may be a second case, like that mentioned by Mr. Justice Bayley in *Coates* v. *Railton* (7), namely, where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination. He is not speaking there of the case where there is a bargain, but simply of the case where the vendee has told the vendor what he is going to do. I fall back, however, upon the broader proposition laid down by Lord Tenterden, that the test in each case is not what is said or thought, but what is done. In *Coates* v. *Railton* (7) several cases were cited by Mr. Justice Bayley, but it is to be observed that in all the cases which have hitherto been reported in which the vendee has told the vendor where he intends delivery to be given, the Courts have held, subject to the exception which has been mentioned, that the place named was the place where the transit was at an end. The exception proves, to my mind, that the definition of the right of stoppage *in transitu* given by Lord Tenterden is the true one, because the vendee can always anticipate the arrival of the goods; he can take possession of them half way if he can arrange with the carrier to do so; and that puts an end to the transit, and to the right to stop them, whatever may have been said at the time when the contract was made. That shews, to my mind, that not what is said but what is being done is the test. As the exception mentioned seems to me to prove what is the true rule in these cases, I may give an illustration. If the vendee tells the vendor to send the goods to a ship named by vendee, and the goods are shipped by the vendor, it is not necessary in order to continue the vendor's right to stop them that he should be told where the ship is going. That is the case of *Ex parte The Rosevear China Clay Company* (4). In that case there was not any one who, as soon as the goods were shipped, took constructive possession of them for the vendee; for they were still in the possession of the carrier, and were being carried towards the vendee. But I think the cases seem to shew that the Court as yet has never held that when the vendee has told the vendor that he means to take delivery at a given place, and that when delivery is taken by some one there, the transit is not at an end.

If we were to decide this case in favour of the respondents we should be going beyond any decided case. There may be cases in which transmission by one carrier to another carrier is, and also cases in which it is not, equivalent to an assumption of possession by the vendee, or by some one entitled to take constructive possession for the vendee.

The illustration put by Lord Justice Cotton was, to my mind, in point when he suggested the case where, instead of receiving the goods, the vendee sends some one to tranship them elsewhere. Such a person is in one sense a carrier, and in one sense is connected with the carriage of goods, but he is not a carrier throughout for the purpose of transmitting the goods from the vendor to the vendee, but for the purpose of carrying the goods from the vendee to his purchaser.

The facts of the present case seem to bring it within the principle laid down by Lord Tenterden. Here I find as a fact that the goods had come into the constructive possession of the vendee as soon as they arrived at Garston, and as soon as the time had expired during which the railway company held the goods for the purpose of carriage; and that at all events they were in the constructive possession of the vendee at the time when the insolvency took place. Marshall & Co. were not acting throughout as agents to forward the goods from the vendor to the vendee. They may have been concerned throughout with nothing but the carriage of goods to the vendee; but they were also concerned with the carriage of goods from the vendee, and the interval was a warehousing between the two transits. They were agents, it is true, to forward the goods to Rouen, but they were agents also to take possession of the goods from the carrier who

was employed at the request of the vendee to carry the goods from the vendors.

Appeal allowed.

Solicitors—R. W. Marsland, agent for Addleshaw & Warburton, Manchester, for plaintiff; Chester & Co., agents for H. M. Richardson, Bolton, for defendants.

1883. March 6, 8.

CLARK AND OTHERS (*petitioners*) *v.* WALLOND (*respondent*).

Municipal Election Petition—Time for Delivery of Particulars—Amendment of Petition—Fresh Charge—Limit of Time—45 & 46 *Vict. c.* 50. *s.* 88. *sub-s.* 4; *s.* 100. *sub-s.* 4.

In a municipal election petition, in the absence of exceptional circumstances, particulars of the acts of bribery should not be ordered to be delivered more than seven days before the trial.

By the Municipal Corporations Act, 1882, *s.* 88. *sub-s.* 4, *a municipal election petition "shall be presented within twenty-one days after the day on which the election was held." By s.* 100. *sub-s.* 4, "*The High Court shall, subject to this Act, have the same powers, jurisdiction and authority, with respect to a municipal election petition and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction*":—

Held, *that there was no power to amend a municipal election petition after the expiration of twenty-one days from the election by adding a charge of treating.*

Maude *v.* Lowley (43 Law J. Rep. C.P. 103; Law Rep. 9 C.P. 165) *followed.*

This was a municipal election petition, in which there were cross-appeals from two interlocutory orders made at chambers. They now came on for hearing together.

The appeal of the petitioners was from an order of Hawkins, J., that the petitioners do deliver to the respondent particulars of the acts of bribery relied on fourteen days before the day of trial.

H. F. Dickens, for the petitioners, asked that the order might be varied, by substituting seven for fourteen. Seven days was the usual time, and there were no exceptional circumstances in this case. He cited *Lenham* v. *Barber* (1).

E. Morten, contra.—The petitioner has chosen to word his petition in such general terms as to constitute an exceptional circumstance.

GROVE, J.—We think that as two learned Judges, in the case that Mr. Dickens has cited, have fixed seven days before the trial as the proper period for the delivery of particulars, we should not depart from that. Probably no Judge has had more experience in trying election petitions than I have, and I can speak to seven days' interval being the usual practice.

LOPES, J.—I think that seven days is quite enough. Moreover, it is the usual rule, and we have the decision of two learned Judges in favour of that period. I am therefore of opinion that this appeal should be allowed, and that the order should be varied by substituting "seven" for "fourteen."

MATHEW, J.—I think that any different rule would increase the difficulty of getting at the truth in these matters.

Appeal allowed. Costs to be costs in the petition.

The appeal of the respondent was from an order of Lopes, J., giving the petitioners leave to amend their petition more than twenty-one days after the election, by adding the words "and treating."

E. Morten, for the respondent.—By sub-section 4 of section 88 of the Municipal Corporations Act, 1882, an election petition "shall be presented within twenty-one days after the day on which the election was held." By sub-section 4 of section 100 of the same Act, "The High Court shall, subject to this Act, have the same powers, jurisdiction and authority, with respect to a municipal election petition and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction."

(1) *Ante*, p. 312; Law Rep. 10 Q.B. D. 293.

The power of amendment there given is controlled by the words "subject to this Act." The Act provides that the petition shall be presented within twenty-one days from the election. The amendment that has been allowed here amounts to the presentation of a fresh petition, and consequently cannot be made after the twenty-one days. The case of *Pickering* v. *Startin* (2) is relied on by the other side. In that case the point as to there being no jurisdiction was never taken. But if it is any authority on the question, it is overruled by *Maude* v. *Lowley* (3); and Keating, J., was a party to both decisions. In the course of the argument in the latter case, Honyman, J., raises a question as to the power to make the very amendment that has been made here; and counsel for the petitioners admits that such an amendment would be difficult to support. The other case that bears on the question is *Aldridge* v. *Hirst* (4). A passage from the judgment of the Court, delivered by Grove, J., is relied on by the other side:—"We by no means decide that this Court has no power to make amendments in petitions, provided it sees that no injurious or unjust result or that a beneficial result will follow. In *Pickering* v. *Startin* (2) the Court of Common Pleas allowed, in the case of a municipal election petition, an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maude* v. *Lowley* (3), an application for an amendment by the addition of allegations as to acts committed in other wards besides those named in the original petition was refused by this Court." The Court refused to make the amendment that was asked for; and all that the Court says in the above passage is that they will not decide that they have no power to make it.

H. F. Dickens, for the petitioners.—In *Pickering* v. *Startin* (2) one of the points for argument was that the Court had no jurisdiction. Therefore, this point was before the Court. In *Maude* v. *Lowley* (3) *Pickering* v. *Startin* (2) was never mentioned; and it was said in argument, and by Lord Coleridge in his judgment, that such an amendment had never been made. There are therefore two conflicting decisions: and *Aldridge* v. *Hirst* (4) expressly leaves the point open. Sub-section 4 of section 100 should be read as follows: When the petitioner has complied with the provisions of this Act (*inter alia*) as to filing his petition within twenty-one days, then the Court shall have all the powers of amendment that they would have in an ordinary action.

[MATHEW, J.—The Legislature have reproduced the words upon which the case of *Maude* v. *Lowley* (3) was decided, and they must be taken to have known the interpretation that had been put upon them in that case.]

E. Morten, in reply.

Cur. adv. vult.

GROVE, J. (on March 8).—This is an appeal against an order of my brother Lopes, allowing an amendment in a municipal election petition after the time had elapsed within which the presentation of a petition is allowed, namely, twenty-one days, except in certain specified cases, when twenty-eight days are allowed. The original petition questioned the election on the ground of bribery; my brother Lopes allowed that to be amended by the addition of the words "and treating." The question is whether my brother Lopes had jurisdiction to make that amendment. If he had, we should not interfere with the manner in which he had exercised his discretion. The question turns upon section 100, sub-section 4, of the Municipal Corporations Act, 1882, which is: "The High Court shall, subject to this Act, have the same powers, jurisdiction and authority with respect to a municipal election petition, and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction." My brother Lopes thought that those words gave him plenary authority, because in an ordinary case before the High Court an amendment can be made at any time. On consideration we think that the appeal should be allowed. It is to be observed that the words are: "The High Court shall, *subject to this Act*, have the same powers,"

(2) 28 L. T. N.S. 111.
(3) 43 Law J. Rep. C.P. 105; Law Rep. 9 C.P. 165.
(4) 45 Law J. Rep. C.P. 431; Law Rep. 1 C.P. D. 410.

&c. Now, it cannot be contended that we can strike those words out of the section. We must give them some meaning, and the only meaning that can be given to them is, subject to the provisions of this Act.

We must therefore look to the provisions of the Act and see whether there are any that apply to this section. Sub-section 4 of section 88 provides that an election petition shall be presented within twenty-one days after the day on which the election was held, except under certain circumstances, which do not arise here, when it is to be presented within twenty-eight days. That would appear to be an imperative provision of the Act. Not only is the word "shall" used, but by section 89—"1. At the time of presenting an election petition, or within three days afterwards, the petitioner shall give security for all costs, charges and expenses which may become payable by him to any witness summoned on his behalf, or to any respondent. 3. Within five days after the presentation of the petition, the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition, and of the nature of the proposed security, and a copy of the petition. 4. Within five days after service of the notice, the respondent may object in writing to any recognisance" on various grounds. "6. If the objection is allowed, the petitioner may, within a further prescribed time not exceeding five days, remove it by a deposit," &c. Therefore, by that section, security is to be given within three days after the presentation of the petition; within five days after presentation notice of the petition is to be served on the respondent; and within five days from the notice the respondent may object to the surety. Then, by section 90—"On the expiration of the time limited for making objections, or, after objection made, on the objection being disallowed or removed, whichever last happens, the petition shall be at issue." Then follows a provision for the publication of the election petitions at issue. Now all these provisions are with reference to acts to be done within a prescribed time, which time is based throughout on the period of twenty-one days allowed for the presentation of a petition. It appears to me that they are material provisions, and that we cannot disregard them in considering the meaning of the words "subject to the provisions of this Act." What would be the immediate consequence of disregarding the provision as to time, and making this amendment? It would dislocate all these other provisions as well, they being all based on the twenty-one days. If you enlarge the twenty-one days, the time within which all the other steps are to be taken must be altered. If not, the same petition would be at issue at two different times. That, to my mind, is a very formidable objection to making this amendment. But then it is said that amendments such as this are allowed to be made in statements of claim, although the pleadings are finished and other alterations are thereby necessitated. Possibly that may be so; and, so far as the provisions of the Act do not apply, a similar power may be exercised with regard to a municipal election petition. I give no opinion as to whether there is power to allow an allegation to be withdrawn after the twenty-one days. Many of the objections that exist to adding a charge after the prescribed period would not apply to withdrawing one. Neither do I give any opinion on the question as to whether there is power to amend after the twenty-one days by making slight alterations that leave the petition substantially the same. I give no opinion as to either of those points. All that I decide is, that where an alteration makes the petition substantially a new one, the alteration cannot be made after twenty-one days from the day on which the election was held.

The words of this Act and of similar Acts have received judicial construction. I may refer to the now familiar case of *Parsons* v. *Tinling* (5), which turned upon the wording of Order LV., which begins: "Subject to the provisions of the Act." That case is acted upon every day. The powers given by that order were held to be limited only by the provisions of the Judicature Act. Then there are two decisions on this very point. The first is that of *Pickering* v. *Startin* (2), which at first sight is against our decision in the present

(5) 46 Law J. Rep. C.P. 230; Law Rep. 2 C.P. D. 119.

case. But there the point was not argued. The second is the case of *Maude* v. *Lowley* (3), where the point was argued and the decision that we have come to now adopted. That case is not only a guide to us, but, as a general rule, would be binding upon us. The very point before us was argued and decided in that case. If I did not think it right, as I do, I should still think that we were bound to follow it. The only objection that could be taken to it was that *Pickering* v. *Startin* (2) was not cited in it.

A great deal of argument has been urged upon us as to the inconvenience and injustice that may arise if we do not allow this amendment. But the argument *ab inconvenienti* cannot prevail against the plain words of the statute. On the other hand, it is said that there must be some limit of time within which these charges are to be brought forward, and that the limit fixed by the Act may be presumed to be a reasonable one. There are, therefore, arguments that may be used on both sides as to the desirability of allowing or not allowing this amendment. To my mind the words of the Act are reasonably clear, and make it unnecessary to consider on which side the balance of convenience lies.

LOPES, J.—This is an appeal against a decision of mine at chambers, allowing a municipal election petition to be amended by adding the words "and treating" more than twenty-one days after the election. If this was *res integra* I should have felt a difficulty in arriving at the same conclusion as my learned brothers. I should have felt a difficulty in placing so narrow a construction on the words "subject to this Act." I would rather have taken the view that appears to have been taken in *Pickering* v. *Startin* (2). Since this case was argued, however, I have had an opportunity of reading *Maude* v. *Lowley* (3), and I am bound to say that I cannot distinguish that case from this. The headnote of that case is, "A petition against the election of a town councillor cannot, after the expiration of the twenty-one days limited by section 13, sub-section 2, for its presentation, be amended by the introduction of a substantially new charge." And the judgment of Mr. Justice Honyman is as follows:—"I am of the same opinion. There is nothing in the Act or in the Rules framed in pursuance of it to warrant this amendment. The 7th section requires the petition to be presented within twenty-one days after the election. Here, a petition was presented in time, charging the employment, as paid canvassers, of persons on the register of burgesses for the north ward of the borough. After the expiration of the twenty-one days, the petitioners seek to add a new charge—namely, the employment, as paid canvassers, of persons who are on the register of burgesses for other wards in the borough. I think that cannot be allowed. Suppose a petition to allege bribery only, could the petitioners be allowed afterwards to add a charge of treating? Or, suppose a *qui tam* informer sues for one penalty, would he be allowed to amend by introducing two or three more? I entertain a strong opinion that no such authority exists." It appears to me, therefore, that the very point in this case was raised and decided in that. It is, no doubt, remarkable that the case of *Pickering* v. *Startin* (2) was not cited in that case. Whether, if it had been, it would have affected the decision of the Court, it is of course impossible to say. But there is this to be said, that Mr. Justice Keating, who was a party to the decision in *Pickering* v. *Startin* (2), also took part in *Maude* v. *Lowley* (3). I will only make one remark as to *Aldridge* v. *Hirst* (4). When I made this order in chambers, I was very much influenced by the headnote to that case, which is: "This Court will not amend an election petition by striking out, after the lapse of the time limited by the Act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate), and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency. Practice of election committees in this respect followed. *Semble*, that it is competent to this Court to amend an election petition at any time by striking out allegations therein, where it is satisfied that no injurious result, or a beneficial one, will follow; or by adding matters discovered after the filing of the petition." I had not then time to read the report at length; and I

must say that I think that that head-note was scarcely warranted by what Mr. Justice Grove said (6). The passage from his judgment which bears on the present point is as follows:—"We by no means decide that this Court has no power to make amendments in petitions, provided it sees that no injurious or unjust result or that a beneficial result will follow. In *Pickering* v. *Startin* (2) the Court of Common Pleas allowed, in the case of a municipal election petition, an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maude* v. *Lowley* (3), an application for an amendment by the addition of allegations as to acts committed in other wards besides those named in the original petition was refused by this Court." If he will allow me to say so in his presence, all that I think my brother Grove meant was that that was not the point before the Court, and that therefore they would not decide it.

MATHEW, J.—I am of opinion that this appeal should be allowed. I think that *Maude* v. *Lowley* (3) ought to be followed.

GROVE, J.—I may add that in *Aldridge* v. *Hirst* (4) I intended to guard against being supposed to express any opinion on the present point.

Appeal allowed; costs to be costs in the petition.

Dickens asked for leave to appeal.

Leave to appeal granted.

Solicitors—Schultz & Son, agents for A. J. Ellis, Maidstone, for petitioners; Routh, Stacey & Castle, agents for F. S. Stenning, Maidstone, for respondent.

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(6) The head-note in the Law Journal Reports puts no such gloss on the judgment of Grove, J.

[IN THE COURT OF APPEAL.]

1883. March 1. } WOODLEY AND COMPANY *v.* MICHELL AND COMPANY.*

Ship and Shipping—Bill of Lading—Exception—Perils of the Sea—Collision—Negligence.

The plaintiffs shipped a cargo on board the K., a sailing vessel, of which the defendants were the owners, for carriage from Caen to London, under a bill of lading which only excepted perils of the sea. The K., while sailing up the Thames, came into collision with a steamer which was coming down, and was sunk. In an action to recover the value of the cargo which was lost, the jury found that the collision was caused by the K. starboarding her helm, but that there was no negligence on her part. There was no finding as to the steamer:—Held, *that the loss was not occasioned by a peril of the sea, inasmuch as it had not been shewn that the collision was not caused by the negligence of the steamer; and a collision caused by the negligence of one of two vessels is not a peril of the sea.*

Appeal by the plaintiffs from a judgment of Hawkins, J., at the trial.

Action by the indorsees for value of a bill of lading against the owners of the schooner *Kate* for the loss of a cargo of barley by the negligence of the servants of the defendants.

The cargo was shipped on board the *Kate* at Caen, in Normandy, to be carried to the London Commercial Docks, under a bill of lading which contained only one exception—the perils of the sea. The *Kate*, while sailing up the Thames, met a steamer called the *Fyenoord* which was coming down, whereupon the *Kate* starboarded her helm; a collision took place, and the *Kate*, together with the cargo, was sunk. The plaintiffs sued the defendants to recover the value of the cargo; the defendants alleged that the loss was occasioned by a peril of the sea, within the meaning of the bill of lading, and that it was not due to any negligence on the part of those on board the *Kate*.

The substantial question at the trial

*Coram Brett, L.J.; Cotton, L.J., and Bowen, L.J.

before Hawkins, J., and a special jury was whether the collision was brought about by the negligence of those on board the *Kate* by starboarding her helm. The jury found that the collision was caused by the captain of the *Kate* starboarding her helm, but that there was no negligence on the part of the captain, pilot and crew of the *Kate*. There was no finding as to the steamer *Fyenoord*. Upon these findings Hawkins, J., entered judgment for the defendants.

The plaintiffs appealed.

Butt, Q.C. (with him *Tyser*), for the plaintiffs.—The plaintiffs are entitled to judgment upon these findings; for the collision is not a peril of the sea within the meaning of the exception. The question as to how far collision is a peril of the sea was discussed in *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company*(1). The judgment of Brett, L.J., shews that it has been established that the expression "perils of the sea" will not cover a loss by collision at all except in the case of an absolutely accidental collision which is not brought about by the agency of man. Lindley, L.J., also says that such expressions as perils of the sea, accident or damage of sea, and the like in charter-parties and bills of lading, have been long held to extend to collisions not occasioned by the negligence of the master or crew of the carrying ship. That passage is undoubtedly contrary to the present contention of the plaintiffs. The authority upon which it is founded—*Buller* v. *Fisher* (2)—may perhaps, taking it in its strictest sense, support the statement of Lindley, L.J., because Lord Kenyon there said that the shipowners were "exempt, by the condition of the charter-party, from misfortunes happening during the voyage, which human prudence could not guard against—against accidents happening without fault in either party." But if negligence was only imputable to the other ship, and not to the carrying ship, then that other ship would be answerable over to the masters and owners of the vessel whose cargo was injured. Thus in the case of an anchor left without a buoy, if the carrying ship through any negligence goes over the anchor and is injured, *cadit quæstio*; but if the carrying ship is not negligent, still if the other ship is negligent by leaving the anchor without a buoy, the master of the latter ship will be liable to the master and owner of the carrying ship—*The Proprietors of Trent and Mersey Navigation* v. *Wood* (3) and *Abbott on Shipping* (4).

In *Smith* v. *Scott* (5) a loss occasioned by another ship running down the ship insured, through gross negligence, was held to be a loss by a peril of the sea. That was a decision upon a policy of insurance, which differs from a bill of lading. The rule in the case of a policy of insurance is that the *causa proxima* of the loss is to be regarded, and that any loss caused immediately by the perils of the sea is within the policy, although it would not have occurred but for the concurrent action of some other cause which is not within the policy—*Dudgeon* v. *Pembroke* (6) and *Dixon* v. *Sadler* (7). But that is not so in the case of a bill of lading, where the *causa causans* is always to be considered. In *Kent's Commentaries* (8) it is said that "perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be '*quod damno fatali contingit, cuivis diligentissimo possit contingere.*' It is a loss happening in spite of all human effort and sagacity. The only exception to this definition is the case of a vessel captured and plundered by pirates, and that has been adjudged to be a peril of the sea." The finding of the jury is that there was no negligence on the part of the master or crew of the *Kate*, and that the accident was caused through the act of starboarding the helm of the *Kate*. The plaintiffs are entitled to judgment, inasmuch as the defendants have

(1) *Ante*, p. 220.
(2) 3 Esp. 67.
(3) 3 Esp. 127.
(4) 12th ed. p. 331.
(5) 4 Taunt. 126.
(6) 46 Law J. Rep. Q.B. 409; Law Rep. 2 App. Cas. 284, 297.
(7) 8 Mee. & W. 895; 11 Law J. Rep. Exch. 435.
(8) Vol. iii. part 5, lect. 47, p. 217.

not shewn that the loss was caused by a peril of the sea within the meaning of the bill of lading.

Webster, *Q.C.*, and *H. Sutton*, for the defendants.—The finding here is that the collision was brought about by a positive, but not a negligent, act; perhaps such an act cannot be called a peril of the sea. A peril of the sea would include any ordinary act of navigation which was not negligent; it is such an accident as may be expected to happen upon the sea. But a master is not liable if, being in a position of great peril, he does an act which afterwards turns out to be a mere error of judgment. In an early edition of *Parson's Maritime Law* (9) quoted in *Lloyd* v. *The General Iron Screw Colliery Company* (10), the law is thus stated: "If the cargo is injured by collision through any fault of the master, the shipper has an undoubted claim. If the collision occurred from the irresistible force of tide or storm, the ship is excused because the loss was occasioned by a peril of the sea. But if the collision occurred wholly through the fault of another vessel, and most unnecessarily, but without any fault on the part of the ship which contains the damaged cargo, then the ship is not excused, whether there be a bill of lading or not, such collision being neither an act of God nor a peril of the sea." In *Lloyd* v. *The General Iron Screw Colliery Company* (10) it was laid down that negligence in a ship other than the carrying ship is not a peril of the sea. But in the later edition of *Parson's Maritime Law* (11) the passage is altered—"When the cargo is lost or damaged by a collision between the carrier vessel and another, the liability of the carrier depends upon the nature of the collision and also upon the obligation he has assumed. A collision may be caused by the fault of neither ship—that is, by inevitable accident—by the fault of the carrier ship, by the fault of the other ship, and by the fault of both. If neither vessel is in fault, the collision is clearly a peril of the seas, and under some circumstances may clearly be an act of God. If the carrier ship is in fault she is clearly liable. If the other vessel is entirely in fault the loss is not an act of God, but is a peril of the seas, and the liability of the carrier depends in such a case upon the obligation he has assumed." That is the law upon the subject in America, but no English authority is cited. If that statement of the law be correct, the collision here would clearly come within the exception of perils of the sea.

[BRETT, L.J.—We doubt whether the new passage in *Parson's Maritime Law* (11) is a correct statement of the law.]

BRETT, L.J.—I am of opinion that this appeal must be allowed. The jury, we must take it, have found that this collision between a sailing vessel and a steamer was caused by the sailing vessel starboarding her helm; but they have also found that under the circumstances of the case the starboarding of the helm was not negligent. There has been no finding with regard to the steamer. The question is, whether the judgment ought to be entered for the plaintiffs, who are the owners of the cargo on board the *Kate*, or for the defendants, the owners of the sailing vessel. It seems to me that it was only necessary for the plaintiffs in such a case as this to prove the non-delivery of their goods at the end of the voyage. The defendants could answer that only in one way, by shewing that they were prevented from making delivery by reason of something contained in the bill of lading. The bill of lading excepts perils of the sea; the burden of bringing their case within that exception was therefore on the shipowners. I am not prepared to retract anything from what I said in *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company* (1); but I am bound to say that all I there said was so necessary for the decision of that case as to make it binding upon this Court. It is not necessary for us to consider whether the whole of what was there said was right or wrong. What I think it necessary to repeat, and I do so without any doubt, is this—that although a collision which is brought about without any negligence on the part of either vessel is or may be a peril of the sea, yet a col-

(9) Vol. i. book 1, chap. vii. p. 190.

(10) 3 Hurl. & C. 284, 289; 33 Law J. Rep. Exch. 269.

(11) Ed. 1869: vol. i. book 1, chap. vii. p. 259.

lision which is brought about by the negligence of either one or other of the vessels, so that without that negligence it would not have happened, is not a peril of the sea within the meaning of that expression as contained in a bill of lading. The defendants therefore have failed upon the finding of the jury to bring their case within the exception; for the jury have only found in their favour that the collision was brought about without any negligence on the part of their vessel. Looking at the findings of the jury and the facts—namely, that the collision took place between a sailing vessel and a steamer, and nothing more, it is inevitable that the defendants must fail, because the Court is bound to take notice of the law that it is the duty of a steamer to keep out of the way of a sailing vessel, and the duty of a sailing vessel to keep her course. It was, however, said that, notwithstanding that rule, where a vessel is put in such extreme danger by a steamer as to make the rule unreasonable, the captain, if he disobeys it, is not guilty of negligence (12). It seems to me that the defendants here are in this inevitable difficulty. The only way in which the finding of the jury with regard to the steamer can be dealt with is to assume that the captain of the *Kate* was put in such a position of danger by the negligence of the steamer that he might be excused obedience to the rule; but even if his vessel was without negligence, it is clear law that a collision where there is negligence in either vessel cannot be said to be a peril of the sea. In either case the defendants have failed.

COTTON, L.J.—I am of the same opinion. The plaintiffs sue for the non-delivery of the goods; the defendants are clearly liable, unless there is something in the bill of lading to excuse them. The exception here is loss from perils of the sea. There is not any decision binding upon this Court that a collision which is occasioned by the negligence of one ship is a peril of the sea; and looking upon the matter with reference to decided cases, a collision where there are no waves and wind which contribute to the accident, is not, in my opinion, a peril of the sea, but an accident of the sea. The defendants must prove that the case comes within the exception. It was admitted that the collision occurred in broad daylight; the jury simply found that there was no negligence on the part of one of the vessels; but that would not bring the case within the exception. I agree with Lord Justice Brett that the finding of the jury can only be right upon the supposition that the steamer was in the wrong and must have been guilty of negligence. That being so, the defendants have not made out their case.

BOWEN, L.J.—I am of the same opinion. The plaintiffs are entitled to succeed, unless the defendants can shew that the loss was occasioned by a peril of the sea. The jury have found that the loss was caused by starboarding the helm of the *Kate*, and added that there was no negligence on the part of those who navigated that ship. It is clear to my mind that on that finding alone the owners of the carrying ship are not entitled to judgment. The facts are that the steamer was coming down the Thames, while the *Kate* was going up, under no difficulties of wind, tide or weather, and in no danger at all. All that can be said is that she was driven to starboard her helm by the action of the steamer. *Prima facie* no doubt the steamer would be negligent, because it is the duty of a steamer to keep out of the course of a sailing vessel. Under these circumstances I think there is at any rate no evidence that the loss was occasioned by a peril of the sea. Although I do not dissent from what has been said by Lord Justice Brett, I think it is sufficient to say that in the present circumstances the findings of the jury alone do not entitle the defendants to judgment.

Judgment for the plaintiffs.

(12) See *The Bywell Castle*, Law Rep. 4 P. D. 219.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; Clarkson, Greenwell & Co., for defendants.

1883. March 10, 21. THE ATTORNEY-GENERAL v. DARDIER.

Revenue—Legacy Duty—Valuation of Property not reduced into Money—Sale after filing of Residuary Account—36 *Geo.* 3. *c.* 52. *s.* 22.

Chattels which were entered in an account for assessment of legacy duty upon residuary personal estate as property not converted into money, and were there valued, and upon which duty was accepted according to such valuation, were afterwards sold by the executor, in pursuance of an intention existing from the first, but not known to the Crown; and, although there had been no want of good faith towards the Crown, the proceeds greatly exceeded the valuation. Duty was claimed upon the excess:—Held, *that* 36 *Geo.* 3. *c.* 52. *s.* 22, *providing for the valuation of property "which shall not be reduced into money," did not apply where property was sold during the administration, though after account filed, and that acceptance of duty upon the basis of the valuation in ignorance of the intention to sell did not disentitle the Crown to duty upon the real value as shewn by the sale.*

Information for legacy duty. The facts and arguments are stated in the judgment.

The Attorney-General (*Sir Henry James, Q.C.*) and *The Solicitor-General* (*Sir Farrer Herschell, Q.C.*) (*Vaughan Hawkins* with them), for the Crown.

Webster, Q.C., and *Lumley Smith, Q.C.* (*MacSwinney* with them), for the defendant.

Cur. adv. vult.

The judgment of the Court (1) was (on March 21) delivered by—

POLLOCK, B.—This is an information filed by the Attorney-General against the defendant, Miss Dardier, claiming on behalf of the Crown legacy duty, payable by the defendant, at the rate of ten per cent. on the proceeds of the sale of pictures and effects which were left by one Harriet Bredel to the defendant. Harriet Bredel died on the 3rd of December, 1874, having by her will, dated the 19th of February, 1870, appointed as executors and trustees William Barber and Charles Cancellor, and bequeathed to them all her real and personal estate upon trust, after payment of her debts, to pay certain pecuniary legacies, and, as to the residue, in trust to transfer and pay the same to the defendant. On the 17th of February, 1875, her executor William Barber brought into the office of the Inland Revenue the residuary account of her property, wherein it was stated that the residue on which duty was chargeable was 37,932*l.* 19*s.* 2*d.* Among the items in the account was the sum of 2,979*l.* 17*s.*, which was therein stated to be the value of certain furniture, plate, linen, china, books, pictures and other personal property of Harriet Bredel not converted into money.

The material facts relating to the valuation of these chattels, as appears from the answer, the amended answer, and the affidavits which have been filed, are as follows:—The chattels in question were in the house of Harriet Bredel, the testatrix; and, shortly after her death, on the 15th of December, 1874, they were valued, for the purpose of paying probate duty, by Mr. Oughton, an auctioneer and valuer of experience and repute, at the sum of 2,979*l.* 17*s.*; at which amount they were upon the 17th of February, 1875, as already stated, returned by the executor in the residuary account brought in to the commissioners as a portion of the personal estate not reduced into money.

It was intended from the first that the property should be sold forthwith by the executor; and immediately after the valuation by Mr. Oughton, Mr. Wood, a partner in the firm of Messrs. Christie, Manson & Co., the auctioneers, was called in by the executor, with the knowledge and approval of the defendant, and by his advice the sale was postponed until the 29th of April and the 1st of May, 1875, upon which days the property was sold by Messrs. Christie, Manson & Co., and realised prices amounting in the whole to 31,156*l.* 19*s.*, and, after deducting expenses, the net proceeds were paid to the executor and accounted for by him to the defendant.

Upon these facts, it was contended on

(1) Pollock, B.; Huddleston, B., and North, J.

behalf of the Crown—first, that, at the time when the residuary account was brought in by the executor, there was such a suppression of the true facts as would entitle the Crown to insist upon the valuation being reopened, and the legacy duty being paid upon the amount which the property actually realised; secondly, that, apart from this, the Crown was entitled to the payment of legacy duty based upon the larger amount upon the true construction of the statute which creates the liability.

With regard to the first of these contentions, we do not think the case is one in which it can be said that an advantage was gained or sought by or for the defendant by any fraud or improper suppression of the truth; and, seeing the conclusion at which we have arrived with regard to the second contention on the part of the Crown, it is not necessary to say more on this part of the case than that we do not doubt for a moment that the defendant and her advisers acted with good faith in what they did.

With regard to the second contention, which depends upon the true construction to be put upon the statute, the question stands thus. The statute by which the legacy duty in question becomes payable is the 36 Geo. 3. c. 52, and the sections bearing upon the present question are sections 6 and 22. By section 6, the duties imposed are to be paid by the persons taking the burden of the execution of the will upon delivery, payment or other satisfaction of any legacy, or of the residue of any personal estate, to which any other person shall be entitled; and if any legacies are paid without deducting the duty it becomes a debt from the executor who has made any delivery or payment, and also from the person to whom the same is made. By section 22, "In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money," the executor, or the person by whom the duty ought to be paid, may set a value thereon and offer to pay the duty according to such value, or may require the commissioners to appoint a person to set a value; and the commissioners may accept the duty offered upon the value set by the executors, or by the person by whom the duty is payable, without such appraisement, if they think fit. If the commissioners are not satisfied with the value so set, they may appoint a person to appraise the effects and set a value, and assess the duty upon such value. Further, if the person by whom the duty is payable is not satisfied with the valuation made under the authority of the commissioners, he may cause the valuation so made to be reviewed by the Commissioners of Land Tax, who may appoint a person to appraise the effects and set a value thereon, and hear and determine the appeal. Upon this section, it was argued for the defendant that the commissioners, having received without objection the valuation put upon the goods in question by the valuer appointed by the executor, and not having availed themselves of the means of further valuation provided, were bound by such valuation, and could not now seek to surcharge the defendant by reason of the goods having been sold for a larger amount. If the circumstances of the case brought it within the provisions of section 22, we think that this contention would be correct; but, in our judgment, when the whole facts of the case are taken into consideration, it cannot be truly affirmed that the goods in question were at the time of the valuation goods which come within the words of the section, as being "property which shall not be reduced into money." These words appear to us to be used as distinguishing property which is, or is intended to be, specifically retained by the executor, for the purpose of being handed over to the legatee when the executor's duties with respect to it have come to an end, from property which is, or is intended to be, sold in the course of the administration, and in the performance of the executor's duties, and the proceeds thereof accounted for to the legatee. We read those words as meaning "which shall not be reduced into money during the administration," whereas the contention of the defendant would read them as though they had been written "which shall not have been reduced into money when the account is carried in." Section 6 speaks of the duty as being payable upon the delivery, payment or other satisfaction of any legacy, or of the residue of any per-

sonal estate; and section 22 merely creates a machinery whereby the valuation of such legacy or residue may be conveniently made. Now in the present case, it is obvious that from the date when Mr. Wood was first called in—which was long before the residuary account was brought in—down to the sale by Messrs. Christie, Manson & Co., the intention of the executor and of the defendant, the legatee, was not that the property in question should be retained by the executor and handed over to the legatee in specie, but that it should be sold and the proceeds thereof accounted for in money; and the fact that during the interval which elapsed between the valuation and the sale the officers of the Inland Revenue, in ignorance of the real facts, accepted such valuation ought not to affect the rights of the Crown. In fact, the officers of the Crown were put off their guard and were misled by the express statement in the residuary account that the executor "intended to retain these articles for the use of the legatees." This was not the fact, though, as before mentioned, we acquit the defendant and her advisers of any intention to misrepresent the truth or to deceive. It appears to us, therefore, unnecessary to consider how, or under what circumstances, the property in question came to be sold rather than retained by the executor; and that the true mode of treating the case is to consider the return and payment made by the executor as insufficient, and as if it had been made under a mistake common to the executor and the commissioners; and that when that mistake is discovered, and the real facts are known, the commissioners are entitled to have the full amount of duty paid based upon the actual proceeds of the property when sold, and that our judgment should be for the Crown, with costs.

Judgment for the Crown.

Solicitors—Solicitor of Inland Revenue, for the Crown; Soames, Edwards & Jones, for defendant.

1883. March 10. April 5.

DORMONT *v.* THE FURNESS RAILWAY COMPANY.

Harbour Authority—Liability of—Removal of Sunken Wreck—Construction of Local Acts—Wrecks Removal Act, 1877 (40 & 41 *Vict. c.* 16), *s.* 4—*Word "may," whether permissive or obligatory.*

By a local Act, the harbour of B. was vested in the defendants, and jurisdiction was conferred on them over P. harbour and channel "for the purpose of maintaining, improving, regulating and buoying the said harbour and channel"; but such powers were not to confer on them the right to levy dues or rates beyond the limits of B. harbour.

By a subsequent local Act, one-half of the residue of certain light duties to which ships entering or leaving P. harbour and channel were liable to contribute was to be paid to the defendants, to be applied by them in "maintaining, buoying, lighting, regulating and improving" P. harbour and channel.

There was a sunken wreck in P. channel, which the defendants, under the powers of section 4 *of the Wrecks Removal Act,* 1877, *had partially removed, leaving the part not removed insufficiently buoyed. The plaintiffs' vessel struck on the sunken wreck and sank:—*

Held, *that the above enactments imposed upon the defendants the obligation to remove the wreck, and to mark its position by buoys, and that they were therefore liable for the damage done to the plaintiffs' vessel.*

Semble, *section* 4 *of the Wrecks Removal Act,* 1877, *is permissive and not obligatory, and does not impose an obligation upon a harbour authority to remove sunken wrecks from the approaches to their harbour.*

Further consideration of an action tried before Kay, J., and a jury at Liverpool.

At the trial the amount of damages was agreed and a verdict taken, subject to the question whether the defendants were liable, which was reserved for further consideration.

The facts of the case sufficiently appear from the judgment.

Dormont v. *Furness Rail. Co.*

Gully, Q.C., and *Henn Collins* (*W. R. Kennedy* with them), for the plaintiffs.—The defendants are a harbour authority, who, in respect of the approaches to their harbour, are authorised by their local Acts to take tolls; and therefore there arises out of that state of things, independently of any express statutory enactment, a common law obligation on them to keep the approaches in a safe condition for those whom they invite to use the harbour. The cases of *The Mersey Docks and Harbour Board* v. *Gibbs* (1) and *Winch* v. *The Conservators of the Thames* (2) are authorities for that proposition. See also *Forbes* v. *The Lea Conservancy Board* (3). Moreover, by the local Acts the defendants are to apply the tolls in "buoying" the harbour, and this imposes an express obligation upon them. Secondly, apart from the local Acts, section 5 of the Wrecks Removal Act, 1877, creates a positive duty on the part of a harbour authority having jurisdiction to remove wrecks from the approaches to their harbour. The word "may" in that section is equivalent to "must"—in other words the section is obligatory, not permissive—see the observation of Brett, L.J., in the case of *The Douglas* (4). But even if that be not so, and the section does not create a positive duty to initiate proceedings, yet where the authority does initiate proceedings and takes possession of the vessel, and thereby acquires a right to deal with the vessel in derogation of the rightful owners, the possession so taken, coupled with the language of the section, imposes a positive duty upon them.

Russell, Q.C., and *Aspland*, for the defendants.—The local Acts have not the effect of imposing any liability on the defendants. The defendants have no power to levy tolls in respect of Piel harbour. All that is done is that vessels using that harbour pay 3*d.* per ton per annum in respect of light dues, and that sum is paid into a fund, of which any surplus may possibly come to the hands of the defendants. The class of persons for whom the duty is imposed are persons who are going to use Piel harbour, who are strangers to the defendants, and none the less so because they pay something to a fund of which the defendants may possibly some day have the advantage.

The language of section 5 of the Wrecks Removal Act, 1877, is permissive and not obligatory. The observation of Brett, L.J., in *The Douglas* (4) was a mere *dictum* not necessary for the decision of that case. The word "may" in the concluding clause of the section clearly cannot be read "must," and the Courts are very reluctant to construe words which are *prima facie* permissive as being obligatory. If the section imposes no duty, the fact that the defendants partly performed that which was not their duty cannot create any liability.

They referred to *Collis* v. *Selden* (5).

Gully, Q.C., in reply, referred to *White* v. *Crisp* (6) as an authority that on the abandonment of a sunken wreck by the owner all liability on his part in respect of it ceases.

Cur. adv. vult.

KAY, J.—On the 8th of September, 1882, the plaintiffs' sloop, the *Agnes*, was making her way by Piel channel to Piel harbour, near Barrow, when she struck upon a sunken wreck, and was so much injured that she went down.

The wreck was a ship called *The Brothers*, which had sunk in that place on the 19th of July, 1882. The place where *The Brothers* sank is outside the harbour of Barrow, but is in the channel leading to that harbour, and leading also to Piel harbour. The defendants, the Furness Railway Company, have a certain authority over both these harbours and the channel leading to them, and it was admitted upon the trial of this action that if it was their duty to remove the wreck of *The Brothers*, or to protect ships coming up the channel from the danger of run-

(1) 35 Law J. Rep. Exch. 225; Law Rep. 1 E. & Ir. App. 93.

(2) 43 Law J. Rep. C.P. 378; Law Rep. 9 C.P. 378.

(3) 48 Law J. Rep. Exch. 402; Law Rep. 4 Ex. D. 116.

(4) 51 Law J. Rep. P., D. & A. 89; Law Rep. 7 P.D. 151.

(5) 37 Law J. Rep. C.P. 333; Law Rep. 3 C.P. 495.

(6) 10 Exch. Rep. 312; 23 Law J. Rep. Exch. 317.

ning upon it, the defendants had been guilty of negligence, and the amount of damage was agreed. It was also admitted that upon the 3rd of August, 1882, the defendants took possession of the wreck of *The Brothers*, and proceeded to remove it, and they had partially done so by the 8th of that month.

It is argued that under the Acts of Parliament which relate to the matter, a duty to protect ships against this wreck was thrown upon the defendants; and, secondly, that even if that were not so, by taking possession and commencing to destroy it, they have assumed that duty, and are therefore liable. There is no evidence as to how *The Brothers* was sunk —whether by negligence of the master or not. I think I must infer that after being sunk she was abandoned by the owner.

By a statute passed in 1863 (26 & 27 Vict. c. lxxxix.), the harbour of Barrow was vested in the defendants, the Furness Railway Company; and section 14 defined the limits of the harbour, and provided that the company should have jurisdiction over Piel harbour and Piel channel beyond those limits, "for the purpose of maintaining, improving, regulating and buoying the said harbour and channel," to a point there mentioned as Helpsford Scar, which is further seaward than the place where this accident occurred; but it was further provided that such powers should not confer on the company the right to levy dues or rates beyond the limits of the harbour of Barrow, and that the defendants should not in any manner impede the present access to Piel harbour, or diminish or affect in any way its present use, conveniences, privileges or immunities as a harbour of refuge.

By another Act passed in 1879 (42 & 43 Vict. c. cxlvi.), reciting that section, it was provided that the powers of the harbour-master should comprise and include the harbour of Barrow and Piel harbour, and Piel channel beyond the place of this accident, but that nothing in the Act should confer upon the company the right to levy dues or rates beyond the limits of the harbour of Barrow; and by section 29, after certain deductions, one-half of the residue of certain light duties to which ships entering or leaving Piel harbour or Piel channel were liable to contribute, was to be paid to the defendant company, and to be applied by them in "maintaining, buoying, lighting, regulating and improving Piel harbour and Piel channel as far as Helpsford Scar, and to no other purpose."

The 17th by-law gave the harbour-master power to remove wrecks and obstructions, and to retain anything so removed to defray the expenses of such removal. In 1877 there was passed a general Act to facilitate the removal of wrecks obstructing navigation. Section 4 provides—"where any vessel is sunk, stranded or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such manner as, in the opinion of the authorities, to be or be likely to become an obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal or destruction thereof, and may sell in such manner as they shall think fit any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may, out of the proceeds of such sale, reimburse themselves for the expenses incurred by them under this Act, and shall hold the surplus (if any) of such proceeds in trust for the persons entitled thereto." Section 5 gives a similar power to the general lighthouse authorities for that part of the United Kingdom in or near which the wreck is situate, if there is no harbour or conservancy authority having the power to remove the same.

It is argued that the 4th section of this statute, although in terms permissive, imposes a duty upon the harbour or conservancy authorities, and this argument is, to some extent, strengthened by the 3rd section, which defines harbour and conservancy authority as including all persons or bodies of persons entrusted with the duty or invested with the powers of improving harbours or tidal waters. In the case of an authority entrusted with

such duty, at least it may be plausibly argued that this addition to their powers implies an additional duty. On the other hand, if section 4 imposes this duty upon a harbour authority, it is difficult to avoid the conclusion that section 5 must impose a like duty upon the lighthouse authority where there is no harbour or conservancy authority.

In the case of *The Douglas* (4), Lord Justice Brett during the argument observed that the statute related to the performance of a public duty, and asked whether the word "may" in section 4 was not to be read "must." I do not find anything to that effect in his judgment in that case. Lord Coleridge declines to give an opinion upon the point; but Lord Justice Cotton intimates that under that section it became the duty of the harbour-master to remove a dangerous obstruction.

The reluctance of the Court to construe permissive words in a statute as obligatory is shewn by the language used by the noble Lords in the case of *Julius* v. *The Bishop of Oxford* (7), in which the principal authorities on the subject are referred to and commented on. It is obviously a strong construction to treat permissive words as imposing a serious obligation, which, if neglected, may expose the body so empowered to heavy damages, and I should hesitate to hold on this ground alone that the defendants were liable. Nor do I see if the owner of *The Brothers* had not become by negligence or otherwise liable for the consequences of the ship being sunk in the Piel channel, how the harbour authority by simply commencing to remove the wreck can be held to have incurred a duty not otherwise cast upon them.

But by the Act of 1879 the defendants were empowered to receive a certain proportion of the light dues from ships entering Piel harbour and Piel channel, and these dues were to be applied by them in maintaining, buoying, lighting, regulating and improving Piel harbour and Piel channel up to and beyond the place of the accident. It seems to me that those words did impose upon them an obligation to remove such an obstruction as this wreck, and to mark its position by buoys until removed, and to apply whatever funds they might receive under the Act for that purpose; and on this ground I think the action against them must succeed. The case, in my opinion, comes within the authority of *The Mersey Docks Trustees* v. *Gibbs* (1), and judgment must accordingly be given for the plaintiffs for the agreed amount of damages and for the costs of the action.

(7) 49 Law J. Rep. Q.B. 577; Law Rep. 5 App. Cas. 214.

Solicitors—Parkers, agents for Bradshaw, Barrow-in-Furness, for plaintiffs; Tahourdins & Hargreaves, agents for S. Hart Jackson, Ulverston, for defendants.

1883. March 8.

DAVIS v. BURTON. BLAIBERG (*claimant*).

Bill of Sale—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7 *and* 9—*Accordance with the Form in the Schedule.*

The Bills of Sale Act (1878) *Amendment Act*, 1882, *s.* 9, *enacts that a bill of sale, made or given by way of security for the payment of money by the grantor thereof, shall be void unless made in accordance with the form in the schedule to the Act annexed. The form permits the insertion of terms as to insurance, payment of rent or otherwise, which the parties may agree to, for the maintenance or defeasance of the security.*

By section 7: Personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes:—(1) *If the grantor shall make default in payment of the sum or sums of money thereby secured, at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security;* (2) *If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates or taxes . . . .* (4) *If the grantor shall not, without reasonable excuse, upon demand*

in writing by the grantee, produce to him his last receipts for rent, rates and taxes.

A bill of sale of goods was made by way of security for the payment of 300*l.* *money advanced, and of* 180*l.* *agreed capitalised interest thereon, at the rate of sixty per cent. per annum. Such sum of* 480*l.* *to be paid by instalments at certain specified dates. There were covenants that the grantor would deliver to the grantee the receipts for rent, &c., when demanded in writing or otherwise; that the grantor would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition.*

It was further agreed that, if the grantor should break any of the covenants, all the moneys secured by the bill of sale should immediately become due, and should be forthwith paid to the grantee, and that all the foregoing covenants were necessary for maintaining the security, within the meaning of sub-section 1 *of section* 7 *of the Act; and there was a proviso that the chattels assigned should not be liable to seizure for any cause other than those specified in section* 7 *of the Act:—*

Held, *that the bill of sale was not in accordance with the form in the schedule, and was in violation of section* 7; *it was therefore void.*

This was a Special Case, raising the question whether a bill of sale was void as against an execution creditor, as not being in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882.

The plaintiff had recovered a judgment against the defendant, and certain goods had been seized under a *fi. fa.* issued on such judgment. The claimant claimed the goods so seized as having been assigned to him by a bill of sale, and the sheriff interpleaded.

The defendant was the mortgagor, and Blaiberg, the claimant, the mortgagee, and the bill of sale contained the following provisions which were material to the judgment of the Court:—

"In consideration of 300*l.* now paid by the mortgagee to the mortgagor, the receipt of which the said mortgagor hereby acknowledges, she, the said mortgagor, as beneficial owner, conveys and assigns to the mortgagee all and singular the several chattels and things specifically described in the schedule hereunto annexed . . . . in and about the premises . . . . by way of security for the payment of the said sum of 300*l.*, and of the capitalised interest thereon, as hereinafter mentioned, being at the rate of 60 % per annum, and any further moneys that may be advanced, and interest thereon, under the provisions hereinafter contained. And the said mortgagor doth further agree and declare that she will duly pay to the said mortgagee the principal sum aforesaid, together with the further sum of 180*l.* for agreed capitalised interest thereon, making together the sum of 480*l.*, as follows: by consecutive quarterly instalments of 45*l.* each, the first of such to become due and payable on the 12th March next, 1883, and the balance, or so much as shall remain unpaid, to become due and payable on the 12th December next, 1883. And in the meantime, and until such goods, chattels and effects shall be taken possession of by the mortgagee, under the powers in that behalf hereinafter contained, they shall remain in the possession of the mortgagor. And also will pay the rent, rates, taxes and other impositions whatsoever payable in respect of the said dwelling-house, or any other premises in or about which the said goods, chattels and effects, or any of them, shall happen to be immediately they respectively become due. And the mortgagor further covenants and agrees with the mortgagee:—

"1. That she will not permit or suffer the said goods, chattels and effects, or any of them, to be distrained for rent, rates, taxes or other impositions; or,

"2. To be seized or taken under any writ of execution, or other legal process whatsoever.

"3. And that she will deliver to the mortgagee the receipts for rent, rates, premium of insurance, and impositions aforesaid, when demanded in writing or otherwise.

"4. And will not remove, or permit or suffer the said goods, chattels and effects, or any of them, to be removed from the said dwelling-house or premises for any purpose, under any pretence whatsoever, without the previous written consent of

the mortgagee, except as hereinafter provided.

"5. And will not charge, encumber, sell or otherwise dispose of or make away with the same, or any of them, or attempt or endeavour so to do, except as hereinafter provided.

"6. And will not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer any act, matter or thing whereby she shall render herself liable to be made or become bankrupt; or be

"7. Arrested upon, or imprisoned, under any Court or criminal process whatsoever.

"8. And will not abscond from her dwelling-house.

"And it is hereby declared and agreed, that if the mortgagor shall break any of the covenants above set forth, then all the moneys hereby secured shall immediately become due, and shall forthwith be paid to the mortgagee. And further, that all the foregoing covenants and agreements are necessary for maintaining this security, within the meaning of sub-section 1, section 7, of the Bills of Sale Act (1878) Amendment Act, 1882. And also, that notwithstanding the moneys hereby secured may have been fully paid, the mortgagee shall be entitled to retain possession of these presents, first, however, cancelling the same. Provided always, that the chattels hereby assigned shall not be liable to seizure, or to be taken possession of by the mortgagee, for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

C. C. Scott, for the plaintiff.—The question is, whether the form in the schedule is obligatory. It is submitted that the bill of sale must, at any rate, be substantially in accordance with it, which this is not. The form provides for payment of the principal and interest, but the so-called capitalised interest is an illegal charge. Section 7 provides for seizure upon certain events and no others; but it is here evaded by the provision making the whole sum due on breach of any of the covenants.

J. J. Sims (*Herbert Reed* with him), for the claimant.—In a recent case Chitty, J., held that an exact copy of the form was not necessary; and the form does permit the insertion of any terms which the parties may agree to for the maintenance or defeasance of the security. The parties agreed upon the covenants which are inserted; and section 7, sub-section 1, provides for seizure if default is made in the performance of any such covenant necessary for maintaining the security.

[CAVE, J.—The Act says the mortgagee is not to seize, except for matters specified in section 7; but here there are several covenants outside section 7, and which do not affect the security; so the section is evaded.]

Still the grantee cannot seize if the covenants are not in accordance with the Act; so the grantor is within the protection of the Act; and they do not make the bill of sale void.

CAVE, J.—I am of opinion that the plaintiff is entitled to our judgment. It seems to me that this bill of sale sins against the Act in several ways. It is not in substantial accordance with the form, because it provides for the payment of capitalised interest, which is stated to be at the rate of sixty per cent., but which may come to be very much more if there is a seizure of the goods, consequent on any violation of the covenants. That alone is enough to shew that the instrument is not in accordance with the form. I agree that it need not follow the form slavishly, but it must do so in spirit, which it certainly has not done in this case; had it done so nothing more would have been payable than the principal sum, and interest down to the date of seizure. But as it is, by calling the money to be forfeited capitalised interest, the grantee could seize for the whole 480*l.* when the 300*l.* actually advanced had only been enjoyed by the grantor for a week. In other ways also the Act is evaded. Section 7 provides that the goods may be seized upon certain specified events, and no others. Here, however, the creditor has ingeniously provided that he may seize for various causes clearly not included in the Act. For instance, the Act says that the mortgagee may seize when there has been a demand in writing for the production of the last rent

receipt, and it has not been produced and no reasonable excuse made for its non-production. Here, however, the provision is that the whole sum is to become due unless the receipt is produced when demanded in writing or otherwise. The consequence of that is, that a verbal notice to produce the receipt might be given, on failure to comply with which the whole sum would become due; and then there might be a seizure, nominally under the 7th section, for making default in payment, but really for not producing the receipt. This is, as it seems to me, a direct attempt to get round the Act, and if such a bill of sale as this were good, the Act might as well never have been passed.

DAY, J.—I concur.

Judgment for the execution creditor.

Solicitors—Walter & Durham, for execution creditor; Moresby White & Co., for claimant.

1882. July 3. Nov. 14.

COOKE *v.* NEWCASTLE AND GATESHEAD WATER COMPANY.

Practice—Reference for Trial—Setting aside Findings of Referee—To whom Application to be made—Judicature Act, 1873, *ss.* 57, 58—*Order XXXVI., rule* 34.

An order referring the issues of fact in an action was made under section 57 *of the Judicature Act,* 1873. *The Judge ordering the reference was moved to set aside the referee's findings:*—Held, *that the motion must be made before a Divisional Court.*

Quære, *whether the period from which the time for moving against a referee's report runs is not the delivery of the report to the Judge.*

Motion before HAWKINS, J.

The facts and arguments are stated in the judgment.

Digby Seymour, Q.C., and *G. Bruce* (on July 3, 1882), for the plaintiff.

Waddy, Q.C., and *J. Edge*, for the defendants.

HAWKINS, J. (on Nov. 14, 1882).—This action came on for trial before me and a special jury at the Newcastle summer assizes, 1881. After some witnesses had been examined, it became obvious that the facts would be much more satisfactorily ascertained and determined by a special referee; the parties therefore consented to my discharging the jury, and referring the issues of fact to a barrister-at-law upon the terms stated in the order of reference hereafter set forth. The jury were thereupon discharged, and an order of Nisi Prius was drawn up by consent, "that the issues in fact in this action shall be referred to" a barrister-at-law, "as special referee, who shall inspect the premises in the pleadings mentioned, and who shall assess the damages, if necessary, in order to report to the Judge." It is also ordered "that the facts with reference to the liability of the parties shall be reported to the Judge, and the questions of liability determined before the damages are assessed. It is further ordered that there shall be liberty to apply to the Judge from time to time, who shall have power to amend the pleadings whenever he may think fit."

Under this order the referee proceeded to inspect the premises; he heard all the evidence tendered on either side, and on the 12th of January, 1882, signed that which was intended to be his report to me. For reasons hereafter appearing, I think it right, however, to add he has not to this hour delivered it to me, although, as a matter of courtesy, he has handed a copy to each of the parties, and they have furnished me with such copies. On the 27th of February, 1882, the defendants' solicitor gave notice to the plaintiff's of an intended application to me to set aside the findings of the referee, and to remit the case and report back to him, upon the grounds that he had not fully or sufficiently reported the facts with reference to the liability, and had embodied in his report findings and conclusions of law which he had no jurisdiction to find or draw, and that his findings were against the weight of evidence. No steps were taken upon this notice, nor was any application made either to a Divisional Court or to me, until the 3rd of July, when the

case came on before me for further consideration. On that day all parties appeared, and the defendants' counsel then claimed to move in accordance with their notice. To this motion the plaintiff's counsel took two objections:—first, that it ought to have been made to the Divisional Court and not to me, and that I had no jurisdiction to entertain it; and, secondly, that, at all events, the motion was too late, and they claimed to have the findings of fact in the report treated as final.

I am of opinion that the first of these objections must prevail. My order referring the issues of fact was made under section 57 of the Judicature Act, 1873. The effect of that order was to substitute Mr. Ridley for the jury, and to give to his findings of fact precisely the same effect as though those facts had been specially found by the jury in open Court. This is in accordance with the express enactment contained in section 58. See also *per* Lord Justice Cotton, in *Miller* v. *Pilling* (1). Now if the facts had been found by the jury, I should have been bound to determine the case, and give my judgment, upon the facts so found; however dissatisfied I might have been with the findings, I should have had no jurisdiction to set them aside; that could only have been done by a Divisional Court—see Order XXXIX. rule 1. The report of the referee stands, in my opinion, precisely upon the same footing. It is, in truth, merely his written verdict upon the facts referred to him for trial, and is by no means to be looked upon as a report to be adopted, or not, according to the views of the Judge before whom the case is in course of trial. That such was the intention of the Legislature is clear from the language of section 58, which makes the referee's report equivalent to a verdict, unless set aside by "the Court." If it had been intended to confer upon the Judge ordering the reference power to set aside a referee's report on questions of fact, I should have expected to find such jurisdiction conferred in express terms, the more especially since I find that, in the earlier part of the same section, both the Court and Judge ordering the reference are invested with powers to regulate the course of the trial; in the Court alone, however, is vested the power to set aside the report when made. I am therefore of opinion that I have no jurisdiction to set aside the findings of the referee, but that such power is vested in the Divisional Court alone.

In the argument before me, Mr. Waddy, for the defendant, placed considerable reliance upon Order XXXVI. rule 34, as conferring upon me the power he desired me to exercise. In my opinion that rule has no such effect. It may well be that the "Court," upon application made to set aside the findings of a referee, has, in order to enable it to adjudicate upon the application, power to require explanations, &c., from the referee, and to make such order for re-trial of all or part of the matters referred as justice may require—see *Miller* v. *Pilling* (1); but no such power is conferred by the rule in question upon the Judge ordering the reference, who is not even mentioned in that rule, though he is in some of the preceding rules of the same Order. As regards the last clause of the new rule 34, added to the old rule in consequence of the decision in *The Dunkirk Colliery Company* v. *Lever* (2) (a case cited for the defendant, but not affecting the present, that being a reference for "enquiry and report" under section 56, and being before the Master of the Rolls sitting as the Court), it confers no new power upon the Judge ordering the reference; he has no right to disregard the findings of the referee and take upon himself to find the facts which, by the order of reference, he has directed shall be tried by the referee; to do so would be in direct contradiction of his own order (more especially so where the order has been made by consent of the parties, who have appointed their own tribunal to settle the facts). But it is totally different when the matter is before the Court on an appeal against the findings. The Court may then look at the evidence which was before the referee and hear his explanations or reasons, and if it then appears to the Court that the findings are wrong or unsatisfactory, it may either remit the matter back for trial, or may, if it is

(1) 51 Law J. Rep. Q.B. 481, at p. 484; Law Rep. 9 Q.B. D. 736.

(2) Law Rep. 9 Ch. D. 20.

satisfied that it has all the evidence and materials necessary for determining the question in dispute, decide those questions without remitting them back at all—a power analogous to that conferred by Order XL. rule 10.

As regards the objection that it is now too late to move to set aside the findings, I express no opinion. The Divisional Court must decide that. In the case of *Sullivan* v. *Rivington* (3) it was, no doubt, expressly held that when a referee has made a report, an application to remit the issues back to him for further consideration must be made within the time limited for moving against the verdict of a jury; but it by no means follows that the defendants are too late to move in the present case. In the case of a verdict, the time for moving against it ordinarily begins to run from the day on which the verdict is delivered. But in the case where the referee is to report his findings to the Judge, it would at least seem reasonable that the time should not begin to run until the day on which the report is so made; for until then the referee cannot be said to have finally and irrevocably exercised his jurisdiction: up to that time he may reconsider the evidence as much and as often as he sees fit. It is only the report to the Judge which is equivalent to a verdict, and it stands to reason that no motion can be made to set it aside until then.

I have already said that up to this hour the referee has made no report to me; and, though he has in courtesy delivered to the parties copies of his intended report, I have never been furnished with the original.

I have confined my judgment to so much of the motion as asks me to set aside the findings. Upon the rest of the motion, at present, I need say no more than this, that if, on the argument, I am satisfied the report does not embody all the material facts which the referee was required to find, of course I could upon an imperfect report pronounce no judgment in the action, and should probably require the referee to complete his report by finding all the issues submitted to him; but I should not require him to set out the evidence, or his reasons for his findings; this I have no right to order him to do—see *per* Lord Justice Bramwell in *The Dunkirk Colliery Company* v. *Lever* (2) and *Miller* v. *Pilling* (1).

Should I be of opinion that the referee has exceeded his jurisdiction, either in his findings or in any other respect, I shall reject all such unwarranted findings and conclusions and treat them as though they had never been embodied in the report at all.

Such objections as that the report is imperfect, or that it is in excess of jurisdiction, may clearly be urged, on the hearing on further consideration, as grounds why judgment should not be given for the plaintiff who is applying for it—see *In re Brook*; *Sykes* v. *Brook* (4).

For the reasons I have stated, I decline to entertain the application to set aside the findings, and propose to hear the case discussed on further consideration as soon as convenient to the parties after the referee has furnished his report to me. I would, if necessary, enlarge the time for moving.

Motion dismissed (5).

Solicitors—Williamson, Hill & Co., agents for J. A. Philipson, Newcastle-on-Tyne, for plaintiff; Pattison, Wigg & Co., agents for Armstrong & Sons, Newcastle-on-Tyne, for defendants.

1883. April 7. } THE QUEEN *v.* YOUNG (*Justice*) AND WHITE.

Jurisdiction of Justices—Bona fide Claim of Right—Offence of putting Obstructions in a Street.

[For the report of the above case, see 52 Law J. Rep. M.C. 55.]

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(3) 28 W.R. 372.

(4) 50 Law J. Rep. Chanc. 744.

(5) The defendants afterwards made the like application to a Divisional Court, by whom it was refused upon the merits. The Court of Appeal, on motion by way of appeal against such refusal, granted a rule *nisi*, which came on for argument, together with an appeal from the above decision of Hawkins, J., and was discharged upon the merits, without any decision being pronounced upon the questions discussed in the above decision.

1882. June 19, 20. Nov. 9. } THE MAYOR, ALDERMEN AND BURGESSES OF SWANSEA v. THOMAS.

Landlord and Tenant—Lease by Deed—Assignment of Reversion of Part of Lands demised—Apportionment of Rent.

The lessor of lands demised by deed (before the commencement of the Conveyancing and Law of Property Act, 1881), *at a rent covenanted to be paid, assigned the reversion in a part of the lands. The lessee (who had previously to that assignment assigned the term) was sued by the lessor for subsequent rent in respect of that part of the lands of which the reversion remained in him, the sum claimed being a fair proportion of the rent*:—Held, *by* POLLOCK, B., *that the action for such sum was maintainable.*

Further consideration. The facts are stated in the judgment.

McIntyre, Q.C., and *Brynmor Jones* (on June 19, 20, 1882), for the plaintiffs.

Christopher James (*W. D. Benson* with him), for the defendant.

Besides the authorities mentioned in the judgment, there were cited *West* v. *Lassels* (1), *Collins* v. *Harding* (2), *Thursby* v. *Plant* (3) and the notes thereto; *Viner's Abridgment*, Rent Ea, Fa; *Bacon's Abridgment*, Covenant E 4, E 6; *Chitty on Pleading*, 7th ed. vol. i. pp. 123, 127, 131; *Simpson* v. *Clayton* (4), *Holgate* v. *Kay* (5) and *Thompson* v. *Hakewell* (6). And sections 10 and 12 of the Conveyancing and Law of Property Act, 1881 (7), were referred to.

POLLOCK, B. (on Nov. 9, 1882).—This action was brought to recover 16½ years arrears of rent, alleged to be due to the plaintiffs in respect of certain premises let by the plaintiffs to Thomas Thomas, of whom the defendant was the widow and executrix. At the trial before me at the Glamorganshire summer assizes, and subsequently upon further consideration, the following facts were agreed upon by counsel:—

By an indenture dated the 19th of June, 1835, the plaintiffs let to Thomas Thomas two fields called "The Burrows," and also a field called "Goose Island," for the term of ninety-nine years, at the yearly rent of 10*l.* in respect of the two fields, and of 15*l.* 15*s.* for Goose Island. The said Thomas Thomas died on the 3rd of January, 1844, having appointed by his will the defendant his sole executrix. On the 31st of October, 1863, the defendant assigned her interest in the premises to certain trustees. Before the 25th of December, 1864, the then residue of the term in Goose Island had become vested by assignments from the defendant in Lewis Thomas, Edward Cory Thomas and the Rev. J. G. Mould; and by an indenture of that date, to which the plaintiffs were parties, the two Thomases and Mould assigned a portion of Goose Island to the trustees of Swansea Harbour, and by the same deed the rent was apportioned between the assignees of the defendant and the harbour trustees as follows:—the assignees of the defendant were to pay 15*l.* 2*s.* per annum, and the harbour trustees to pay 13*s.* per annum. On the same date as the last-mentioned assignment the assignees of the defendant assigned to Watson & Overend, contractors, the whole of their remaining interest. Shortly afterwards, the plaintiffs granted to the Llanelly Railway and Dock Company their reversion in part of Goose Island, but no apportionment of the apportioned rent of 15*l.* 2*s.* was then made. No rent was paid by the defendant or her assignees since the assignment to Watson & Overend. No rent has been paid by Watson & Overend, nor was there any evidence to shew that the plaintiffs had accepted them as tenants; on the other hand, it was admitted that it did not appear that the defendant had ever been in actual possession of any part of the premises.

Upon this state of facts, it was contended, on the part of the plaintiffs, that the defendant was bound to pay such an amount of rent as would be due upon apportionment in respect of that portion

(1) Cro. Eliz. 851.
(2) 13 Co. Rep. 57; s.c. Cro. Eliz. 606, 622.
(3) 1 Wms. Saund. 240.
(4) 4 Bing. N.C. 758; 8 Law J. Rep. C.P. 59.
(5) 1 Car. & K. 344.
(6) 35 Law J. Rep. C.P. 18.
(7) 44 & 45 Vict. c. 41. ss. 10 and 12, applying only to leases made after the commencement of the Act.

of Goose Island the reversion of which remained in the plaintiffs.

The liability of the defendant as executrix of the lessee arises from privity of contract, and not from privity of estate. As executrix of the original lessee, she is liable upon the covenant contained in the lease for payment of rent.

On the part of the defendant, it was contended—first, that the plaintiffs, upon the facts stated, must be taken to have recognised Watson & Overend as their tenants, and therefore that they could not now maintain an action against the defendant for the rent sued for. If the plaintiffs had received rent from the defendant's assignees, this might have been so: because, by so doing, they would be taken to have accepted the assignees as their tenants, and so privity of contract between the plaintiffs and the defendant would have been extinguished, in accordance with the well known doctrine laid down in *Walker's Case* (8); but it was admitted by counsel for the defendant that no rent had ever been paid by the assignees, and the defendant's name still stood as tenant in the books of the corporation. Under these circumstances, the mere knowledge by the plaintiffs of the assignment did not amount to an extinguishment of the privity of contract between the plaintiffs and the defendant.

It was contended, secondly, that an action would not now lie for the original rent or any portion of it, inasmuch as the reversion in a part of the premises let by the original lease had been assigned by the plaintiffs. This ground of defence requires more consideration. The defendant is sued as executrix upon the covenant entered into by her testator, and to the extent of her assets she is liable for any breach of that covenant, if it be still in force. A part of the rent which should have been paid under the covenant has not been paid, and *prima facie* she, as executrix, is liable for the breach. Considerable discussion took place, in the argument before me, about the apportionment of the rent which has been made by parties other than the lessee and the defendant his executrix. As they were strangers to that apportionment, the defendant is in no respect bound by it, as clearly appears from the case of *Bliss* v. *Collins* (9). It may therefore be excluded from the case as irrelevant. If the defendant is liable for anything, the amount, in the absence of consent upon her part, must have been fixed by a jury; and, as I have been placed by agreement of the parties in the position of a jury, it must now be fixed by me; and further, in regard to the amount no question arises, because it was admitted by the defendant's counsel that, if the rent could be apportioned, the amount of 8*l.* 8*s.* per annum was a proper sum, and that which the plaintiffs would be entitled to recover. Why then is not the defendant liable for the breach of her testator's covenant? At common law, before the statute 32 Hen. 8. c. 34, it is clear that, notwithstanding the assignment by the plaintiffs of their reversion in part of the premises, and notwithstanding any number of assignments by the lessee or his assignees, the plaintiffs might have sued the lessee or his executrix for the breach in question. The effect of that statute is to give to the assignee of the reversion the same right of suing the lessee and his executrix as the original reversioner had; and it has been held that the statute transfers to the assignee the privity of contract, and, further, that the covenant is divisible; so that the assignee of the reversion of part may sue upon the covenant in respect of his interest in that part—see *Twynam* v. *Pickard* (10). If, therefore, the reversioner can assign the reversion of part of the premises to A, and of the residue to B, and A and B can both sue in respect of their respective interests, there seems no good reason why, if the reversioner assigns the reversion of part of the premises to A, and reserves to himself the reversion in the residue, he should not be allowed to sue in respect of his interest in the residue. In the case of *Pyott* v. *St. John* (11), the lessor being seised in fee of the reversion in part, and entitled to a term of years in the residue, demised the whole by one deed, and then assigned his

(8) 3 Co. Rep. 24 *b.*

(9) 5 B. & Ald. 876.
(10) 2 B & Ald. 105.
(11) Cro. Jac. 329.

reversion in the fee-simple portion by one deed, and the reversion in the term of years portion by another deed, both to the same person; and it was contended, not that the assignee could not sue in respect of each part, but that, as there were two assignments, there should have been two writs of covenant, or at least two counts. It was held, however, that the action was rightly brought. That case and the case of *Twynam* v. *Pickard* (10) were both actions on the covenant to repair; but if the statute divides a covenant to repair between two holders of the reversion, I see no good ground for holding that it does not divide a covenant to pay rent.

There seems to have been some confusion in the older cases with regard to the right of a reversioner to sue for an apportioned rent where that rent was due by reason of privity of contract, and not by reason of privity of estate; and what is said in some of these cases can hardly be reconciled. This probably arises, however, from the fact that in most of them the question arose upon the consideration whether the action was brought in a proper form, and whether it should be in debt or covenant. A further consideration of these cases, now that forms of action have been abolished, would seem to be unprofitable, especially as in the present case, the plaintiffs not having accepted the assignee as tenant, the action might, when forms of action existed, have been framed in debt, as appears from 1 *Wms. Saund.* 241*a*, note 5.

One case, however, which contains an expression of opinion by Lord Ellenborough in delivering the judgment of the Court, ought to be noticed. I refer to the case of *Stevenson* v. *Lambard* (12).

The action was by landlord against assignee of lessee, who had entered and was in possession of the premises. The defendant pleaded an eviction as to one undivided moiety of the premises by one claiming under a title superior to the plaintiff. The Court held that, notwithstanding this, the plaintiff was entitled to recover for an apportionable part of the rent; but this holding was upon the ground that the liability of the defendant arose from privity of estate and not from mere privity of contract; and Lord Ellenborough said, "The question is, whether the rent be apportionable in this action of covenant by the lessor against the assignee of the lessee? It clearly is so in an action of debt, or upon an avowry in replevin, by all the authorities; and the only question is, whether it be so in covenant? In covenant as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory, as any other personal contract is, the rent is not apportionable," and for this he cites *Bro. Contract*, pl. 16, *Moore* 116, and *Finch's Law*, lib. 2, c. 18.

This and other authorities to which I have referred appear to me to be open to the observation which I have already made; and it is observable that what Lord Ellenborough said in *Stevenson* v. *Lambard* (12) was only a *dictum* unnecessary for the decision of the case before him. Nor does it appear by the report that the bearing of the statute of Hen. 8, or the case of *Pyott* v. *St. John* (11), was called to the attention of the Judges or considered by them; and the remarks which occur in the judgment appear to have been made upon the supposition that the question depended solely on the common law. Since that decision the cases of *Bliss* v. *Collins* (9) and *Twynam* v. *Pickard* (10) have been decided, and I cannot think I am bound by the *dictum* in *Stevenson* v. *Lambard* (12).

The result, therefore, will be that my judgment is for the plaintiffs against the defendant for 16½ years of the apportioned rent, at the rate of 8*l.* 8*s.* per annum, as agreed by counsel, amounting to 138*l.* 12*s.*, to be paid by the defendant out of the assets of the testator.

Before, however, judgment is entered, the plaintiffs' statement of claim may be amended to meet the facts of the case as now admitted.

With regard to the costs of the action, I cannot but say that the claim is one which bears hardly upon the defendant. It is said that the corporation of Swansea ought to get their 16½ years rent if it be due in law; but to this it might well be answered that, had not the agents of the corporation been guilty of great neglect,

(12) 2 East, 575.

they might have obtained it long ago from those who enjoyed the actual occupation of the land in question, and that the defendant is now fixed with the liability for a rent the amount of which up to the present time has never been ascertained, and which, in accordance with the usual order of events, she might well suppose she was not liable for since the date of the assignment in 1863. Under these circumstances, I think it but just to say that each party must pay their own costs.

Judgment for plaintiffs.

Solicitors—Sharpe, Parkers, Pritchard & Sharpe, agents for J. Thomas, Swansea, for plaintiff; H. A. Stephens, agent for F. James, Swansea, for defendant.

1883. March 3, 21. } JOHNSTON AND COMPANY *v.* HOGG AND OTHERS.

Ship and Shipping—Marine Insurance—"Seizure"—Taking without intent to keep.

By a policy on a vessel the owners warranted her free from "capture and seizure." The vessel was forcibly taken possession of for the purpose of plundering the cargo, and in consequence became a constructive total loss:—Held, *that the loss was a loss by "seizure" within the meaning of the warranty, although the taking possession was without any purpose of keeping the vessel.*

Further consideration. The facts, together with the arguments, are stated in the judgment.

Butt, Q.C., and *J. Fox* (on March 3), for the plaintiffs.

Gully, Q.C., and *J. G. Barnes*, for the defendants.

CAVE, J. (on March 21).—The plaintiffs in this case were the owners of a vessel called the *Cypriot*; and they sued the defendants, underwriters at Lloyds', on a policy of insurance effected on that vessel, alleging that she had been lost by perils insured against. The plaintiffs had in the policy warranted the vessel free from capture and seizure and the consequences of any attempt thereat; and the defence was that the loss was a loss by seizure within the meaning of that warranty.

It was admitted by the parties that the *Cypriot*, during the continuance of the risk, became a constructive total loss, by reason of the proceedings of and damage done by the natives as described in the examination of the master, that due notice of abandonment was given, and that the only issue to be tried was whether the loss was a loss by any of the perils from which the vessel was warranted free.

From the examination of Edward Laidlaw it appeared that on the 7th of October, 1879, the *Cypriot* got ashore while going down the Brass river. On the following day the natives took forcible possession of the ship, drove away the master and crew, and plundered the vessel in the manner there described. The consequence was, as stated in the admissions, that the ship became a constructive total loss.

The jury found that the natives seized the vessel for the purpose of plundering the cargo, and not for the purpose of keeping her.

It was contended for the plaintiff that to constitute a seizure of a vessel there must be a taking possession with intent to keep it as one's own, and not merely for purposes of plunder; and in support of this contention certain passages from well known text-writers were cited.

In *Phillips on Insurance* (vol. i. s. 1108) it is said, speaking of loss by capture, that "by capture is meant the taking possession of property with the purpose of appropriating it to the captor's own use, by which it is distinguished from a mere detention with the design of ultimately liberating the property, as in the case of an embargo." For this position the case of *Black* v. *The Marine Insurance Company* (1) is cited. The author also says, "A seizure is equivalent to a capture, as it is made with the intention of depriving the owner of his property in the subject." But a little further on (s. 1110), the author remarks, "The word capture is of itself broad enough to comprehend any

(1) 11 Johns. Am. Rep. 287.

forcible seizure, arrest or detention which may be lawfully insured against." Moreover, in the case of *Black* v. *The Marine Insurance Company* (1) the Court said, "seizure may in general be applicable to a taking or *detention* for the violation of some municipal regulation."

In *Marshall on Insurance* (book 1, ch. xii. s. 4) it is said, "Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is a capture of the ship in the proper sense of the word. The latter is only an arrest and detention without any design to deprive the owner of it."

In *Parsons on Insurance* (vol. i. p. 584) it is stated that, "'Capture,' or its equivalent 'seizure,' means a taking with intent to keep; 'arrest,' or 'detention,' a taking with intent to return the thing taken, as when a ship is arrested by an embargo, or stopped for search, or detained in a port by an actual blockade thereof, or perhaps by being lawfully restrained from entering her port of destination." At another place (p. 576) the author says, "If a seizure (which becomes a capture if it be intended to take from the owner the property seized), &c.," which is hardly consistent with the previous definition of seizure.

Several cases were cited which had but a very remote bearing on the point in dispute. The only one it is necessary to mention is that of *Rodocanachi* v. *Elliott* (2), in which case Lord Justice Brett, then Mr. Justice Brett, in the course of his judgment says, "Capture means the hostile seizure of goods with intent to deprive the owner of them," upon which it is to be observed that in the opinion of that learned Judge seizure, plus the intent to deprive the owner of goods, is equivalent to capture, from which it follows that the intent to deprive the owner of the goods is not implied in the word "seizure."

The ordinary and natural meaning of "seizure" is a forcible taking possession.

(2) 42 Law J. Rep. C.P. 247; 43 ibid. 255; Law Rep. 8 C.P. 649; ibid. 9 C.P. 518.

This was admitted by Mr. Butt; but he contended that the word "seizure" had acquired a peculiar connotation in insurance law, and was in fact a technical term involving an intent by the person seizing to keep possession of the vessel as his own. In support of this proposition he relied on the passages above cited, and submitted that in this case what the natives had done was an arrest and not a seizure.

In my opinion, the word "seizure" must be taken in its ordinary and natural meaning, and is not a term of art. The passages I have cited from Phillips certainly do not prove that the word has any technical meaning; and the case of *Black* v. *The Marine Insurance Company* (1), which that author cites in support of his view as to the meaning of capture, shews, if anything, that seizure is a general term capable of a very wide meaning. Marshall seems to recognise two meanings of the word "capture," but certainly does not assert that the more restricted meaning is that in which alone the word is understood in insurance law. The passages from Parsons are not more definite; and that from the judgment of Lord Justice Brett is rather in favour of the defendants. The seeming confusion in some of these passages arises from the desire of the authors in question to give a distinct and different meaning to such words as "capture," "seizure," "arrest," "detention," "restraint," and the impossibility of accomplishing the task is shewn by their attempts to distinguish between "arrest," "restraint" and "detention." I have no doubt that the word "seizure," like many other words, is sometimes used with a more general and sometimes with a more restricted meaning; and whether it is used in a particular case with the one meaning or the other depends, not on any general rule, but on the context and the circumstances of the case.

This brings me to the consideration of the policy sued on; and, after reading it carefully, I cannot find any indication that the word "seizure" is used in any but its ordinary and general signification. Indeed, the words "free from capture and seizure, and the consequences of any attempt thereat," point to the more general mean-

ing of the word "seizure," since in the case of an unsuccessful attempt at seizure it must obviously be difficult to say what the intention was of those who made the attempt. In this particular case, if the natives had been beaten off by the master and crew, it would have been far from easy to determine what their intention was with regard to the vessel, although it might have been easy to determine what their intention was with regard to the cargo. As to the contention that this was an arrest, the action of the natives cannot, to my mind, be correctly so described, although if their acts amounted to a seizure it is immaterial whether it was or was not an arrest, unless these terms are mutually exclusive, which I do not think they are. In truth, the natives neither intended to keep possession of the vessel as their own, nor to return it to the owners. Their object was plunder, and to facilitate that object they seized the vessel, not caring what became of it after their main object, that of plunder, was effected.

Being clearly of opinion that the acts of the natives amounted to a seizure within the meaning of the warranty, I must direct the verdict and judgment to be entered for the defendants, with costs.

Judgment for defendants.

Solicitors—Parker, Garrett & Parker, for plaintiffs; Waltons, Bubb & Walton, for defendants.

1883. March 9. TIPPETT *v.* HART.

Revenue—Beer—Inland Revenue Act, 1880 (43 & 44 *Vict. c.* 20), *ss.* 32 *and* 33—*Brewer not for Sale chargeable with Duty—Exemption of the Occupiers of Houses not exceeding* 10*l. Annual Value.*

[For the report of the above case, see 52 Law J. Rep. M.C. 41.]

[IN THE COURT OF APPEAL.]

1883. April 6. CAPELL *v.* THE GREAT WESTERN RAILWAY COMPANY.*

Lands Clauses Act, 1845 (8 *Vict. c.* 18), *ss.* 23 *and* 34—*Land taken under Compulsory Powers—Arbitration to Assess Price—Costs of Arbitration—Payment of, when Due.*

When, in an arbitration held to settle the amount of compensation to be paid to the owner of land compulsorily taken under the Lands Clauses Acts, the costs of the arbitration have been awarded to the owner, such costs become payable within a reasonable time after the award has been made, and the execution of the conveyance and the investigation of title are not, in the absence of fraud, conditions precedent to his right to recover such costs.

Appeal from the judgment of Lopes, J., on further consideration. The case is reported 51 Law J. Rep. Q.B. 601.

Action to recover the costs of an arbitration held under the Lands Clauses Act, 1845 (8 Vict. c. 18), to assess the compensation to be paid to the plaintiff for land compulsorily taken by the defendants under certain statutes empowering them to do so.

In April, 1876, the railway company gave the plaintiff notice to treat for the land. In December, 1876, an award was made, by which a sum in excess of that offered by the railway company was, together with the costs of the arbitration, awarded to the plaintiff. The draft conveyance of the land was forwarded to the owner in 1878. In August, 1881, the costs of and incidental to the arbitration were taxed, and the Master gave his allocatur for the sum of 177*l.* 12*s.* 6*d.*, the amount of the costs. The draft conveyance was returned approved, and the engrossment was sent by the railway company on the 24th of October, 1881. The plaintiff issued his writ for the costs on the 26th of October, 1881. In November, 1881, the vendor's solicitors requested that certain alterations should be made in the conveyance, and these were made in December, 1881. The costs of the arbitation, but not

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

of the writ, were then tendered by the defendants to the plaintiff, but were refused by the plaintiff.

Lopes, J., gave judgment for the plaintiff.

The defendants appealed.

R. S. Wright, for the appellants.—The contention of the appellants is that the costs of such an arbitration as this do not become payable till after the conveyance has been finally settled and executed, and until it has been discovered that the claimant has a good title to the land. The question arises under section 34 of the Lands Clauses Consolidation Act, 1845 (1). The observations in the case of *Todd* v. *The Metropolitan District Railway Company* (2) were made with reference to section 68, but they are in point also on section 34. "Costs," says Brett, J., "are an accessory to a valid claim."

[COTTON, L.J.—But under section 68 the landowner sets matters in motion, whereas under section 23 (1) the railway company take the initiative.]

The railway company do not initiate the proceedings if a person who has no title sends in a claim for compensation; if the railway company give a notice to treat, and if they pay the costs of the arbitration to a person who has no title to the land, they will be unable to recover them, as the money will have been paid under compulsion of law—*Marriot* v. *Hampton* (3); and if the claimant is not entitled to the price of the land, how can he be entitled to the cost of ascertaining that price?

[BRETT, M.R.—These costs have been taxed.]

That is immaterial, for if the plaintiff is entitled at all he can sue for the costs before they are taxed—*Sharpe* v. *The Metropolitan District Railway Company* (4).

[BRETT, M.R.—The railway company force the plaintiff to have a price assessed: can they say they will not pay the costs of that assessment until the conveyance is settled?]

Section 80 tends to shew that the railway company are not bound to pay costs until they part with the money. In *Sharpe* v. *The Metropolitan District Railway Company* (4) the judgment was confined to giving the claimant costs of that part of the arbitration on which the plaintiff recovered something, and no costs were given as to that part of her claim wherein she failed; so that it is clear the costs of such an arbitration as this are not payable at once

(1) 8 Vict. c. 18. s. 18: "When the promoters of the undertaking shall require to purchase or take any of the lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this Act to sell and convey or release the same, or such of the said parties as shall, after diligent enquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

Section 23: "If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided."

Section 34: "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same, or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

(2) 24 Law Times, 435.

(3) 2 Sm. L.C. (8th ed.), 421.

(4) 48 Law J. Rep. Q.B. 325; 50 ibid. 14; Law Rep. 4 Q.B. D. 645; ibid. 5 App. Cas. 425.

and without reference to whether the person claiming has or has not any right so to claim. Where, after notice to treat, the amount of compensation to be paid has been fixed by an award under this statute, an action for the amount cannot be maintained until a conveyance of the land has been executed—*The Guardians of the East London Union* v. *The Metropolitan Railway Company* (5).

[BRETT, M.R.—This contention requires words to be read into section 34.]

That may be necessary to do justice, for the question of title is not considered in the arbitration.

[BOWEN, L.J.—Assuming the view of the appellants to be correct, what would happen, in a case where the costs were to be borne by each party, to the costs of the railway in a case where it turned out that the claimant had no title?]

If a person claims what he has no right to claim, and an assessment consequently takes place with regard to something which he has no right to have assessed, then the claimant ought to pay to the company the expenses caused by his wrongful claim.

Charles, Q.C., and *Bucknill*, for the plaintiff, were not called on.

BRETT, M.R.—In this case the plaintiff brought an action for the costs of an arbitration which was held under the Lands Clauses Consolidation Act, for the purpose of settling the amount of compensation to be paid to him by the Great Western Railway Company in respect of certain land compulsorily taken by that company. The question is, whether at the time this action was brought these costs were so payable as to enable the plaintiff to maintain this action; and the question is also raised, whether he is entitled to have and to keep these costs whether he has or has not a good title to the land intended to be taken. In my opinion he is so entitled. The question depends upon sections 23 and 34 of the Lands Clauses Consolidation Act, 1845 (1). Section 23 provides that if the compensation claimed or offered exceeds 50*l.*, the amount is to be settled by arbitration or by a jury, at the option of the party claiming compensation. The right of a party claiming compensation to go to arbitration arises from the fact that the railway company give him a notice of their intention to take his land, and of their desire to treat for the purchase of it. This is a power which the company exercise against his will, under a statute which forces him to submit, or to go to an enquiry as to the price to be paid for his land. Then section 34 (1) provides that all the costs of the arbitration shall be borne by the promoters of the undertaking, unless the arbitrators award no more than was offered by the promoters, in which case each party shall bear his own costs of the arbitration. Unless, then, we alter, modify or add to the plain words of section 34 (1), a party claiming compensation is entitled to the costs of the arbitration, and if he is so entitled then he can sue for them, and if he succeeds he can keep them. It is suggested that we should add the words "if the claim is valid and if he has title to the land to be taken." Why should we add those words? Because, as is suggested, justice requires it. I protest against the argument, that where the plain words of an Act would if construed according to their plain meaning work injustice, we are not to construe them according to that plain meaning. I think, on the contrary, we are bound to do so, and that it is for the Legislature to alter them if it should seem necessary so to do. But it seems to me that there is no injustice in the provisions of this section. The railway company get under the Act compulsory powers, and the statute requires the person whose land is to be taken either to submit or to settle the price by arbitration before the question of title arises, and independently of the question of title. The landowner might wish to remain quiet and to sit still in possession of his land, but the railway company have the power to force him to go to an enquiry, and yet it is said that it is unjust that they should pay the expenses of that enquiry. I, however, cannot see that there is any such injustice.

I do not think it is necessary to deal with or to say anything about cases which may arise under section 68, or about cases where the party claiming compensation knows that he has no title to the land in question, and so is in fact acting fraudulently. In

(5) 38 Law J. Rep. Exch. 225; Law Rep. 4 Exch. 309.

the present case there is no question of fraud; the only suggestion is, that the plaintiff might not know enough of his own title to know whether he has or has not a good title. The Legislature says that in such a case the railway company are to pay the expenses of the enquiry; and the true interpretation of the section is, as it seems to me, that the railway company must pay the costs of the arbitration, and that the plaintiff is entitled to keep them whether his title is good or bad. I also think that the plaintiff is entitled to sue within a reasonable time after the arbitration is closed, and I think that the smallest possible time is a reasonable time. This appeal therefore fails.

COTTON, L.J.—I am of the same opinion. The plaintiff in this case has a good title to the land intended to be taken. The only objection alleged is that the action is brought too soon. I do not propose to say anything with regard to cases in which there is fraud: those cases are outside our present decision. Section 34 of the Act of 1845 (1) provides that if the arbitrator gives a certain amount, the costs of the arbitration are to be borne by the promoters of the undertaking: that is a statutory declaration as to the way in which the costs are to be paid. It is, however, said that the plaintiff in this action is not entitled to be paid these costs until it has been ascertained whether or not he has a good title; but there is no such provision in the statute, and it is but justice that the party claiming compensation shall not be liable to the costs of the arbitration if he is reasonably entitled to believe that he has an interest in the land. The arbitration takes place to fix the price of the land taken by the company, and the company is, in a certain event, to bear all the costs of that arbitration. In my opinion there is no injustice in this provision, and nothing which should lead us to interpose words which are not found in the statute. The plaintiff is entitled to be paid his costs by the railway company, and that within a reasonable time. His right does not depend on taxation; he has a right to sue quite independently of any taxation.

With regard to the case of *Todd* v. *The Metropolitan District Railway Company* (2), it is not necessary to say much. That was a case under section 68 of this Act, a case where the landowner and not the railway company initiated the proceedings, a case in which no land of the plaintiff was taken, but some of his land was, as he alleged, injuriously affected, and he failed in his contention, so that it was right to say that he was not entitled to costs. *Sharpe* v. *The Metropolitan District Railway Company* (4) was also relied on by the appellants; but in that case there were two claims made under a section analogous to section 68 of this statute, and the plaintiff recovered nothing at all in respect of one of those claims, so that there was no fruit of one of the claims made, and it was held that the plaintiff was not entitled to costs in respect of the claim as to which nothing had been awarded. That case differs from the present, for here, *ex hypothesi*, the arbitrator has made an award in favour of the plaintiff; and, further, that case was under a section analogous to section 68 of this Act, and not under the section which applies to this case.

BOWEN, L.J.—I am of the same opinion.

Judgment affirmed.

Solicitors—Mead & Daubeny, for plaintiff; Nelson, for defendants.

1883. March 15. DOWNING (*appellant*) *v.* SCHNEIDER AND OTHERS (*respondents*).

Licensing—Beer Off-licence—Appeal—The Beer Dealers' Retail Licences (Amendment) Act, 1882 (45 & 46 *Vict. c.* 34), *s.* 1 —*The Beer Dealers' Retail Licences Act*, 1880 (43 *Vict. c.* 6), *s.* 1.

[For the report of the above case, see 52 Law J. Rep. M.C. 51.]

[IN THE COURT OF APPEAL.]

1883. April 19. THE ALEXANDRIA WATERWORKS COMPANY (LIMITED) *v.* MUSGRAVE (*Surveyor of Taxes*).*

Income Tax—English Company carrying on Business abroad—Debenture Bonds—Deduction in respect of Interest on, paid abroad to Foreigners residing abroad—5 & 6 Vict. c. 35. s. 100, sched. D, rule 4, ss. 102 and 159.

An English company carrying on business abroad, and making all its gains and profits abroad, claimed to deduct from the sum assessed to income tax the amount of interest paid by it to foreign holders of its debenture bonds living abroad, receiving the interest abroad, and who were persons not liable to pay income tax:—Held (*affirming the judgment of the Queen's Bench Division*), *that the company was not entitled to the deduction claimed, for that the case was within 5 & 6 Vict. c. 35. s. 100, sched. D, rule 4, which provides that, in estimating the amount of profits and gains of such a company, "no deduction shall be made on account of any annual interest, or any annuity or other annual payment payable out of such profits or gains."*

Appeal by the Alexandria Water Company from the judgment of the Queen's Bench Division on a Case stated for the opinion of the Court by the Special Commissioners of Income Tax.

The Alexandria Waterworks Company is a company carrying on business abroad, but having its registered office and residing in England. The District Commissioners for Income Tax assessed the company to the income tax on the amount of 25,600*l.* the profits made by the company.

The company claimed as a deduction from the sum so assessed the amount of 7,695*l.*, being interest on debenture bonds paid to foreigners residing in Egypt.

The Special Commissioners decided that the company being an English company was liable to pay income tax on the whole profits of the concern, irrespective of the manner and places in which such profits were distributed, and they confirmed the assessment in the sum of 25,600*l.*

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

The company appealed to the Queen's Bench Division.

The appellants' points for argument were—

1. That interest on mortgage debentures of the company payable out of property of the company not situate within the United Kingdom to persons residing out of the United Kingdom, is not annual profit or gain arising or accruing to any person residing in Great Britain from any kind of property, or from any profession, trade, employment or vocation; neither is it annual profits or gains arising or accruing to any person, although not resident within Great Britain, from any property whatever in Great Britain, or from any profession, trade, employment or vocation exercised within Great Britain, within the meaning of schedule D of 5 & 6 Vict. c. 35. s. 100.

2. That such interest is not an annual interest or annuity or other annual payment payable out of such profits or gains, within the meaning of the 4th rule of the first case of section 100 of the same Act.

3. That the enactment of section 102 of the same Act that the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, subject to a power for the person so liable to deduct the amount of the duty from such annual payment, does not apply to a case where the person entitled to such annual payment is not a person liable to be assessed to the income tax.

The Queen's Bench Division confirmed the assessment.

The company appealed.

Charles, Q.C., and *F. R. Y. Radcliffe*, for the appellant company.—The question raised by this appeal is, whether the company can claim as a deduction from the sum assessed on its profits the amount of the interest paid on debenture bonds to foreigners residing out of the United Kingdom. The interest on debentures is in no sense a profit arising out of the gains of the company; it is a charge against the gains of the company, it is a liability of the company, which ought to be deducted before the profits or gains of the company are considered to come into existence for the pur-

poses of 5 & 6 Vict. c. 35. sched. D (1), for if the company were to make no profits it would still have to pay the interest, or be liable to have its property seized. Schedule D charges the tax upon the profits accruing to any person residing in Great Britain, and upon profits accruing to a person not resident in Great Britain from a trade exercised in Great Britain. The interest in question does not come within that definition. The Crown relies upon rule 4 of section 100 (1); but that must be read with section 159 (2), and then it will appear that the operation of rule 4 is limited to cases in which the company gets back from the recipient of the interest the amount of the tax which it has paid to the Government. Section 102 (2) also assists the contention of the appellant company, for while the first part deals with cases of profits made within Great Britain, the second part deals with profits which arise out of, but which are paid within Great

(1) 5 & 6 Vict. c. 35. s. 100, first case, sched. D, rule 4: "In estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains. . . ."

(2) Section 102: "And be it enacted, that upon all annuities, yearly interest of money or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed, or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence without deduction, according to, and under and subject to the provisions by which the duty in the third case of schedule D may be charged: Provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act, no assessment shall be made upon the person entitled to such annuity, interest or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction at the full rate of duty hereby directed to be charged upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; but in every case where any annual payment as aforesaid shall by reason of the same being charged on any property or security in Ireland or in the British Plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then, and in every such case, there shall be charged upon such interest, annuity or other annual payment as aforesaid, the duty before mentioned, according to, and under and subject to the several and respective provisions by which the duty in the third case of schedule D may be charged: Provided always that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable on such interest, and every such officer shall be answerable for doing all acts, matters and things necessary to a due assessment of the said duties, and payment thereof as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts as if the said rates and assessments were chargeable."

Section 159: "And be it enacted, that in the computation of duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed, or of loss sustained in any trade, manufacture, adventure or concern, or in any profession, employment or vocation."

Britain: it in fact makes the company in relation to the interest on debentures merely a collector for the Government, and it throws the burden of the payment of the tax upon the recipient of the interest. That section applies to "profits or gains brought into charge by virtue of this Act"; but this charge is not so brought in, as it is a charge on the income of persons residing abroad. Section 102 (2) provides for the present case, for it applies to money paid within and not outside Great Britain.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Dicey*, for the commissioners, were not called on.

BRETT, M.R.—I am of opinion that this decision must be affirmed. In the first place we must consider what it is which the appellant company desires should be done. The company claims that a deduction should be made from a sum which is assessed upon the interest paid by the company on debenture bonds issued by the company. The complaint of the appellant company is that it is assessed upon a wrong amount—that is, that it is assessed upon an amount from which the deduction which it claims to have made has not been made. The subject-matter on which the assessment is made is the interest upon debentures. Out of what fund is that payment made? The only fund out of which it can be made is out of the moneys which the company receives for supplying water—that is, out of money which it gains by carrying on its trade. That money is the profit so gained by this company. It is true that the words of the debenture bond give to the debenture-holders a further security in the shape of a charge upon the property of the company, but their interest is in fact paid out of the only fund which the company possesses—that is, out of the gains which it makes by its trade.

The argument for the appellant company is that in estimating the amount of the profits of the company in order to assess them to income tax a deduction ought to be made on account of a certain proportion of the interest on debenture bonds—that is, as I have said, of interest which it pays out of its gains.

The Act of Parliament which governs this case is 5 & 6 Vict. c. 35, and rule 4 of section 100 (1) enacts that, "in estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains." That seems to me to enact that no deduction is to be made in respect of such interest as that which is paid by this company, and to make this deduction would be to contradict the grammatical construction of this rule, and the ordinary meaning of the English words used in this rule. Is there then anything in the statute which entitles the Court to read the rule in any other way than that which gives to the words of it their ordinary grammatical construction? It is urged on behalf of the appellant company that section 102 (2) not only enables but obliges the Court to give such a construction to the rule. I am, however, of opinion that section 102 (2) does not apply to the same operation as that which is provided for by section 100, rule 4, but that it applies to an operation which takes place after all the conditions of section 100 have been fulfilled. It was then said that section 159 (2) applied and enabled the Court to construe the rule in question according to the contention of the appellant company. I think section 159 (2) may apply to the same period of time as rule 4 of section 100; but I also think there is nothing in it which enables us to read it into that rule so as to limit its operation.

The argument therefore on behalf of the appellant company is reduced to one of hardship. I am unwilling to give an opinion whether a foreign debenture-holder can be made to repay to the company the amount which the company has been compelled to pay as income tax, because that class of debenture-holders is not now represented, but I suspect that the Legislature did intend to make such debenture-holders liable to recoup the company so far as an English Act of Parliament could effect such result. At all events, I am not prepared to hold that there would be anything contrary to natural justice in making them so liable. That, however, is not material for the purposes of this decision: if the company can so recover the money so

paid, then there is no hardship; if it cannot, then the hardship, if it is a hardship, is one imposed by the express words of this statute. I agree, therefore, with the judgment of the Court below, and this appeal must be dismissed.

COTTON, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors—Radcliffes, Cator & Martineau, for appellant company; Solicitors to the Inland Revenue, for respondent.

1883. April 20. } ABRATH *v.* THE NORTH EASTERN RAILWAY COMPANY.

Malicious Prosecution—Reasonable and Probable Cause—Preliminary Questions for Jury—Onus Probandi.

In an action for malicious prosecution it lies on the defendant to prove the facts which the jury have to find, with a view to the decision of the Judge in his favour on the question of reasonable and probable cause—namely, that the defendant took reasonable care to inform himself of the true state of the case, and that he honestly believed the case which he prosecuted.

Rule for a new trial as upon a verdict against the evidence and for misdirection in an action for malicious prosecution, tried before Cave, J., at the Durham Summer Assizes, 1882. At the trial the verdict was entered for the defendants.

The plaintiff was the medical adviser of one McMann, who brought an action against the defendant company for compensation for injuries received in a collision at Ferryhill Junction, on the 10th of September, 1880. On the 4th of July, 1881, that action came on for trial at Newcastle, and was settled on the defendants paying 725*l.* damages and 300*l.* costs. Some time between July and November in the same year, information was given to Mr. Rayne, a medical man in the employ of the defendants, by detectives employed to watch the plaintiff; and on the strength of that information application was made to Mr. Wharton, a director of the defendant company, who gave instructions to Mr. Dix, a solicitor of Gateshead, to take the statements of witnesses, obtain the opinion of counsel and lay the matter before the directors. That having been done, on the 7th of November an information was laid, on the defendants' behalf, charging the plaintiff with conspiring with McMann to defraud the company. The plaintiff was committed for trial, and was tried and acquitted in January, 1882.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Seymour, Q.C.*, *Gainsford Bruce* and *J. L. Walton*, shewed cause.

Sir Hardinge Giffard, Q.C., and *Mac-Clymont*, supported the rule.

The arguments appear sufficiently from the judgment.

Cur. adv. vult.

GROVE, J. (on April 20).—This is a rule in an action for malicious prosecution tried before my brother Cave. The rule asks for a new trial on the ground that the verdict was against the evidence, and for misdirection. The misdirection alleged consisted in this, "that the learned Judge ought not to have told the jury that if they were not satisfied one way or the other, or if there was a doubt in their minds, they ought to find for the defendants, and that the learned Judge should have held that there was no reasonable and probable cause."

The point raised appears to be a new one. As a general proposition the onus of proof lies on the plaintiff. But it was argued for the plaintiff that the question whether the defendants used reasonable care in making enquiries before the prosecution was undertaken was not an issue in the cause. It was what may be called a subordinate fact which the Judge asks the jury to determine in order to inform his mind in regard to the question which it is for him to decide. The Judge, according to the law laid down in *Panton* v. *Williams* (1) and *Lister* v. *Perryman* (2),

(1) 10 Law J. Rep. Exch. 545.
(2) 39 Law J. Rep. Exch. 177: Law Rep. 4 E. & Ir. App. 521.

has to decide whether there is reasonable and probable cause, but the jury are to be asked to find the facts necessary to decide that question. It was argued that where the defendant undertakes to satisfy the Judge that there was reasonable and probable cause the onus is on him to shew the necessary facts to the jury. I am of opinion that this is a right view of the law. The facts are within the knowledge of the defendants only. They alone know whether they took the necessary care, and also whether they had an honest belief. I think the general rule of law that the onus falls on the person affirming applies to the case. It is singular that there is no case expressly an authority on the point. A case of *Sutton* v. *Sadler* (3) was cited, in which it was held that the onus changed from one party in the cause to the other, but the facts were so extremely different as not to throw much light on the present case. Where the defendant brings forward evidence on a question which the Judge has to decide, the onus lies on him. In this case detectives were employed by the railway company, and a solicitor; what these men did and knew was known only to the defendants. It is necessary now to call attention to the summing up. The learned Judge says early in his charge—"It is thought desirable that whenever there is reasonable and probable cause, no matter what the motive might be, that the prosecutor should be protected. So again, a man may not have reasonable and probable cause, but he may honestly think that he has. There again our law says that he ought to be protected, because it is for the advancement of justice that enquiries should be made into crime wherever there is reasonable and probable ground for making enquiry, or where in the absence of reasonable and probable ground a man acts honestly and *bona fide*: in neither of those cases is the man liable to an action." The learned Judge does not separate the question of malice from that of reasonable and probable cause. The matter is put as if the negation of honest belief were malice. The correctness of this is a nice question not necessary to be considered. A little further on, the Judge says that the first question for the jury will be —"Did they take reasonable care to inform themselves of the true facts of the case?" and adds, "it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves." The onus is put distinctly on the plaintiff to negative that the defendants did not take reasonable care to inform themselves. The difficulty, almost impossibility, of the plaintiff so doing is such as to point to its not being the law. The learned Judge continues:—"If you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point." Further on, the learned Judge leaves the question whether the defendants had an honest belief in the case which they laid before the magistrates; and lastly, whether the defendants were actuated by malice. Nothing could be more emphatic than the way in which the onus is put. "The plaintiff must satisfy the jury that the defendants did not take reasonable care to inform themselves of the facts, otherwise the jury must find for the defendants." At the end of the summing up, the following questions were left to the jury:—"First, did the defendants take reasonable care to inform themselves of the true state of the case? Secondly, did they honestly believe the case which they laid before the magistrates?" To both of these questions the jury answered in the affirmative. The third question, "Were the defendants actuated by any indirect motive in preferring the charge?" was not answered. Upon this position of things I think we cannot avoid sending the case for a new trial. There is no finding as to malice, but the jury find facts from which the Judge infers reasonable and probable cause upon an express direction from the Judge that they are to find those facts unless the plaintiff satisfies them to the contrary. I have hesitated whether we could not act under Order XL. rule 10, but have come to the conclusion that we cannot. I should be anxious to avail myself of that extremely useful provision, and should do so if I thought the question of onus was only indirectly mentioned in the summing up.

(3) 3 Com. B. Rep. N.S. 87; 26 Law J. Rep. C.P. 284.

Abrath v. *North Eastern Rail. Co.*

Mr. Wharton, one of the directors of the defendant company, was called, and gave evidence; but Mr. Dix, the company's solicitor, who had acted in the matter, and Mr. Rayne, a medical man, who was one of the company's advisers, although challenged and in Court, were not called by the defendants. The jury might have thought more of their not being called if the onus had been placed on the defendants. Two witnesses, named Gray and Adams, were called by the defendants. Their statements, as made before the magistrates and as made previously, were assumed to be the same; but such was not the case. The discrepancy was not so essential if the onus was on the plaintiff, and it was not a mere matter with practically no influence on the verdict. The way in which the case was left to the jury may well have occasioned a miscarriage. If the jury had answered the first question in the negative the Judge would have found absence of reasonable and probable cause, and from this finding the jury might have inferred malice.

LOPES, J.—I have considered what our judgment ought to be with my learned brother, and I entirely concur in the judgment which he has delivered.

Rule absolute for a new trial (4).

Solicitors—J. Balfour Allen, agent for W. M. Skinner, Sunderland, for plaintiff; Williamson, Hill & Co., agents for George S. Gibb, York, for defendants.

(4) A similar rule in the case of *McMann* v. *The North Eastern Railway Company* was also made absolute by arrangement.

1883. Feb. 22.

In re CAINE.

Married Woman—Conveyance of Wife's Property without Husband's Concurrence—Fines and Recoveries Act, 3 & 4 Will. 4. c. 74. s. 91.

A married woman applied for and obtained an order, under the 91st section of 3 & 4 Will. 4. c. 74, to dispense with the concurrence of her husband in the conveyance of certain property by her, in which he declined to join unless he was paid a sum of money for so doing. It appeared that the husband had left and lived apart from the applicant for several years, and had in a very small manner contributed to her support since, but that she had otherwise wholly maintained herself.

Cyril Dodd moved for an order, under 3 & 4 Will. 4. c. 74. s. 91 (1), to enable Mrs. Caine to dispense with the concurrence of her husband in the execution of a certain conveyance.

It appeared from the affidavit that James Cockayne had devised certain dwelling-houses to his wife, the present applicant, to hold the same upon certain trusts (in which she, among others, was beneficially interested) declared in his will, including a power of sale.

James Cockayne died on the 9th of July, 1871; and on the 14th of December, 1872, and before exercising the power of sale conferred by James Cockayne's will, the applicant intermarried with James Henry Caine. Mrs. Caine subsequently sold the above premises, in exercise of the power of sale contained in James Cockayne's will; but James Henry Caine, her husband, refused to execute the deed of conveyance unless he was paid a sum of 50*l.* for so doing.

It further appeared that James Henry Caine had left his wife several years ago, and that since that time he had lived

(1) The Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4. c. 74), s. 91, provides that "if a husband shall be living apart from his wife, either by mutual consent or by sentence of divorce . . . . or from any other cause whatsoever, it shall be lawful for the Court . . . . by an order, to be made in a summary way, upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise; and all acts, deeds or surrenders to be done, executed or made by the wife, in pursuance of such order, in regard to lands of any tenure . . . . shall be done, executed or made by her in the same manner as if she were a *feme sole*, and when done, executed or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred."

In re Caine.

separate and apart from her, and that he had in a very small manner contributed towards her support, but that she had otherwise wholly maintained herself.

The Court (HUDDLESTON, B., and NORTH, J.) made the order asked for.

Order granted.

Solicitors—Chester & Co., agents for Chew & Son, Manchester, for applicant.

[IN THE COURT OF APPEAL.]

1883. April 4, 7. } M'GOWAN AND ANOTHER *v.* MIDDLETON.*

Practice—Claim and Counter-claim—Discontinuance by Plaintiff—Effect on Counter-claim—Judicature Act, 1873 (36 & 37 Vict. c. 66), *s.* 24, *sub-ss.* 3 *and* 7—*Rules of Court, Order XIX. rule* 3; *Order XXII.*

The discontinuance by a plaintiff of an action brought by him against a defendant does not put an end to a counter-claim pleaded by that defendant, for although a counter-claim is not a cross action, yet it is to be treated as though it were in fact a statement of claim in a cross action.

Vavasseur *v.* Krupp (Law Rep. 15 Ch. D. 474) *overruled.*

Appeal by the defendant from refusal of the Queen's Bench Division to order judgment to be signed on a counter-claim.

Action by shipowners for money received by the defendant as managing owner.

The defence denied the plaintiffs' claim, and set up a set-off and counter-claim for a sum exceeding that claimed by the plaintiffs.

The plaintiffs then gave notice of their intention to discontinue the action, and did not deliver any pleading in reply to the allegations contained in the counter-claim.

The defendant accordingly applied, under Order XL. rule 11, for leave to sign judgment on his counter-claim as on admissions made by reason of default in pleading.

The Divisional Court refused to enter judgment, holding that the Court was bound by the judgment of Jessel, M.R., in *Vavasseur* v. *Krupp* (1).

The defendant appealed.

Ambrose, Q.C., and *Henry*, for the appellant.—The plaintiffs have a right to discontinue their action, but that cannot affect the defendant's right to proceed with his counter-claim. *Vavasseur* v. *Krupp* (1) is undoubtedly an authority for the position taken by the plaintiffs; but that case cannot be reconciled with the principles as to counter-claims laid down in the Rules of Court. It is clear that those rules intended that the claim and counter-claim should be considered as wholly independent actions, which are for convenience of procedure combined in one action—*Winterfield* v. *Bradnum* (2).

[BRETT, M.R.—Order XIX. rule 3 (3),

(1) Law Rep. 15 Ch. D. 474.

(2) 47 Law J. Rep. Q.B. 270; Law Rep. 3 Q.B. D. 324.

(3) Rules of Court, Order II. rule 1: "Every action in the High Court shall be commenced by a writ of summons. . . . ."

Order XIX. rule 3: "A defendant in an action may set off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. . . . ."

Order XXII. rule 10: "Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

Order XXIII.: "The plaintiff may at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. . . . ."

* *Coram* Brett, M.R., and Bowen, L.J.

does not say that a counter-claim is a separate action.]

But it says it shall have the same effect as a cross action; and Order XXII. rule 5, is another rule which tends to shew that a counter-claim is to be treated as a cross action; and to the same effect is the decision in *Turner* v. *The Hednesford Gas Company* (4). A plaintiff must plead to a counter-claim as though it were a statement of claim in a cross action. Sometimes that which is pleaded as a counter-claim is really set off, but the difference between these is pointed out in *Stooke* v. *Taylor* (5). The defendant will be injured if the effect of a discontinuance by the plaintiffs is to put an end to the counter-claim, as the counter-claim may allege matters which would be barred by the Statute of Limitations if the defendant had after such a discontinuance to commence a fresh action. The plaintiffs' claim, of course, falls when they give notice of discontinuance, but the cause must still exist for the purposes of the counter-claim. *Beddall* v. *Maitland* (6), *Andrew* v. *Aitken* (7) and *The Original Hartlepool Collieries Company* v. *Gibb* (8) were also cited.

Crompton, Q.C., and *H. P. Reed*, for the plaintiffs.—The counter-claim dies with the discontinuance of the plaintiffs' claim, for a counter-claim is not a cross action. An action is begun by writ of summons, and a counter-claim is not so begun. It may well be that for the purpose of working out the results of the litigation between the parties a counter-claim is sometimes treated as a cross action, but that does not make it such an action. The word "action" under the Judicature Act and under the Rules of Court means the whole cause or matter. Order XXIII. (3) enables a plaintiff to "discontinue his action," that is, the whole action, for the action is the action of the plaintiff, and he is *dominus litis*. In this case what the defendant pleads is really a set-off and not a counter-claim. The decision in *Vavasseur* v. *Krupp* (1) seems to be approved of by Lush, L.J., in *Gathercole* v. *Smith* (9). The application of the defendant is under Order XL. rule 11 (3), and that rule has been considered to apply to interlocutory relief, and not to final judgment—*Lumsden* v. *Winter* (10). The plaintiffs are not in default; they have not admitted the truth of the counter-claim, because they acted, as they had a right to do, on a decision which held that in such a case as this the counter-claim ceases to exist.

[BRETT, M.R.—That may be a question of terms.]

Ellis v. *Munson* (11), *Street* v. *Gover* (12), *Toke* v. *Andrews* (13) and *Mapleson* v. *Massini* (14) were also cited; and the Judicature Act, 1873, s. 24, sub-ss. 3 and 7 (15), were referred to.

(4) 47 Law J. Rep. Exch. 296; Law Rep. 3 Ex. D. 145.

(5) 49 Law J. Rep. Q.B. 857; Law Rep. 5 Q.B. D. 569.

(6) 50 Law J. Rep. Chanc. 401; Law Rep. 17 Ch. D. 174.

(7) 51 Law J. Rep. Chanc. 784; Law Rep. 21 Ch. D. 175.

(8) 46 Law J. Rep. Chanc. 311; Law Rep. 5 Ch. D. 713.

(9) 50 Law J. Rep. Q.B. 681; Law Rep. 7 Q.B. D. 626.

(10) 51 Law J. Rep. Q.B. 413; Law Rep. 8 Q.B. D. 650.

(11) 35 Law Times, 585.

(12) 46 Law J. Rep. Q.B. 582; Law Rep. 2 Q.B. D. 498.

(13) 51 Law J. Rep. Q.B. 281; Law Rep. 8 Q.B. D. 428.

(14) 49 Law J. Rep. Q.B. 423; Law Rep. 5 Q.B. D. 144.

(15) The Judicature Act, 1873, s. 24, sub-s. 3: "The said Courts respectively, and every Judge thereof, shall also have power to grant to any defendant in respect of any equitable estate, or right or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner. . . ."

Sub-s. 7: "The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of

M'Govan v. *Middleton, App.*

BRETT, M.R.—The plaintiffs brought an action against the defendant, in answer to which the defendant set up a counter-claim—that is, he delivered a pleading, which, in my opinion, is either a set-off or a counter-claim. If it be considered as a set-off, still it contains a claim for an amount which exceeds the amount claimed by the plaintiffs, so that the defendant would, if he is right on the facts of the case, get judgment for that amount against the plaintiffs. The plaintiffs then discontinued their action, and did not deliver any pleading in answer to the counter-claim of the defendant; whereupon the defendant applied to the Court for judgment upon his counter-claim in respect of the default of pleading on the part of the plaintiffs, which was, it is said, equivalent to an admission of the facts alleged in the counter-claim. The Divisional Court, however, thought that, on the authority of *Vavasseur* v. *Krupp* (1), judgment ought not to be given for the defendant, because, according to that case, the counter-claim must be considered to have ceased to exist when the plaintiffs discontinued their action, so that all the rights of the defendant in respect of his counter-claim, except the right to costs, then ceased to exist.

It is said that a counter-claim is treated by the Judicature Acts and by the Rules of Court as a defence to an action, and not as itself an action, so that when a plaintiff discontinues his action the whole action is at an end, and the counter-claim ceases to exist. In answer to this, it is urged on behalf of the defendant that a counter-claim is a cross action; or if a counter-claim is not a cross action, still that all the proceedings with regard to a counter-claim are to be treated as though a counter-claim were a cross action, even though it is not in fact a cross action; and therefore that a discontinuance by a plaintiff does not put an end to a defendant's right upon his counter-claim. The plaintiffs rely upon the very great authority of the judgment of the late Master of the Rolls in *Vavasseur* v. *Krupp* (1). That decision does undoubtedly support the argument on behalf of the plaintiffs, and we must in order to decide in favour of the defendant dissent from that decision. It is to be observed that other Judges have not been able to express their assent to the view taken in that case by the late Master of the Rolls, and it is necessary for us to decide which of these conflicting views is to be supported.

The first point to be considered is, whether a counter-claim is a cross action; if it is, then the discontinuance by a plaintiff of his action would not effect a discontinuance of the cross action brought by the defendant to the action brought by the plaintiff. Under the old practice a cross action was not discontinued by the discontinuance of the original action, so that if a counter-claim is a cross action we ought to decide this case in favour of the defendant. In my opinion, however, a counter-claim is not a cross action. The Rules of Court say that every action shall be commenced by a writ of summons, and a counter-claim is not so commenced, and is not, as it seems to me, a cross action. The question then is, whether, although a counter-claim is not a cross action, the proceedings on a counter-claim are nevertheless to be treated as though they are proceedings in a cross action.

In my opinion the great object of every Judge of the Court of Appeal has ever been to make litigation as short, as cheap and as safe for the suitors as it can possibly be made. One of the great Judges with whom I sat when I first became a member of the Court of Appeal was Lord Justice James, and he used the powers of his large mind to break down all merely technical rules, whether of equity or of law. He treated the Judicature Act as a final blow to all mere technicality, and considered the principle of that Act to be that when both the parties to an action were before the Court it was intended that all questions in dispute between the two parties should be as far as possible finally determined.

Lord Justice James founded himself, as I think rightly, on the true meaning of the Judicature Act. The fundamental principle of the Judicature Acts is found in the Act of 1873, s. 24, sub-s. 7 (15), which, omitting words not material to the present question, provides that the Court "shall have power to grant, and shall grant, . . . all such remedies whatsoever as any of the parties thereto may appear

legal proceedings concerning any of such matters avoided."

to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." That great principle was fully appreciated both by Lord Justice James and by the late Master of the Rolls, whose powerful and liberal mind in many respects resembled that of Lord Justice James, and I think every member of the Court has always tried to carry out in practice the idea contained in that sub-section.

How then does this principle affect this case? It is said by the defendant that if the plaintiffs discontinue their action the defendant may succeed on his counter-claim, or he may succeed in an amount which will give a balance to him. It is said by the plaintiffs that the true meaning of the Rules is that if they, whether from caprice or for good reasons, discontinue their action, that puts an end to the counter-claim, and that the defendant must recommence the litigation and go through all the same steps again. I must say that, unless the Rules oblige us to say that such is the law, we ought to resist so technical a view, and that we ought so to decide as if possible to prevent all that the defendant has done from being thrown away. Taking that view I feel compelled to say that I think the decision in *Vavasseur* v. *Krupp* (1) was given without a full appreciation of all the considerations which arise from the construction of the Rules of Court. I find that that decision has been questioned by Mr. Justice Fry in *Beddall* v. *Maitland* (6), and as we have to determine here what view we must adopt, I must say that, in my opinion, the judgment in *Vavasseur* v. *Krupp* (1) cannot be supported.

There are also decisions in the Court of Appeal which shew that the Court of Appeal always leaned to the view of the Rules which was taken in *Beddall* v. *Maitland* (6), and it seems to me that the Court of Appeal has taken the view that although a counter-claim is not a cross action, nevertheless everything which is done in respect of the proceedings on a counter-claim must be treated as though it were a cross action. Therefore when the question was how the costs were to be settled, the Court of Appeal held that all the costs of the plaintiff which were incurred in respect of his cause of action, and all which were incurred in respect of what was nothing but a defence to his cause of action, should be taxed as they would be taxed in an action in which the plaintiff was plaintiff and the defendant was defendant; but that all the costs which related to the counter-claim alone and not to what was mere matter of defence ought to be taxed as though the counter-claim were a cross action, and as though the defendant were plaintiff in that cross action; and then that the *allocatur* should be given in one action, because there is in such a case really only one action, and that it ought to be given for the balance of the costs thus taxed (16). The Court therefore considered that there was in such a case only one action; but it also considered that everything which was done under the counter-claim should be treated as though the counter-claim were a cross action.

The 3rd sub-section of section 24 of the Judicature Act, 1873 (15), also shews what the spirit of that Act is. It says, omitting again words not relevant to the present case, that the Courts "shall have power to grant to any defendant . . . . all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleadings, and as the said Courts respectively, or any Judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." So that the statute is there considering the case of an action in which there is a plaintiff and a defendant, and it speaks in that sub-section of an action by a plaintiff against a defendant; but it does not speak of an action by a defendant against a plaintiff; it enables a defendant, by proper pleadings, to enforce against the plaintiff "all such relief against any plaintiff or petitioner" as might have been "granted in any suit instituted for that purpose by the same defendant against the same plaintiff."

There is then only one action, and that

(16) *Baines* v. *Bromley*, 50 Law J. Rep Exch. 465; Law Rep. 6 Q.B. D. 691.

is the action of the plaintiff; but the defendant is to have in that action all the rights against the plaintiff which he would have if he had brought an action against the plaintiff. Now that shews that although the counter-claim is not an action, yet all proceedings under it are to be treated as though it were an independent action—that is, a cross action.

Order XIX. rule 3, carries out that idea, for it says, "a defendant in an action may set off, or set up by way of counter-claim, against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

The true meaning of that rule is, as it seems to me, that although there is but one action, and although a counter-claim is not a cross action, nevertheless, where there is a counter-claim, every proceeding under the counter-claim is to be treated as though the counter-claim were a cross action, so as to enable the Court to pronounce a final judgment, both on the original action and on the matters comprised in the counter-claim. The execution is one, although in one sense there may be said to be two judgments, and it is for either the plaintiff or the defendant, according as the balance is for the one or the other. The *allocatur* is also given as though there were but one action, and the amount of the costs to be recovered is the difference between the two sums thus arrived at.

If this be a true view it is then necessary to see how it affects the construction of Order XXIII., which says that "the plaintiff may at any time before the receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action, or withdraw any part or parts of his alleged cause of complaint; and thereupon he shall pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn." That rule says that a plaintiff may "discontinue his action"—it does not say he may discontinue "the" action; that means that he may discontinue that part of the action which is his, but it does not include that part of the action which, although it is not the action of the defendant, is yet to be treated as though it were such an action. I think that the expression "the action" in that part of the rule which relates to costs refers to "his action" in the earlier part of the rule, or that it means that the plaintiff is in such a case to pay to the defendant the costs of that action which he, the plaintiff, has discontinued.

If so, then what the plaintiff can discontinue is that part of the whole action which is his action; and his action being discontinued, everything which exists only as a defence to his action is, in fact, part of his action, and it must drop with his action; but everything which may be both part of the defence to that action, and also part of a counter-claim raised by the defendant, is not discontinued by the mere fact of the discontinuance of the plaintiff's action, for all such matters may properly be treated as part of an action by the defendant.

If the counter-claim of the defendant raises matter which may be both set-off and counter-claim, I do not think the defendant is bound to rely on that as a set-off. Under the old system a defendant was not compelled to plead a set-off: he was entitled, if he thought fit to do so, to reserve that matter and to bring a cross action; and so in the present case, if the matters alleged by the defendant are both matters of set-off and of counter-claim, then the discontinuance by the plaintiff of his action would not prevent the defendant from proceeding as though what he alleges were matter for a counter-claim, and from recovering on that counter-claim, if he can establish it.

The discontinuance of the plaintiff's action, therefore, does not put an end to that which is treated as a cross action, and the counter-claim of the defendant continues to exist still, if he so choose.

The plaintiff can plead to this counter-claim, and can plead anything which he could plead as a defence to a cross action.

I think that the doctrine of departure is gone, and I think that the plaintiff can plead to the counter-claim anything which would be a good ground for a claim on his part; he must do so within a certain prescribed time, or else there will be a default in pleading; and if there is such a default, then the defendant has rights similar to that which he would have if he had brought an action as plaintiff. One of those rights is to have judgment on his counter-claim in default of pleading.

That is what the defendant claimed to have in this case; he treated the counter-claim as still existing, and as giving him still a cause of action against the plaintiffs; he therefore considered that the plaintiffs had not pleaded to that counter-claim in proper time, and he therefore asked for judgment in his favour. The only answer with which he was met was that his counter-claim was gone, as a consequence of the discontinuance by the plaintiffs of their action, and the plaintiffs argue that the result of that discontinuance is that all the proceedings must be begun afresh. That appears to me to be opposed to the fundamental principle of the Judicature Act. There is not anything in the words of the Rules made under that Act to justify the position thus taken by the plaintiffs, or to give them that power over what is to be treated as an independent action by the defendant, although it is not actually such an action.

Then it was urged that the discontinuance of the action caused the counter-claim to be at an end, because if under the old system a bill were filed in Chancery, and a cross bill were also filed, and the original bill was discontinued, then the cross bill was also at an end. If that be a well-founded remark, still the present case would not be governed by any such rule, for a cross bill could in the Court of Chancery only be brought on the same subject-matter as the original bill, although it is also true that it enabled the Court of Chancery to do perfect and complete justice between the parties. I have consulted those members of the Court who are more conversant with these matters than I am, and I may say that it does not seem to be clear that in the Courts of Chancery the discontinuance of a bill did, of necessity, put an end to a cross bill which had been filed.

A counter-claim under the Judicature Act is of wider operation than was a cross bill in the Court of Chancery, and it may be entirely independent of anything in the plaintiff's claim. The system under the Judicature Act is not like the old system, either in Chancery or at common law; it is rather like a system which stood halfway between those two systems—that is, the system of the Court of Admiralty, where there were cross actions, which were often at the trial treated as one action in which two judgments were given.

I do not forget the argument urged that a plaintiff may, if the counter-claim is put an end to by the discontinuance of the action, in some cases induce a defendant to rely on his counter-claim and then discontinue his action, and then in a new action by the defendant the Statute of Limitations might be pleaded. Of course it is true that the defendant might issue a writ at the same time as his counter-claim, but that would lead to more expense. Then the plaintiffs here urged that they might be unable to meet the allegations of the counter-claim within the time specified; but if there were any fair ground for delay the Courts would give a plaintiff proper time to proceed with his own case, or to prepare to meet the allegations contained in the counter-claim.

In the result, therefore, I am of opinion, both on the construction of the Judicature Act and the Rules, that we must differ from *Vavasseur* v. *Krupp* (1), that this counter-claim ought to be treated as though it were a cross action, that the defendant has under it the same rights as though it were a cross action, and that he is not deprived of those rights by the discontinuance by the plaintiff of his action.

In this case, therefore, the plaintiffs must be allowed to withdraw the notice of discontinuance, and they may then take such steps as they may be advised. They were entitled to rely on the authority of *Vavasseur* v. *Krupp* (1) until notice of appeal was given, and therefore I think that the costs, except the costs of this appeal, should be costs in the cause. The appellant is entitled to have the costs of

this appeal according to the usual rule, because when notice of appeal is given then it becomes the duty of both sides to consider whether they will rely on the case decided in the High Court or not.

BOWEN, L.J.—The defendant in this case being before the Court as a defendant set up an independent counter-claim which overtopped in amount the claim of the plaintiffs. The plaintiffs then dropped their claim, and were ready to pay the costs. The question then arose whether the plaintiffs can thus compel the defendant to drop his counter-claim also. Does the plaintiffs' claim thus falling drag down with it the counter-claim of the defendant? In *Vavasseur* v. *Krupp* (1), the late Master of the Rolls held that it did; but this Court must take, as it seems to me, a broader view, and the source of the error which is, in my opinion, to be found in that judgment is, that the learned Judge did not for the moment appreciate the full extent of the relief which the Judicature Act and the Rules enable the Court to give.

The principle of the Judicature Act is that the Court should give complete relief, not only in the pending litigation, but that it should sweep all existing controversy between the parties into the net of the pending litigation, and thus end all litigation between them. This cardinal principle is found in section 24, sub-section 7, of the Act of 1873, and thenceforward it became the duty of the Courts, when litigants are once before them, to see that the questions at issue are as far as possible finally settled.

The plaintiffs here say, We brought an action, and you, the defendant, set up an independent case. We now drop our action, and you must drop yours also. You must begin *de novo* and issue a writ of summons, and this although we are now both before the Court. The defendant objects to this, and says that, We are both before the Court, and you, the plaintiffs, cannot make me drop my action by dropping yours; it is not true that because your action ceases my counter-claim also dies. It is, I think, essential to recollect that these are pictorial terms, and that they are not unlikely to lead to confusion. An action is not a living organism which actually lives or dies, and if it be not carefully remembered that these are pictorial terms, the use of them will lead to error.

I now turn to section 24, sub-section 3 (15), the language of which is amply sufficient to vest in a defendant who sets up a counter-claim a right to have the subject-matter of his counter-claim finally adjudicated upon.

Have then the Rules of Court cut down this *prima facie* right of the defendant to have this litigation decided at once?

Passing now to Order XIX. rule 3, we find it not merely gives a counter-claim to a defendant for the first time, but it distinctly provides that such a counter-claim shall not be a mere defence, but that it "shall have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim."

Did the discontinuance of an action ever affect the statement of claim in a cross action? Surely not. Is it not then contrary to the plain intention of the rule that it should so affect a counter-claim? Something has been said about the difference between a set-off and a counter-claim. Certainly a set-off which overtops the claim of the plaintiff partakes of the nature both of a set-off and a counter-claim: it is a set-off so far as it bars the claim of the plaintiff; but it is also something more, and it partakes of the nature of a counter-claim. Order XXII. rule 10, says —"Where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." A pleading may be a set-off as well as a counter-claim; and if, although it is pleaded only as set-off, yet it is in truth a counter-claim, can it be said that the discontinuance of the action prevents the defendant from proceeding with what is in substance a counter-claim?

The fallacy of the argument on behalf of the plaintiffs arises from the fact that

in the pleading rules made under the Judicature Act, a counter-claim is sometimes spoken of as though it were necessarily connected with the statement of defence. It is in those rules spoken of as though it were contained in the statement of defence, but it is nowhere enacted that it is not to have any other force. It is now time to consider the provisions of Order XXIII., and to see whether discontinuance by the plaintiff does put an end to a *bona fide* counter-claim raised by the defendant. The rule says that a plaintiff may "wholly discontinue his action." Now it is remarkable to my mind that the words used are "his action." Before the Judicature Act an action was wholly the action of the plaintiff: he was the actor and *dominus litis*. But under the Judicature Act is the counter-claim of the defendant part of the plaintiff's action? Order XIX. rule 3, says, a "counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." It is then not part of the plaintiff's action, and if this be so the use of the words "discontinue his action" is appropriate; but I should be sorry to lay too much stress on the use of these particular words, and I will assume that the word "his" is an incautious substitute for "the," and I will read the rule as though it ran "discontinue the action." Then the plaintiff can discontinue the action so far as he can properly so do; but he cannot cause to be discontinued that which by a preceding rule has been made equivalent to a cross action.

In *Vavasseur* v. *Krupp* (1) the late Master of the Rolls did not give a sufficiently broad interpretation to the Judicature Act; he assumed that under section 24 the Court could only give complete relief to the defendant as long as the plaintiff proceeded with his action. Is the construction which we place on the Act and the Rules likely to cause inconvenience to a plaintiff or the defendant? Take the case of a plaintiff who discontinues his action. Is he put in a difficult position? If the defendant does not accept the olive branch thus tendered, the plaintiff can reply and repeat all the allegations of his original claim. Is it then a hardship to force him to try the matters in dispute now and once for all? Surely not, it is for his advantage. Suppose again that a plaintiff is discouraged from discontinuance whenever a defendant sets up a counter-claim—is any inconvenience hereby caused? The answer is the same, and no harm can accrue. Therefore, although the judgment of the late Master of the Rolls has caused me to hesitate, yet I must say that I think, with some confidence, that we are now giving the right judgment in deciding that a discontinuance by the plaintiff under Order XXIII. does not put an end to the defendant's vested right to continue the litigation when he has pleaded a counter-claim, and therefore that this appeal must be allowed. I agree with the proposition of the Master of the Rolls as to the costs.

Appeal allowed.

Solicitors—Lewty & Bendle, agents for John Mason, Whitehaven, for plaintiffs; Helder, Roberts & Gillett, agents for E. Atter, Whitehaven, for defendant.

[IN THE COURT OF APPEAL.]

1883. March 13. April 5. } PRYOR *v.* THE CITY OFFICES COMPANY (LIMITED).*

Practice — Inferior Court — Mayor's Court — Procedure in — Application of Rules of Supreme Court to—Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89—*Rules of Court, Order XL. rule* 10.

The provisions of section 89 *of the Judicature Act,* 1873, *which enable inferior Courts to grant in all causes of action within their jurisdiction such relief, redress, or remedy, or combination of remedies, in any proceeding as the High Court could grant, do not enable an inferior Court to apply the provisions of the Rules of the Supreme Court to proceedings in the inferior Court.*

Appeal of the defendants from the Recorder of London, sitting as Judge of the

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

Mayor's Court, giving judgment for the plaintiff upon a motion for a new trial after verdict for the defendants.

Action in the Mayor's Court for trespass to goods.

Defence, not guilty, and that the goods were not the property of the plaintiff.

The plaintiff claimed the goods under a bill of sale.

At the close of the case for the plaintiff, the counsel for the defendants opened the case on behalf of the defendants, and before any evidence was called the jury expressed themselves satisfied, and gave a verdict for the defendants.

A new trial was moved for on behalf of the plaintiff, when the Recorder, acting on the provisions of Order XL. rule 10 (1), of the Rules of the Supreme Court, gave judgment for the plaintiff for the agreed value of the goods notwithstanding the verdict.

The defendants appealed.

Masterman, for the appellants.—This record is bad on the face of it; the Judge of the Mayor's Court had no power to apply Order XL. rule 10 (1), to this case. There is no statute by which the Rules of the Supreme Court are made to apply to the Mayor's Court. Section 89 of the Judicature Act, 1873 (2), does not confer this power on that Court, it only gives that Court jurisdiction to grant relief in certain ways, as by granting an injunction; it does not deal with the procedure of the Court, and to enter judgment in this way is a matter of procedure. Section 91 of the Judicature Act, 1873 (3), only provides that the rules of law enacted in that Act shall be in force in all Courts, and does not apply rules of procedure, such as the Rules of the Supreme Court, to inferior Courts. Section 16 of the Judicature Act, 1875, expressly enacts that the Rules of Court shall regulate the proceedings in the High Court of Justice and the Court of Appeal, and that is in effect a statutory declaration that they do not apply to inferior Courts. *King* v. *Hawkesworth* (4), which appears to be opposed to this contention, can be distinguished on the ground that the order there considered was Order LV., which contains a rule as to costs. The question of costs may well be held to be a rule of law, and not a mere question of procedure.

To enter judgment is to take a step or proceeding in an action, and each Court must follow its own procedure until that procedure is altered in a regular and recognised way. The Judge of the Mayor's Court could not have thus entered judgment according to the practice of that Court before the Judicature Act, and as the Rules of Court made under that Act do not apply to the Mayor's Court, he cannot do so now.

Cyril Dodd, for the plaintiff.—Proceedings for error upon the record no longer exist. The Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), made, by section 4, the Exchequer Chamber the Court of error for all cases in the Mayor's Court in which error was assigned. The Judicature Act, 1873, transferred, by section 18, all the jurisdiction and powers of the Court of Exchequer Chamber to the Court of Appeal. Order LVIII. rule 1, provides that "bills of exceptions and proceedings in error shall be abolished;" so that there cannot now be a proceeding in error in such a case as this. The only way in which the

(1) Rules of Court, Order XL. rule 10: "Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly. . . ."

(2) Judicature Act, 1873, s. 89: "Every inferior Court, which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provisions next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

(3) Judicature Act, 1873, s. 91: "The several rules of law enacted and declared by this Act shall be in force and receive effect in all Courts whatsoever in England, so far as the matters to which such rules relate shall be respectively cognizable by such Courts."

(4) 48 Law J. Rep. Q.B. 484; Law Rep. 4 Q.B. D. 371.

case can come before this Court is by way of appeal—*Le Blanch* v. *Reuter's Telegram Company* (5); and if this case is before this Court by way of appeal, then this Court can hear the whole matter and give judgment. Moreover, the Judge of the Mayor's Court had power thus to act. Section 89 of the Judicature Act, 1873 (2), enables every inferior Court to grant in any proceeding within its jurisdiction such relief, redress or remedy in as full and ample a manner as can be done in the like case by the High Court; so that the Recorder had, under Order XL. rule 10 (1), power to enter judgment for the plaintiff, for that is a relief or remedy within the wide words of section 89. *King* v. *Hawksworth* (4) is an authority that rules as to costs were in the local Court the same as those in the High Court; or if there was no practice to that effect, then that the rules as to such proceedings in an action are rules of law, and so are rules which, though contained in the Judicature Act, are applicable to all Courts in England.

[BRETT, M.R.—The Court ought to know whether any of the Rules of the Supreme Court have been under competent authorisation adopted by and used in the Mayor's Court and the County Courts, and we will adjourn the case for that enquiry to be made.]

Dodd (on April 5), for the plaintiff.—It appears that the Rules of the Supreme Court have been considered to apply to the Mayor's Court, and have been used there.

[BRETT, M.R.—Is there any statute which empowers that Court to adopt the Rules of the Supreme Court?]

No, and no new rules have been made for the Mayor's Court since the Judicature Act was passed; but that Court has applied the methods of procedure supplied by the Rules of the Supreme Court to its own proceedings as far as has been found practicable. A counter-claim has been allowed in an action in the Mayor's Court—*Davis* v. *The Flagstaff Mining Company* (6). New rules have been made for the County Courts since the Judicature Act was passed by a committee of Judges appointed for that purpose—*Poyser* v. *Minors* (7). The inferior Courts can now grant injunctions —*The Queen* v. *Harington* (8); and the relief here given is a relief of the same kind as an injunction, for before the Judicature Act County Courts could not grant injunctions.

[BRETT, M.R.—Could the Mayor's Court issue a writ in the form given in the Judicature Act?]

That would rather resemble procedure.

[BOWEN, L.J.—A motion for judgment is a step in a proceeding; but is it a proceeding itself?]

Brett, L.J., said in *Richards* v. *Cullerne* (9), "The County Court has the same power as the High Court in regard to every step in the action."

BRETT, M.R.—In this case the Judge of the Mayor's Court exercised, upon a motion for a new trial, the power given to the Judges of the Supreme Court by the Rules of Court. Rule 10 of Order XL. (1) provides that, upon a motion for judgment or for a new trial, the Court may, if it is satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, and the Judge, being so satisfied in this case, directed judgment to be entered for the plaintiff. The defendants brought an appeal against that judgment to this Court, and it has been argued that the appeal does not lie to this Court, because there is not any error which appears on the face of the proceedings, and because the question is one of jurisdiction. It seems to me that the defect (if any) does appear on the face of the proceedings, and therefore that the case is rightly brought to this Court. It is asserted that the Mayor's Court has power by virtue of certain statutes to make rules of Court for the regulation of the business in that Court, and that it can adopt as many of the rules of Court made under the Judicature Acts for the Supreme Court as it thinks fit. It is, in my opinion, immaterial to decide

(5) Law Rep. 1 Ex. D. 408.

(6) 47 Law J. Rep. C.P. 503; Law Rep. 3 C.P. D. 228.

(7) 50 Law J. Rep. Q.B. 555; Law Rep. 7 Q.B. D. 329.

(8) 48 Law J. Rep. Q.B. 677, *sub. nom. Martin* v. *Bannister*, Law Rep. 4 Q.B. D. 491.

(9) Law Rep. 7 Q.B. D. 623.

whether this is so or not, for even if the Mayor's Court has this power, yet the power has never been exercised, and the power to make rules is not equivalent to making them; therefore, without deciding whether such an authority exists or not, I am of opinion that, no rules having been made, the Mayor's Court cannot act under the rules made for the Supreme Court.

It was then argued that it was not necessary that any rules should be made, for that the Judge of the Mayor's Court had power, under section 89 of the Judicature Act, 1873 (2), to make the order which he has made. In the first place, what is it that Order XL. rule 10, enunciates? It seems to me that it contains a power conferred upon the Judges of the Supreme Court to give in certain cases a certain relief upon certain conditions. If this is the true construction of that rule, then the question arises, whether the power so given by that rule of the Supreme Court is also given by section 89 of the Judicature Act, 1873 (2), to Judges of inferior Courts. That section provides that every inferior Court shall, as regards all causes of action within its jurisdiction, have power to grant in any proceeding before it such relief, redress or remedy in as full and ample a manner as might be done in the like case by the High Court of Justice. That section, therefore, enables an inferior Court to grant such relief, redress or remedy as in a like case the High Court could grant, and it can grant the relief in "any proceeding." Now, it is urged that "proceeding" means any step of a proceeding; but, if regard be had to a corresponding section of the same statute, which deals with the same subject-matter, then I think that it is clear what the words "any proceeding" mean. We have a right, I think, to look at section 90, which enacts that, "where in any proceeding before such inferior Court any defence or counter-claim of a defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto;" and the section further provides that it shall be lawful for the High Court, "on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court, or to any division thereof; and in such case the record in such proceeding" shall be transmitted to the High Court.

This section shews, as it seems to me, that the word "proceeding" is a general word there used to include any kind of action. Reverting then to section 89, which is *in pari materia*, then, on a well known canon of construction, the word "proceeding" in that section must be held to bear the same meaning as it bears in section 90, and it must be equivalent to "any action"; so that the words "any proceeding" in section 89 do not mean any step in any action, but the action itself; and then it will appear that an inferior Court can give in any action before it and within its jurisdiction such relief, redress or remedy as the High Court could in like case grant; but there is nothing in section 89 which confers on a Judge of an inferior Court the same power as a Judge of the Supreme Court has to arrive at the mode in which such relief, redress or remedy is to be granted. There is nothing which gives a Judge of an inferior Court the power conferred by Order XL. rule 10, upon the Judges of the Supreme Court. I am therefore of opinion that the order of the Judge of the Mayor's Court must be reversed; that the defect appears on the face of the proceedings; that this Court can accordingly set it right, and can remit this case to the Mayor's Court for a new trial.

COTTON, L.J.—I am of the same opinion. The question whether the Judge of the Mayor's Court had power to make this order must, as no rules have been made for that Court, turn upon the construction to be placed upon section 89 of the Judicature Act of 1873 (2). Order XL. rule 10 (1) provides for the Supreme Court a new mode of arriving at the decision of an action, but that order does not apply to the Mayor's Court. Now section 89 only enacts that the same relief, redress or remedy shall be given in the inferior Court as might in like case be given in the High Court; it does not say that it may be given in the same way; and in this case

there has been an attempt to give the Judge of the Mayor's Court power to cut an action short, and in fact to stop a proceeding altogether. That, however, is not a relief, redress or remedy within section 89 of the Judicature Act, 1873; so that, in my opinion, that section does not give the Judge of an inferior Court power to make such an order as has been made in this case. I would add, in confirmation of what the Master of the Rolls has said, that the words "any proceeding" are also found in the latter part of section 90, and that it is clear that they are there used as equivalent to any action or suit, and do not include a motion in an action or suit.

BOWEN, L.J.—The object of section 89 of the Judicature Act, 1873 (2), was to confer upon inferior Courts the same power to do effectual justice as is possessed by the High Court, and the intention was that their judgments should not be limited or imperfect.

In this case the Recorder, sitting as Judge of the Mayor's Court, was of opinion that section 89 of the Judicature Act, 1873, gave him power to apply to the procedure of that Court the provisions of the rules made for the Supreme Court, although no rules have in fact been made for the Mayor's Court. But this cannot be right. Relief, redress or remedy is not the same thing as the procedure by which such relief is obtained. The party who has obtained this order will in the end get complete justice, but not in this way, nor by the procedure which has been wrongly adopted, but by the proper procedure which applies to and governs the particular Court in which the action is brought.

Appeal allowed; case remitted to the Mayor's Court for new trial.

Solicitors—E. Lee, for plaintiff; Masterman, Hughes & Co., for defendants.

[IN THE COURT OF APPEAL.]

1883. March 6, 10, 12. } CASTELLAIN *v.* PRESTON AND OTHERS.*

Fire Insurance—Vendor and Purchaser—Insurance by Vendor of House agreed to be Sold—Loss by Fire before Completion of Purchase—Receipt by Vendor of both Purchase-money and Compensation—Right of Insurance Company to Benefit of such Payment—Subrogation.

The defendants agreed to sell to R. certain land and buildings which they had insured with an insurance company on behalf of which the plaintiff sued. The agreement for sale contained no reference to the insurance. After the date of the agreement for sale, but before the date named for completion, the buildings were damaged by fire, and the defendants, the vendors, received compensation from the insurance company. The purchaser afterwards duly completed the purchase, and paid to the defendants the full amount of the purchase-money.

In an action by the insurance company in respect of the amount which they had paid to the defendants as compensation for the loss caused by the fire,—

Held, *that the plaintiff company was entitled to succeed; that a contract of insurance is a contract of full indemnity, and nothing more; that as the defendants had received the full amount of the purchase-money as well as the insurance-money, the plaintiff company was entitled to have brought into the account that which diminished the loss suffered by the defendants, and to obtain the benefit of part of the purchase-money received by them subsequently to the payment by the company of the insurance-money.*

Appeal by the plaintiff from the judgment of Chitty, J., on further consideration.

Action by the plaintiff, as chairman of the London, Liverpool and Globe Insurance Company, to recover a sum of 330*l.*, with interest from the 25th of September, 1878.

On the 25th of March, 1878, the defendants, as owners of certain land and build-

* *Coram* Brett, L.J.; Cotton, L.J., and Bowen, L.J.

ings in Liverpool, effected an insurance on the buildings with the above-mentioned insurance company against loss by fire. The policy was in the usual form, giving the insurers the option of reinstating the property.

In July, 1878, the defendants agreed to sell to E. & J. Rayner this land with the buildings for the sum of 3,100*l.* The sum of 155*l.*, part of the purchase-money, was paid upon the signing of the agreement; the 6th of May, 1879, being fixed for payment of the remainder of the purchase-money and the completion of the contract. The agreement contained no reference to the insurance which the defendants had effected.

In August, 1878, the premises comprised in the agreement and the policy of insurance were damaged by fire, and in September, 1878, the insurance company paid to the defendants the sum of 330*l.* in satisfaction of the damage occasioned by the fire. At this time the insurance company had no information of the agreement for sale of July, 1878. In December, 1879, the purchasers completed the purchase, and paid to the defendants the sum of 2,945*l.*, being the balance of the purchase-money.

The defendants were trustees under a will, and in consequence of some of the beneficiaries being under disability, they were unable either to hand over the 330*l.* to the purchasers of the property, or to expend it in reinstating the premises. The purchasers then brought an action in the Chancery Division against the present defendants, claiming a declaration that they, as purchasers, were entitled to the benefit of the moneys received by the defendants, the vendors, from the insurance company. That action was dismissed (1), and the insurance company then brought this action in the Queen's Bench Division against the vendors of the property, claiming the sum of 330*l.* with interest, or a declaration that the vendors held that sum as trustees for them.

Chitty, J., before whom the case was tried without a jury, gave judgment, on further consideration, for the defendants.

The plaintiff company appealed.

(1) *Rayner* v. *Preston*, 50 Law J. Rep. Chanc. 472; Law Rep. 18 Ch. D. 1.

Russell, Q.C., and *Tobin*, for the appellant.—The plaintiff company is entitled both upon principle and also upon authority, both English and American, to recover the money paid, if the vendor is paid for his loss otherwise. The remarks of Jessel, M.R., to this effect in *Rayner* v. *Preston* (2) justify this proposition. In that case it was decided that the vendee, who had paid the whole of the purchase-money, was not entitled as against the vendor to the benefit of the insurance; but the majority of the Court of Appeal (1) seemed to think that the vendors could be compelled to refund the money. The vendors, *prima facie*, suffered a loss, and as between them and the company they were entitled to recover. But when the vendors are paid the balance of the purchase-money, the sum received is affected with an equity for the benefit of the insurer. The question is not strictly one of subrogation. *Darrell* v. *Tibbits* (3) is an authority for the principle now contended for.

[BOWEN, L.J.—It is a fallacy to suppose that the only benefit is the right to bring an action, a right to insist on a vendor's lien may be a benefit to which the insurer is entitled.]

The effect of the decision in *The North British and Mercantile Insurance Company* v. *The London, Liverpool and Globe Insurance Company* (4), which is the converse case to the present one, is well explained by Brett, L.J., in *Darrell* v. *Tibbits* (5), and shews that the insurance company are entitled to recover the money paid to the vendor. *Burnand* v. *Rodocanachi* (6) was the case of a pure gift, because there the American Government were not bound to pay the money to the assured, and did not pay it to them in respect of the loss of the goods, or as part of that which was salvage; consequently the underwriters were held not to be entitled to recover the compensation paid to the assured.

(2) Law Rep. 14 Ch. D. 297.

(3) 50 Law J. Rep. Q.B. 33; Law Rep. 5 Q.B. D. 560.

(4) 46 Law J. Rep. Chanc. 537; Law Rep. 5 Ch. D. at p. 569.

(5) 50 Law J. Rep. Q.B. 33, at p. 35; Law Rep. 5 Q.B. D. at p. 362.

(6) 50 Law J. Rep. Q.B. 284; 51 ibid. 548; Law Rep. 6 Q.B. D. 633; ibid. 7 App. Cas. 333.

Castellain v. *Preston, App.*

The nearest analogy to the present case is *Randal* v. *Cockran* (7), where it is said that, as regards goods insured, if restored in specie or if compensation is made for them, the assured stands as trustee for the insurer in proportion to what he has paid. The insurer here is in the position of the unpaid vendor, and as the vendor was subsequently paid the whole of the purchase-money, there was no loss. The real point is, whether the assured has been recouped *aliunde* the loss which he has sustained, and if so, whether the money so paid is not affected with an equity in favour of the insurance company. The company would be entitled to the benefit of the vendor's lien—*Randal* v. *Cockran* (7). The underwriter, in a case of abandonment, where, after adjustment and payment for a total loss, the whole of the loss was recovered, would be entitled to reclaim from the assured not the whole of the subscription, but merely the thing saved or its value, after deducting the expense of saving it—*Arnould on Marine Insurance* (8). The plaintiff here is seeking to obtain a recognition of his equitable right in respect of certain moneys received by the defendant, and which have gone in recoupment of the loss sustained by him; but, notwithstanding that, the plaintiff's case is not one of money had and received.

In America, the right of the insurer to be subrogated to the claim against a mortgagor to the extent of the payment upon the policy has been recognised—*Tyler* v. *The Ætna Fire Insurance Company* (9), *Kernochan* v. *The New York Bowery Fire Insurance Company* (10), *The Sussex Mutual Insurance Company* v. *Woodruff* (11) and *Kent's Commentaries* (12). The Massachusetts Courts have, however, in *King* v. *The State Mutual Fire Insurance Company* (13) and *The Suffolk Fire Insurance Company* v. *Boyden* (14), held a different doctrine; but those cases contained only expressions of opinion, which do not form the basis of the judgment. There are, therefore, as regards the American authorities, two distinct and contrary lines of argument. But the two authorities opposed to this contention are cases of mortgagor and mortgagee; and decide that the assured are entitled to recover the amount of the insurance, irrespective of the actual *quantum* of the debt. The question is, what was the interest which the defendant did insure? Some of the cases in the Massachusetts Courts treat the matter as a contract to pay the amount of the damage done to the thing insured; but that is a mistaken view of what insurance is. The insurance must be an insurance upon the interest of a man, and not upon the thing itself. The true measure would be the amount of damage done, but that is very difficult to discover; the rule, therefore, has been adopted that if the assured is recouped, except by a pure gift, he must refund the money paid by the insurers. It is not the *res* which is insured, but the interest of the assured in the *res*. The general principle of law is, that where there is a contract of indemnity and a loss happens, anything which reduces or diminishes the loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, anything which comes into the hands of the person to whom he has paid it, and so diminishes the loss, raises an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back—*Burnand* v. *Rodocanachi* (6). That principle entirely governs the present case.

Gully, Q.C., and *W. R. Kennedy*, for the defendants.—The expression that a contract of insurance is a contract of indemnity means that the insurance company is only bound to pay the amount of the loss which the assured has actually sustained, without any reference to any rights of which the assured might avail themselves afterwards. Subrogation means the right to stand in the place of another person for the purpose of recovering what that person is entitled to recover. The policy shews that the contract is to pay a certain sum upon the happening of a certain event, and the insurance company are entitled to have the benefit of all rights which the assured has, whether they arise out of *tort* or contract,

(7) 1 Ves. sen. 98.
(8) Ed. 1877, vol. ii. ch. 6, p. 936.
(9) 12 Wend. N.Y. 507; 16 ibid. 385.
(10) 5 Duer, N.Y. 1; 17 New York, 428.
(11) 2 Dutcher, New Jersey, 551.
(12) 2nd ed. vol. iii. p. 376, § 50, part 5.
(13) 7 Cush. (Mass.) 1.
(14) 9 Allen (Mass.) 123.

provided they arise from the loss, but not otherwise. A tenant from year to year would have a right to require the premises to be rebuilt for his occupation, and his interest is not limited to the value of his tenancy from year to year—*Simpson* v. *The Scottish Insurance Company* (15). There must be a limitation, and that limitation is found in *Darrell* v. *Tibbits* (3), where Brett, L.J., says, that the contract, to the benefit of which the insurer has a right, must be a contract which is affected by the loss or safety of the subject-matter insured; and Thesiger, L.J., held that there may be some contracts so independent of the subject-matter of the insurance as to enable the assured to be more than indemnified; and this is such a case. *Randal* v. *Cockran* (7) and *Blaauwpot* v. *Da Costa* (16) depend on rights incidental to salvage where there has been a total loss (17). In *Edwards* v. *West* (18) a tenant who had an option to purchase was not allowed to claim a sum paid by insurers to his landlord for damage by fire before the exercise of his option.

[BRETT, L.J.—Surely the principle of insurance is that the assured shall get a full indemnity, and nothing more?]

In the present case there was at the time of the loss nothing to disentitle the defendants from recovering the full amount of their loss, and if from any cause they are now to be held to be disentitled, the cause arises from something which has occurred since. It is not urged that the contention of the appellant could extend to a gift, and this shews how shadowy is the principle upon which it is sought to base this claim—*Burnand* v. *Rodocanachi* (6).

The American cases differ much, but the Massachusetts cases are in favour of the respondents, and *Tyler* v. *The Ætna Fire Insurance Company* (9)—which is adverse to this contention—would lead to the conclusion that the defendants in such a case as this would be bound to enforce specific performance at the desire of the plaintiff.

The doctrine of subrogation has the effect of putting one person in the place of another, so far as to enable him to bring an action, either in contract or in *tort*, when the right of action is one which affects loss in respect of which the insurer is in the position of a surety—*Simpson* v. *Thomson* (19) and *Simpson* v. *The Scottish Union Insurance Company* (15).

Collingridge v. *The Royal Exchange Corporation* (20) and *Marriot* v. *Hampton* (21) were also cited.

BRETT, L.J.—In this case an action has been brought by the plaintiff, as the representative of an insurance company, in respect of money paid by the company to the defendants on account of a loss by fire. The defendants owned certain property, consisting in part of a house, and this property the defendants contracted to sell to a third party; this contract would, on the giving of a certain notice as to the time of payment, oblige the purchaser to pay to the defendants the price agreed upon, and this whether the house were in the meantime destroyed by fire or not. After this agreement, but before the date of payment, the house was burned down; but the defendants, the vendors, had insured it with the company represented by the plaintiff. It is not suggested that the defendants had no insurable interest—they certainly had, because, in the first place, they were the legal owners of the house; and secondly, because the purchaser might fail to complete the contract and to pay the money, and in that case the vendors would still own the house.

The house having been burned, the defendants made a claim on the insurance company, and it was satisfied by payment. After that payment the contract for sale was carried out, and the full price agreed on was paid to the defendants by the purchaser, notwithstanding the destruction of the house by fire. The insurance company now sue the defendants not to recover the money so paid, but in respect of the money so paid to them as compensation for the damage sustained by them; and the question is, whether the action can be main-

(15) 1 Hem. & M. 618; 32 Law J. Rep. Chanc. 329.
(16) 1 Eden, 130.
(17) Arnould's Marine Ins. (9th ed.), p. 866.
(18) 47 Law J. Rep. Chanc. 463; Law Rep. 7 Ch. D. 858.
(19) Law Rep. 3 App. Cas. 279 (Scotch).
(20) 47 Law J. Rep. Q.B. 32; Law Rep. 3 Q.B. D. 173.
(21) 2 Sm. L.C. (8th ed.), 421.

tained. The case was argued before Mr. Justice Chitty, who held that the plaintiff could not succeed. It seems to me that the foundation of that judgment is, that Mr. Justice Chitty did not consider that the doctrine of the subrogation of the insurer into the position of the assured could be applied here, for the learned Judge appears to have limited that doctrine, or the application of it, in such a way as to prevent it from applying to this case.

I feel obliged, in considering this case, to revert to the very foundation of every rule which has ever been promulgated by the Courts with regard to insurance law. The very foundation of every such rule is that the contract of insurance with regard to marine and fire policies is a contract of indemnity, and indemnity only. The contract is that the assured shall in case of loss be fully indemnified, but not that he shall receive anything beyond a full indemnity. In my opinion every acknowledged rule of insurance law has been promulgated with the view of carrying out and enforcing that fundamental rule, and every proposition which either diminishes or adds to that view of the contract of indemnity is wrong.

The doctrine of a constructive total loss originated in the desire to carry out this fundamental rule in its entirety. It was a doctrine in favour of the assured, because the doctrine was applied where there was not an actual total loss, but a loss which, as a matter of business, was equivalent to an actual total loss; and therefore if it had been held that the assured could only recover for an actual total loss, although the loss was really what is now known as a constructive total loss, the assured would not have had a full indemnity. That rule of constructive total loss was applied to carry out the doctrine that a contract of insurance is one of full indemnity. Grafted on to that doctrine was the doctrine of abandonment, a doctrine which only applies in a case of constructive total loss, and which is a doctrine which tells in favour of the underwriters; for it prevents the assured from recovering more than what will supply a full indemnity. We find, then, these two doctrines invented or promulgated by the Courts for the express purpose of carrying out the two limits of the doctrine that a contract of insurance is a contract for a full indemnity, and that it is nothing more.

The doctrine of the notice of abandonment is the doctrine the most difficult to justify on principle; it was applied perhaps to the cases to which it attaches, rather as a matter of policy; it is a doctrine in favour of the underwriter, for it prevents the assured from obtaining by means of fraud anything more than a full indemnity. It is to a considerable extent technical—that is to say, that although the loss may be proved to be in reality a constructive total loss, yet by decision it has been established that there must be notice of abandonment, and if there is no notice, then the assured cannot recover. It was probably adopted by the Courts from the custom of merchants and underwriters generally, and so it became part of the law; if this was not so, then it must have been rather an encroachment by the Judges, and imposed by them on merchants. I mention this in order to proceed to the doctrine of subrogation. This doctrine does not arise upon any terms of the contract of insurance. It is only another proposition which has been adopted for the purpose of carrying out the fundamental rule, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity. It is not a doctrine which is applied to insurance law on the supposed ground that underwriters are sureties; they are not always sureties—they have rights which are sometimes similar to the rights of sureties, but that is to prevent the assured from recovering more than a full indemnity. Is the doctrine of subrogation then to be limited to this, that the underwriter is subrogated into the place of the assured, so far as to enable the underwriter to enforce a contract or to enforce a right of action? Why should it be so limited when it will, if so limited, in certain cases enable the assured to recover more than a full indemnity? The moment that such a result is produced the fundamental rule is transgressed, and the limitation must be wrong; and that, I think, is the error in the judgment appealed from.

To apply the doctrine of subrogation the full meaning of the word must be con-

sidered, not its technical meaning if it have such, but its full ordinary meaning in the English language if it is an English word, and it must be construed as the putting the insurer into the position of the assured. This doctrine must be carried to this extent, that as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or of any other right, whether by way of condition or otherwise legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the acquiring or exercise of which right or condition the loss against which the assured is insured can be or has been diminished. That is the largest form in which I can put this doctrine, and if that form falls short of fulfilling that which I say is the fundamental rule and condition of insurance law, then I must have omitted something. But I have used the words "of every right of the assured," for I think that limit is required. I think the foundation of the decision in *Burnand* v. *Rodocanachi* (6) was that that which the American Government paid, could not be considered as salvage, because it was only a gift, and a gift to which the assured had no right until it was in his hands. I know that in the case of reprisals there has been stated to be a gift of the government to the person whose vessel was captured; but that case has been upheld on the ground that the English Government so invariably made that which is called a gift, that it had come to be considered as of right. This explanation of the doctrine of subrogation shews that, in my opinion, it goes farther than being a subrogation into that which might at any time have given a cause of action, either in contract or tort; because if upon the happening of the loss, there being a contract with a third person, that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone, the contract is fulfilled. So if upon the happening of a tort, the tort is immediately made good by the tort-feasor, then the right of action is gone, and there is no right of action into which the insurer could be subrogated; but he cannot be so subrogated until he has paid and made good the loss, so that many cases would be taken out of the doctrine if it were so confined. I however go further, and say that if it be true that there are cases in which there would be no right of action into which the insurer could be subrogated, nevertheless if there is a right in the assured which has been fulfilled as a matter of right, and which has diminished the loss, then, although there never was or could be any right of action into which he could be subrogated, it would be contrary to the doctrine to say that the loss is not to be diminished as between the assured and the insurer by reason of the fulfilment of that right.

I fail to see at present, if the defendants here would have had a right of action at any time against a third party upon which they could enforce the contract for sale of this property whether the building was lost or not, why the insurance company could not in this case have been subrogated into that right of action, if it existed. But I am not prepared to say that they could, particularly as Lord Justice Cotton is not satisfied they could. I pass it by without solving that question, because if in this case there could be no subrogation into such a right of action, nevertheless it seems to me that there was a right in the defendants, notwithstanding the loss, to have the contract fulfilled by the third party, and it was fulfilled. They have had the advantage therefore of that right; and by that right, not as a matter of gift which the third party could have declined to make or not, but as a matter of right, the assured have received, notwithstanding the loss, from a third party the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive but that a right by virtue of which the assured has his loss diminished is other than a right which, as has been said, affects the loss. This right, it seems to me, which was at one time a right merely in contract, but which is afterwards a

fulfilled right, either when it was in contract only or after it is fulfilled, does affect the loss—that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got notwithstanding the loss. It is a peculiar contract applicable to real property, as it seems to me, although a contract may be imagined which might apply merely to movable goods—but it is a contract which applies to real property, and, as I endeavoured to point out, the argument for the defendants supposes that we ought to administer this law of insurance by holding that a contract which says "I will pay you money if the property is lost," is to be brought into the account, but that a contract which says "I will pay you money although the thing is lost," is not to be brought in. I do not and cannot think that a law founded on business principles can ever be properly applied founded on such fine distinctions as that.

Now, applying this large doctrine which I have probably imperfectly endeavoured to enunciate, I think it is due to Mr. Justice Chitty to point out what passages in his judgment require some modification. The learned Judge quotes from the judgment of Lord Cairns in *Simpson* v. *Thomson* (19) as follows:—"I know of no foundation for the right of underwriters, except the well known principle of law, where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss"; and Mr. Justice Chitty then says, "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, confining this doctrine of subrogation to a right which says that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this—and if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies. He then proceeds, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office on payment in like manner succeeds to the right of the landlord against his tenant." I would add this—and if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair. Then dealing with the case of *Burnand* v. *Rodocanachi* (6), the learned Judge cites the opinion of Lord Justice Bramwell. He says that "the point was put very clearly by Lord Justice Bramwell in his judgment, and it was held that it was not, that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I for myself venture to add this as the reason—because there was no right in the assured to receive the compensation from the American Government. There was no right to receive it; it was given and received as a pure gift.

Darrell v. *Tibbits* (3) seems to me to be a case entirely in favour of the plaintiffs in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell* v. *Tibbits* (3) the insurers were not subrogated to a right of action, or to a remedy. They were not subrogated to a right to enforce a remedy, but what they were subrogated into was into the position of the assured in this respect, that they were subrogated into the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then, with regard to the passages cited on behalf of the defendants, I said in that case that "the doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the insured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." Now that seems to me to be one complete sentence, and that it was so intended by

me when I stated it, that is, "into every right given to him by the law respecting the subject-matter insured." Then with regard to contracts, I am reported to have said, "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right which is not affected by the loss or safety of the subject-matter insured; and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss in this sense, that it is by reason of that contract, and that contract alone, that the assured, the vendors, are paid by the vendees, notwithstanding the loss of the building. I agree with Mr. Justice Chitty when he says that the only principle applicable is that of subrogation, only I think my view of the full meaning of that word is larger than that which he adopted. I think that where the right claimed is under a contract between the assured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened; this appears to me to be consistent with the proposition which I laid down at the beginning of my judgment.

This contract does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that arises from this contract alone. According to the true principles of insurance law, and in order to carry out the fundamental doctrine (I will except the suing and labouring clause in certain cases), it is necessary that the plaintiff should recover in this case. *Darrell* v. *Tibbits* (3) cuts away every technicality, and shews that it matters not whether the insurance company has paid or not. The insurance company is *prima facie* bound to pay, and it signifies not whether the question arises before or after the insurance company has paid. The doctrine must be carried out to the full extent, and in this case the plaintiff company must recover, and this appeal must succeed.

COTTON, L.J.—In this case the appellants insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to a purchaser. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss. The appellants now seek, as it would seem, to recover the money which they so paid to the defendants; and if the case depended upon the form of pleading, I am not sure that my opinion would be in favour of the appellants. But the case may be treated as one in which the insurance company seeks to obtain the benefit of part of the purchase-money which the defendants have received since the compensation paid for the damage caused by the fire. On this contention the plaintiff company is, I think, right.

A policy of insurance against fire is really a contract of indemnity to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against when that peril has happened, and it follows that the contract is only a contract to pay the value of that loss which the insured may have sustained by reason of the fire. In order to ascertain what that loss is, everything which is received by and comes into the hands of the insured which diminishes the loss must be taken into account. For the loss, and that alone, is to be indemnified, and the loss is that which remains after taking into account and considering those benefits or sums of money which the insured may have received in diminution of the loss. If this be so, then it is clear that the insurance company would be entitled to the benefit of anything received by the insured before the time when the money becomes payable under the policy; and it matters not, as is established by *Darrell* v. *Tibbits* (3), whether the insurance company does, or does not, before paying the money insist upon a calculation being made of what can be recovered by the insured in diminution of the loss. If the company does not so insist, and it turns out that a sum of money, or even a benefit, is received by the insured, then the company can, notwith-

standing the payment made, say that the insured is to hold that sum of money or that benefit for the benefit of the company, and can insist that, although it was not taken into account in ascertaining the sum to be paid under the policy, yet that the sum received, or the value of the benefit received, estimated in money must be brought into account, and that the company is entitled to the benefit of it.

Lord Blackburn, in *Burnand* v. *Rodocanachi* (22), states the principle as a general rule of law, although in different words: "the general rule of law, and it is obvious justice, is that where there is a contract of indemnity, it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity, and the loss happens, anything which reduces or diminishes that loss, reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

In *Darrell* v. *Tibbits* (3) the question was, whether an insurance company was entitled to the benefit of a covenant to repair if the buildings were damaged. The buildings were damaged, and the company paid the money; but that case did not limit, as I think, the right of the insurer as an insurer to cases in which the contract in respect of which benefit had been received was a contract relating to the same loss or damage as that against which the indemnity was by the policy secured. Undoubtedly there are expressions in that case as to the contract being one relating to the very loss or affecting the loss, but the decision was not limited to that.

The principle which I have enunciated goes farther, and if there is money or other benefit received which is to be taken into account in diminishing the loss, and in ascertaining the real loss against which the contract of indemnity is given, that, in my opinion, ought to be taken into account in order to arrive at the ultimate loss, even though it is not a contract the right of suit on which arises from the accident insured against.

Many ingenious cases have been suggested in argument. It was said that the money paid under this contract of sale had nothing to do with destruction by fire, and that if purchase-money is to be taken into account, so also should a gift to the person whose property has been damaged be taken into account. As a rule, however, if a gift were made afterwards it would be given in such terms as to shew an intention to benefit the insured person, and in such a case to give the insurer the benefit of that would be to divert the gift from its intended object. That was the decision in *Burnand* v. *Rodocanachi* (6); it was there held that the money was not given as a gift to benefit certain persons beyond the amount which they could get under their policies of insurance. But in this case it is not necessary to decide this question, nor is it necessary to decide the question of a gift from the Crown such as was in question in *Randal* v. *Cockran* (7).

But further, it may be that the right of the insurer to have a sum brought into account in diminution of the payment to be made under the contract of indemnity is confined to that which is a right or other incident belonging to the person insured as an incident of the property at the time when the loss takes place. If so, then the principle would not apply to a subsequent gift.

In this case we have to consider whether the purchase-money was not an incident of the property, belonging to the owner at the time of the loss, in such a way that it ought to be brought into the account in estimating the loss against which the insured has a covenant of indemnity. The house and property were insured; there was a loss by fire, the damage was estimated at 330*l.*; but ultimately, the property having been previously agreed to be sold at a fixed price, the insured received the whole of that price. They so received that price in respect of a contract relating to the subject-matter of the insurance, and if they received the whole of the amount of the price which they had previously fixed as the value of the house, that must of necessity be brought into account for the

(22) 51 Law J. Rep. Q.B. at p. 552; Law Rep. 7 App. Cas. at p. 339.

purpose of ascertaining what was the actual ultimate loss against which they had a contract of indemnity under this policy of insurance. In this case the purchaser has paid the money fixed as the price of the property in full, so that the vendors received from the purchaser the full value of the property which has since been burnt; hence anything which they received from the purchaser which, together with the sum received from the insurance company, exceeds the full value of the property as fixed by the vendors under the contract for sale, must diminish if it does not entirely extinguish the loss occasioned to the vendors by the fire. Therefore, although the company is not entitled to get back the money paid under the policy because the purchase is completed, yet it is entitled to have taken into account the money subsequently received under the contract for the sale of the property, in order to ascertain what the actual ultimate loss is against which the contract of indemnity was entered into between the insured and the company. The insurance company was not bound to say that it must be taken into account at the time of the payment under the policy, for on the authority of *Darrell* v. *Tibbits* (3) the company is entitled, when a benefit has afterwards accrued to the insured, to claim that the insured shall relieve the company by bringing into the account money subsequently received. If, then, the purchase-money has been paid in full, then in substance the insurance company will get back that which has been paid under the policy, not as that which the company so paid, but on this ground—that the subsequent payment of the agreed price, the contract for which was existing at the time, must be brought into account by the insured because it diminishes the loss against which alone the insurance company covenanted to indemnify the insured. Mr. Justice Chitty appears to have based his judgment on the ground that there was in this case no right of subrogation, that there was no contract which the company could have insisted on enforcing. I do not think it is necessary to decide that case, because here the vendors have exercised their right of insisting upon the completion of the purchase, and having insisted on that right, a right which existed in respect of this very property at the time of the loss, that must, as I think, be taken into account in estimating what the real loss was against which the insurance company covenanted to indemnify the insured.

BOWEN, L.J.—I am of the same opinion. The answer to the question raised in this case appears to me to follow as a deduction from the two propositions already laid down—first, that a fire insurance is a contract of indemnity; and, secondly, that when there is a contract of indemnity no more can be retained by the insured than the amount of his loss. It appears to me that a fire insurance is exactly as much a contract of indemnity as a marine insurance is, the differences between the two being caused by the diversity of the subject-matter. In the case of a marine policy the insurance is on a ship which is at a distance, or on goods on board such a ship; by a fire policy the insurance is on a house which is on land; but both are contracts of indemnity. Only those can recover who have an insurable interest, and they can only recover to the extent to which that insurable interest is damaged.

It has been sought in the argument for the defendants to establish a distinction between a fire policy and a marine policy; it is said that a fire policy is not quite a contract of indemnity, and that a man who insures can get something more than what he has lost. It does not appear to me that there is any authority or foundation for such a distinction. What is insured by a fire policy is not the bricks which form the house, but the interest which the person insuring has in the thing insured—not the legal interest only, but the beneficial interest also; and there seems no reason why there should be a different definition of an insurable interest in fire policies from that which is well known as the established definition in marine policies. It is an ocular illusion, so to speak, which leads to the supposition that in certain circumstances more than the amount of the loss might really be obtained by the assured. It is well known in marine and fire insurance that a person who has a limited interest may insure, nevertheless,

on the total value of the subject-matter of the insurance, and may recover the whole value subject to these two provisions—first, the form of the policy must be such as to enable him to recover, because a person may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and, secondly, he must intend at the time when he makes the insurance to insure the entire value for those to whom it belongs. A person with a limited interest may insure, either for himself to cover his own interest only; or, if he so mean at the time, he may insure so as to cover not only his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he makes the policy. But he can only hold for so much as he intended to insure.

To take a few cases of persons who having a limited interest insure for the total value of the subject-matter. There are the common cases of carriers, wharfingers and commercial agents who have an interest in the adventure, and who insure so as to cover all. Then there is the case of a mortgagee—if he has got the legal ownership he is entitled to insure for the whole, but even if he is not entitled to the legal ownership he is entitled to insure *prima facie* for all. If he intends to cover only his own mortgage, and is only insuring his own interest, he can only retain the amount in which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But if he intended to cover himself alone, and if his interest is limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest.

Take again the case of a ship and of a mortgagee who has lent 500*l.* on a ship worth 10,000*l.* If he insures for 10,000*l.*, meaning to cover his own interest only and not the interest of any one else, can it be supposed that he could hold 10,000*l.*? That would be an over insurance, and to treat it as anything else would be to make a marine policy not a contract of insurance, but a wager policy and a speculation for gain.

Suppose, again, there are several mortgagees for small sums—can they, if they have insured their own interests only, each of them recover and hold the entire value of the ship? They can only recover what they each have lost. I can see no real distinction between mortgagees of ships and mortgagees of houses; the same principle applies, and the problems of insurance law are equally in both cases to be solved by recurring to the doctrine of indemnity. It has been said that a tenant from year to year can always recover the full value of the house even if he intended only to insure his limited interest in it. I do not assent to that proposition, though certainly the language of Lord Justice James in *Rayner* v. *Preston* (1) affords some justification for the misconception when he says, "In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to shew that a policy of insurance on a house was considered by the Legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant-for-life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease."

I confess I do not quite follow that. It may be true in practice that the insurance companies do not enquire into the exact interests of the tenant, or perhaps of the landlord who insures, because it is constantly intended that the insurance shall be made not merely to cover the limited interest of the tenant, but also the interest of all concerned. There is a large class of leases in which the liability to repair is by the form of the lease thrown upon the tenant. In these cases, therefore, no ques-

tion can ever arise between the insurance company and the tenant from year to year or the tenant for years as to the amount which the insurance company ought to pay. But if the question did arise, if the case should occur in which a tenant for a year, or a tenant for six months, or a tenant from week to week, who is under no liability to repair, insures only meaning to cover his own interest, it cannot be really supposed that he would in such a case get the whole value of the house.

It is true that the claim of the tenant cannot be simply answered by handing him over what may be the marketable value of the property; because he insures more and he loses more than the marketable value of the property: he loses the shell in which he lives, he loses the beneficial enjoyment of the house, as well as its pecuniary value. That is what Vice-Chancellor Wood meant, as it seems to me, in *Simpson* v. *The Scottish Union Insurance Company* (15). A similar observation applies to the case of a life tenant, because it has been pressed on us that nobody would cut down a life tenant's loss in a house that had been burned to the marketable value of his life tenancy. If a life tenant insures, he does something more than insure against his own loss. Suppose the case of a life tenant, a very old man, who has intended to insure only his own interest, and suppose his house is burned down, I do not say he would not be entitled to have the house restored, because a man is not compensated simply by paying him for the marketable value of his interest; but it does not follow that he will receive more than he has lost. If a life tenant who had intended to insure his life interest only were to die within a week after a loss by fire I doubt whether any Court would give his executors the whole value of the house.

Now this particular case arises between vendor and vendee, and does not fall within the category of the cases which I have discussed where a person with a limited interest intends to cover his own interest only. The interest of the insured is here this. They insured against fire; they then contracted for the sale of the house; and after that contract, though before the completion of it, the fire occurred.

At law they are the legal owners, but their beneficial interest is that of vendors, with a lien for the unpaid purchase-money; they are persons who will have a right to insist on receiving all the purchase-money, and to hold back completion until they get it. *Collingridge* v. *The Royal Exchange Assurance Corporation* (20) decided that such a person could recover in the first instance from the insurance company the entire amount of the purchase-money; but it would be monstrous to say that he could in the end keep the whole, having lost only half. Suppose that only 50*l.* of the purchase-money remained to be paid, and that a house worth 10,000*l.* were burnt down, would it be in accordance with any known true principle of indemnity that a person who could only be damnified to the extent of 50*l.* should recover 10,000*l.*? —that would be to obtain a windfall by the fire, and the contract would be a speculation for gain. The principle here, as elsewhere, to be applied is a corollary of the law of indemnity, and it is that a person who wishes to recover for a total loss must deal with it as a total loss, he cannot take with both hands. If he has means of diminishing the loss, those means belong to the underwriters; if he does diminish the loss, he must account for the diminution to the underwriters. Lord Cairns says in *Simpson* v. *Thomson* (19), "I know of no foundation for the right of underwriters except the well known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself or reimbursed himself for the loss."

It seems to me that Mr. Justice Chitty and the American authorities on which he relies have fallen into the mistake of supposing that the distinction which obtains in certain incidents of marine policies and fire policies are incidents which are derived from something else than the diversity of the subject-matter. In both cases the principle of indemnity, as it seems to me, is the same, and there is no departure from it. Mr. Justice Chitty says, "An obvious distinction exists between the case of marine insurance and of insurance of

buildings annexed to the soil. In the case of marine insurance, where there is a total constructive loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil, although the buildings annexed are destroyed there cannot be a cession of the right to the soil itself."

Now it seems to me there is a cloudiness, if I may so express myself, in the way in which the learned Judge thus deals with the doctrine of constructive total loss. The doctrine of abandonment is itself based upon the principle of indemnity, both in history and in reason; and it is only since marine policies have ceased to be wager policies throughout the world and become contracts of indemnity that the doctrine of abandonment has become universal; and so far from its constituting a difference of principle between marine insurance law and fire insurance law, it is the same principle of indemnity, only necessarily worked out in a different way, because what happens at sea is the loss of a ship at some distance from the insurance, and what happens on land is the loss of a house. If the buildings annexed to the soil are destroyed, it is not a question of constructive total loss, it is a question of total loss. The same cloudiness seems to me to exist in the language used in the case of *King* v. *The State Mutual Fire Insurance Company* (13), in which it is said: "It may be a question whether" the Judge "has not relied too much on the cases of marine insurance in which the doctrine of constructive total loss, abandonment and salvage are fully acknowledged, but which have slight application to insurances against loss by fire." True the application of the principle of abandonment to cases of loss by fire is slight. This is not because the doctrine of indemnity is not to be carried out as logically in the case of loss by fire, but because the subject-matter is different. I will add but little to what Lord Justice Brett has said on the doctrine of subrogation. To suppose that insurers are in the position of sureties would lead to confusion; it may be that the default or non-default of another person may as between that person and the person who is insured diminish or increase the loss, but what the insurer guarantees is not the default of that person, but that no loss shall happen by the event. Subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and not a hard and fast line. If there are means of recovery, means of diminishing the loss, the insurer can pursue them, whether he seeks to have a contract carried out in the name of the assured, or whether the action is one of tort. It is said, but I think without any authority, that the law only gives the underwriter the right to stand in the assured's shoes as to rights which arise out of or in consequence of the loss: the question in fact, I think, is whether the right is one the enforcement of which will diminish loss. Here the right has actually been enforced, and the question is whether the fruit of that right does not belong to the insurer. But it is said that only those payments must be taken into account which have been made in respect of the loss. Why so? If the payment diminishes the loss, then it falls within the application of the law of indemnity. Taking the language of the definition given by Lord Justice Brett in its widest sense, it expresses what I would wish to hold, with one small addition—that if anything occurs outside that definition, then regard must be had to the general law of indemnity, and the problem will once again be solved.

It is not necessary to decide the question of gifts; but I am inclined here again to say that with regard to gifts all that has to be considered is whether there has been a loss, what that loss is, and whether it has been in substance reduced by the gift. I admit that in nine cases out of ten it is difficult to conceive of a voluntary gift which does reduce the loss within the meaning which I have attributed to that expression. But I do not think that voluntariness was the basis of the decision in *Burnand* v. *Rodocanachi* (6), although it seems to me it was a very essential element in considering the case. I think the basis of that decision was that the payment did not reduce the loss, and was not intended to do so. It was agreed that the sums which were to be paid

should be paid not in respect of the loss but in respect of something else. Suppose a man loses money by a fire, and his brother then writes saying that he has heard of the loss, and that he sends something which will prevent the man from being a loser. It would be necessary to decide whether the brother intends to give that money for the benefit of the insurer as well as for the benefit of the assured; if he does, the insurers are entitled to the benefit of it, but if he does not, then the gift is not given to reduce the loss, and the case falls within the principle of *Burnand* v. *Rodocanachi* (6). If the gift is given to reduce the loss and for the benefit of the insurer as well as the assured, the case would fall within the principle of the decision in *Randal* v. *Cockran* (7).

In the case of the present appeal the vendors have been paid the whole of the purchase-money. If they had not been paid, and if the purchase-money were still outstanding, they would have a beneficial interest in the nature of their vendors' lien. This is worth something, I suppose. On what principle could they keep the unpaid vendors' lien and be paid for a total loss by the insurer? That would be to take with both hands; and why should not the underwriter be entitled at all events to the benefit of the unpaid vendors' lien? I say nothing about specific performance. Perhaps there could be no claim to that. But why should the insurers not insist upon the unpaid vendors' lien to the extent of saying that the vendee shall not be let off his bargain at their expense? A vendor, fully insured, who handed over the property to the purchaser, and allowed a deduction in respect of part of the purchase-money because a fire had occurred, would be attempting to make the contract between himself and the insurer more than a contract of indemnity. It seems to me that it matters not that the contract of sale was not a contract either directly or indirectly for the preservation of the buildings, or that the contract of insurance was a collateral contract wholly unaffected by the contract of sale. The beneficial interest of the vendors in the house depends on the contract being fulfilled or not; the fulfilment lessens the loss, its non-fulfilment affects it.

Probably after this argument Lord Justice Brett would say, as he said in *Darrell* v. *Tibbits* (3), thus—that "the insurers are put by the contract into the place of the assured with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss of the subject-matter insured," but would add the words "or which affects the loss." But this case falls within the judgment in *Darrell* v. *Tibbits* (3) even as it stands, because the fulfilment or non-fulfilment of the purchaser's contract really does lessen the loss, and to insist upon its fulfilment is to insist upon the fulfilment of a contract which affects the subject-matter.

Mr. Justice Chitty says that it is attempted to make the insurance an insurance of the solvency of the purchaser; but I should rather say that the insurance is a guarantee to the assured against a loss, which happens to be diminished or increased according as the purchaser proves to be solvent or not.

Then the learned Judge suggests the case of a landlord who insures, and of a tenant who is under no obligation to repair. "Where," he says, "under an informal agreement evidently drawn by the parties themselves, the large rent of 700*l.* was reserved, and the tenant was bound to pay the rent." And again, "assume that the building in such a case was ruinous, and would last the length of the term only, could the insurers recover a proportionate part of each payment of rent as it was made, or could they wait until the end of the term, and then say, in effect, You have been paid for the whole value of the building, and therefore we can recover against you?"

That seems to raise a difficult question, but I think the difficulty diminishes if the other conditions of the hypothetical case are enquired into before answering. Is the landlord in the supposed case intending to insure all other interests than his own? He can do so; has he done so? If he has there is no difficulty. If he has not, the case would be a curious one; but apply once more the broad principle of insurance—that is, the principle of indemnity—and the problem can, I think, be solved. The landlord is not to recover for a greater loss than he has suffered. If he has only a limited interest, and only intended to assure

that interest, I know of no means in law or equity by which he is entitled to recover from the insurers anything beyond the measure of his loss.

As to the form of action I have nothing to add to what has been already said, and I agree that this appeal must be allowed.

Appeal allowed.

Solicitors—Gregory, Rowcliffes & Co., agents for Laces & Co., Liverpool, for plaintiff; Torr & Co., agents for Anthony & Imlach, Liverpool, for defendants.

[IN THE COURT OF APPEAL.]

1883. Feb. 22. THE NORTH LONDON RAILWAY COMPANY *v.* THE GREAT NORTHERN RAILWAY COMPANY.*

Jurisdiction—Injunction—Arbitration—Judicature Act, 1873, *s.* 25. *sub-s.* 8.

The Judicature Act, 1873, *s.* 25. *sub-s.* 8, *has not enlarged the jurisdiction of the High Court in the matter of issuing injunctions; and consequently the High Court has no jurisdiction to issue an injunction in a case where, before the passing of the Judicature Act, no Court would have had the power to interfere by injunction or otherwise. The Court therefore refused to restrain the defendants by injunction from proceeding with an arbitration in which the plaintiffs alleged that the arbitrator had no jurisdiction, on the ground that the matter in dispute was not within the terms of the submission of reference, and consequently that the arbitration proceedings would be futile and vexatious.*

Appeal by the defendant company against an order of the Divisional Court restraining them from proceeding with a Board of Trade arbitration.

An agreement had been entered into between the plaintiffs and defendants to provide for the working of the suburban passenger traffic from the defendants' stations over the junction line of railway from their main line at Finsbury Park to join the plaintiffs' railway near Canonbury junction, and for the better exchange of traffic between the systems of the two companies. The agreement contained a clause that any questions or differences arising under the agreement should be referred to arbitration, pursuant to the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59).

In December, 1881, an accident occurred to four of the plaintiffs' trains, through the alleged negligence of a signalman, on the defendants' line between Finsbury Park and Canonbury junction, at which junction the plaintiffs' and defendants' lines were connected; many of the passengers were injured, amongst whom were some whom the defendants had contracted to carry to stations on the plaintiffs' line. The defendants paid or became liable to pay damages to the injured passengers, and sought to make the plaintiffs wholly or partly liable for these damages.

On the 15th of June, the defendants gave the plaintiffs notice to proceed to arbitration under the terms of the agreement. The defendants appointed an arbitrator, and the plaintiffs did the same, under protest, denying, however, that there was any matter in dispute within the meaning of the agreement. The arbitrators not agreeing to proceed, an umpire was appointed by the Board of Trade.

On the 24th of June, the plaintiffs brought an action against the defendants for injury to their rolling stock which came into collision, alleging that the accident was caused solely by the negligence of the defendants' servants. The defendants, by way of defence and counter-claim, claimed 50,000*l.* damages, or an indemnity against all claims for compensation arising from the collision, which they alleged was caused by the negligence of the plaintiffs' servants. The plaintiffs then moved a Divisional Court (Field, J., and Stephen, J.) for an injunction to restrain the defendants from proceeding further with the arbitration, and the Divisional Court granted the injunction, upon the ground that the subject-matter of the arbitration did not come within the terms of the agreement, and that the arbitrator had therefore no jurisdiction.

The defendants appealed.

* *Coram* Brett, L.J., and Cotton, L.J.

Reid, Q.C. (with him *Webster, Q.C.*, and *Cyril Dodd*), for the defendants.—The Court has no jurisdiction to restrain the defendants by injunction from proceeding with the arbitration, except where there is something in the conduct of the parties themselves which raises an equity for an injunction—*Pickering* v. *The Cape Town Railway Company* (1); or where there is misconduct, such as corruption on the part of the arbitrator—*The Malmesbury Railway Company* v. *Budd* (2) and *Beddow* v. *Beddow* (3). The jurisdiction of the High Court to restrain by injunction has not been enlarged by the Judicature Act beyond what it was before the passing of that Act. The Court below was wrong in fact in exercising this jurisdiction. [He was then stopped by the Court.]

Rigby, Q.C., and *Tyrrell Paine* (with them *The Solicitor-General, Sir F. Herschell, Q.C.*), for the plaintiffs.—The dispute here is not within the terms of the agreement; the investigation will involve a great amount of delay and expense; and in the result the award made (if any) will be wholly futile. The Court has jurisdiction to restrain the defendants from proceeding with the arbitration, and the plaintiffs ought not to be compelled to run the risk of futile proceedings.

The powers of the Court to restrain by injunction have been enlarged by the Judicature Act, 1873. Sub-section 8 of section 25 gives the Court power to grant an injunction in all cases in which it shall appear to the Court to be just or convenient. The Court has unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles—*per* Jessel, M.R., in *Beddow* v. *Beddow* (3). The limit as to granting injunctions is therefore merely what is just or convenient. All acts which a common law Court or a Court of equity only could restrain by injunction before the Judicature Act can now be restrained by the High Court. Under section 25, sub-section 8, the Court has unlimited jurisdiction to grant an injunction where it would be just or convenient to do so. The case of *The Malmesbury Railway Company* v. *Budd* (2) is in point; there Jessel, M.R., held that the Court has jurisdiction to prevent the throwing away of the expense and trouble, to say nothing of the delay, involved in proceeding with an arbitration before an arbitrator who has no jurisdiction to decide the case.

[COTTON, L.J., referred to *Pennell* v. *Roy* (4).]

Aslatt v. *The Mayor and Corporation of Southampton* (5) and *Hedley* v. *Bates* (6), explained by Jessel, M.R., in *Stannard* v. *The Vestry of St. Giles, Camberwell* (7), were also cited.

Reid, Q.C., in reply.—The granting of an injunction has, by virtue of the Judicature Act, 1873, s. 25. sub-s. 8, become an interchangeable remedy with other remedies. The object of that section is to deal with the procedure; it has not altered the legal rights of a party. Where before the Judicature Act a party had a right to an injunction, the same right now exists—*Day* v. *Brownrigg* (8) and *Gaskin* v. *Balls* (9).

BRETT, L.J.—In this case the defendants have insisted upon their right to go to arbitration on the matter in dispute between them and the plaintiffs, and so insisting have appointed an arbitrator. The plaintiffs under protest also appointed an arbitrator, and, as those two arbitrators did not agree to proceed, the Board of Trade appointed an umpire. After the commencement of the arbitration, the plaintiffs brought an action against the defendants for certainly a matter in dispute between the two companies, and thereupon the defendants proceeded in that

(1) Law Rep. 1 Eq. 84.
(2) 45 Law J. Rep. Chanc. 271; Law Rep. 2 Ch. D. 113.
(3) 47 Law J. Rep. Chanc. 588; Law Rep. 9 Ch. D. 89.
(4) 3 De Gex, M. & G. 126, 139; 22 Law J. Rep. Chanc. 409.
(5) 50 Law J. Rep. Chanc. 31; Law Rep. 16 Ch. D. 143.
(6) 49 Law J. Rep. Chanc. 170; Law Rep. 13 Ch. D. 498, 501.
(7) 51 Law J. Rep. Chanc. 629; Law Rep. 20 Ch. D. 190.
(8) 48 Law J. Rep. Chanc. 173; Law Rep. 10 Ch. D. 294.
(9) Law Rep. 13 Ch. D. 324.

action by counter-claim for the very matter in dispute which they themselves had insisted should be referred to arbitration. Under these circumstances the plaintiffs applied to the Divisional Court for an injunction to restrain the defendants from proceeding further with the arbitration. The Divisional Court granted that injunction, and thereupon this appeal was brought.

It was said on behalf of the plaintiffs that they had a right to maintain that injunction, because it is manifest that the subject-matter of dispute is not one which is within the arbitration clause of the agreement, and is therefore one in which the arbitrator or umpire has no jurisdiction to proceed so as to bind them; and that therefore, if the arbitration is allowed to proceed, the proceedings will be futile; further, that they will be vexatious to them and will also cause delay. On the other side, it is said that if the subject-matter of the arbitration is beyond the jurisdiction of the arbitrator, and if the defendants proceed with the arbitration, the plaintiffs, if they are advised that the arbitrator has no jurisdiction, may stay away; and that then it is true that the arbitration, if the contention be right, will be futile; but that it cannot be vexatious because it will not injure the plaintiffs, neither will it interfere with their right to proceed with the action; and that there is nothing in the fact of the defendants going on with a futile arbitration which can stop the plaintiffs from proceeding in due course with the action which has been brought. It is therefore said that the arbitration will not cause the plaintiffs expense or delay, and that even if it causes vexation, it is not a vexation of which the law can take any notice; and that the only result of the defendants going on with the arbitration, assuming it to be futile and beyond the jurisdiction of the arbitrator, is that it will be of no benefit to them, and will not injure the plaintiffs.

The question is, whether, under these circumstances, the Court can issue an injunction? The rule, before the Judicature Act, would seem to have been that no Court would have issued an injunction in a case where if the thing went on there would be no legal injury. It is obvious in this case that, on the assumption that the whole matter is beyond the jurisdiction of the arbitrator, the fact of the defendants going on with the futile arbitration in the absence of the plaintiffs, who, if their case be true, ought not to attend, is not a legal injury. Suppose the arbitration went on and an award was made, the plaintiffs here could not bring an action against the defendants for damages, for that is no cause of action known to the law. If an action could not be brought after the award was made, it certainly could not be brought before the award was made. This case, therefore, seems to me to be one in which before the Judicature Act neither the Court of Chancery nor any Court of common law could have had any jurisdiction to issue an injunction to enjoin the defendants from proceeding with the futile arbitration. I doubt whether, under the circumstances of this case, any Court before the Judicature Act would have had any jurisdiction to put a party to an election. It therefore seems to me to be a case in which before the Judicature Act there would have been no remedy which could have been given by any Court to the plaintiffs as against the defendants. Prohibition certainly would not lie, because prohibition will not lie against an arbitration. An injunction would not have been issued, for the reasons I have given; and I do not think the Court would have put the parties to their election. It is said, nevertheless, that by reason of section 25, sub-section 8 of the Judicature Act, 1873, the Court can now issue an injunction, and ought to do so. It is stated that there are decisions to the effect that section 25, sub-section 8, has enlarged the jurisdiction of the Court in the matter of injunctions, to the extent that it gives any Judge of the High Court power to issue an injunction in cases in which before the Judicature Act no Court could have issued an injunction, and what is more, in cases in which no Court could have given any remedy whatever. It is not necessary, however, in this case to determine whether power has been given to the Courts, under section 25, sub-section 8, to issue an injunction in cases where no Court would have issued an injunction before the Judicature Act. It is only necessary to decide the proposition, whether that sub-

section gave a power to the High Court or to a Divisional Court to issue an injunction in a case where no Court could have given any remedy whatever to the person applying for the injunction in respect to the case submitted to the Court. I am strongly of opinion that the Judicature Act has not dealt with the question of jurisdiction at all, and that it has not increased the jurisdiction of any Court. It only deals with the procedure, and gives to the one division the procedure of the other division, or to the other Courts reciprocally the procedure of the other divisions, and has in some cases amended the procedure of both divisions; but it has not given to any Court a jurisdiction which no Court had before. I should myself be inclined to hold, if it were necessary, that in cases where no Court had the power to issue an injunction before the Judicature Act, no division of the High Court has power to issue such an injunction now. It is not, however, necessary to decide that question.

No case seems to me to have gone beyond what my personal views incline me to, unless it be that of *Aslatt* v. *The Mayor and Corporation of Southampton* (5). I am inclined to think that the injunction was granted there in a case in which no Court before the Judicature Act would have granted an injunction; but it is not a case in which no Court would have given any remedy, because it is obvious that there the remedy before the Judicature Act, or a remedy at all events, would have been by information in the nature of a *quo warranto*. In the case of *The Malmesbury Railway Company* v. *Budd* (2), Jessel, M.R., issued an injunction upon the ground that the arbitrator had been guilty of corruption; and in the case of *Beddow* v. *Beddow* (3) upon the ground that the arbitrator had been guilty of misconduct, because, after he had assumed his authority as arbitrator, he became indebted to one of the suitors—which to my mind was a gross piece of misconduct—and that was done without the knowledge of the other side. In both cases, therefore, before the Judicature Act the Court of Queen's Bench or one of the Courts of common law would certainly have prevented either of those arbitrators from proceeding any further with the arbitration. It therefore seems to me that what the Master of the Rolls practically did in both those cases was to enjoin those particular arbitrators from proceeding further, and the legal effect of that was to remove them.

I will not enter upon the case of *Hedley* v. *Bates* (6), because it seems to me that it is one about which there has been much discussion, in which the Master of the Rolls himself has taken part, and one in which for once he does not appear to have expressed himself so as to make what he intended to say as clear as almost all his judgments are. *Hedley* v. *Bates* (6) has been explained twice over—namely, in *Stannard* v. *The Vestry of St. Giles, Camberwell* (7) and *The Great Western Railway Company* v. *The Waterford and Limerick Railway Company* (10).

The only case, therefore, which goes beyond my own inclination as to the construction of this section is the case of *Aslatt* v. *The Corporation of Southampton* (5); but it is not necessary to determine whether it was rightly decided or not. The *dicta* of Lord Justice James in *Day* v. *Brownrigg* (8) and of Lord Justice Thesiger in *Gaskin* v. *Balls* (9) are quite satisfactory, if it were necessary to rely upon authority for the proposition with which we have to deal. It may be said that the words "just or convenient" require some limitation; but I am inclined to put my judgment in terms which I think will convey more exactly what it is I mean to state. It seems to me that these words do not increase the power of any part of the High Court to such an extent as to alter the rights of parties, so far as to give a right to the one and a right against the other which did not exist at law before the Judicature Act was passed. Therefore there is nothing in the Judicature Act which enables any part of the High Court of Justice or any Judge of the High Court to issue an injunction in a case in which there was no legal right on the part of the one side and no liability on the part of the other at law or in equity before the Judicature Act. If we were to attempt to stop

(10) 50 Law J. Rep. Chanc. 513; Law Rep. 17 Ch. D. 493; but not reported on this point; see remarks of Jessel, M.R., in Law Rep. 20 Ch. D. at p. 197.

the appellants from proceeding with the arbitration, it seems to me that we should be putting upon them a burden, and that we should be giving to the respondents a right, neither of which existed either in equity or at common law before this statute. What we are asked to do, even if there be a power of election, is to take away that power and to restrain the appellants from exercising that power, and from proceeding, at their own risk and expense without any injury to anybody, in what is asserted to be, and what for the purposes of this judgment must be assumed to be, an entirely futile arbitration, and one which does not injure any one but themselves. For these reasons, it seems to me that the injunction now appealed against cannot be sustained, and that the appeal ought to be allowed.

COTTON, L.J.—Assuming that the decision of the Divisional Court that the subject-matter of the arbitration is a matter beyond the agreement to refer, and therefore was not within the powers of the arbitrator, is right, the Court had, in my opinion, no power to grant an injunction. The defendants are proceeding, I will assume, before a tribunal which has no jurisdiction to deal with the matter; and can it be said that such a proceeding is an interference with any legal right of the plaintiffs, or is a wrong which the law will regard? It is no doubt inconvenient for a person, even if there is no cause of action against him, to be brought before a competent tribunal; and it is very inconvenient to any one to be brought before a tribunal which has no jurisdiction, where he has to wait and say, either "Go on at your peril; remember, I will meet you hereafter when you seek to enforce your award," or "I will go on before the arbitrator, and try to satisfy him that he has no jurisdiction to proceed." That course would undoubtedly put the party in a somewhat inconvenient position; but the question is, Does it give this Court a right to interfere? It could hardly have been contended that prior to the Judicature Act any Court would in such a case have interfered by injunction to restrain a party from proceeding before the arbitrator; I therefore do not deal with that question. It was argued on behalf of the plaintiffs that the Judicature Acts, and especially section 25, sub-section 8, of the Judicature Act, 1873, had entirely altered the power of the Court in such matters, and that this section, even where there was no right which was previously capable of being enforced, had given power to the High Court to interfere by injunction. Great reliance was placed upon the first words of sub-section 8—"An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." It is remarkable, however, if it was intended by this sub-section to give the enormously increased power which has been contended for, that that which is relied upon is simply a direction as to what is to be done by an interlocutory order; and, in my opinion, that is a matter which cannot be disregarded when considering what was the intention of the Legislature. It is said that if an injunction can be granted by an interlocutory order, it can of course be granted by a final order at the hearing of the cause. That is quite true; but, since the section only refers to interlocutory orders, and not to final orders which are to be made at the hearing of the cause as a decree, is it not a *prima facie* presumption that this section does not give a right to the parties who before the Act had no legal right whatever, but simply gives the Court, when dealing with legal rights which are within their jurisdiction independently of this section, power, if they think it just or convenient, to superadd, to what would have previously been the remedy, a remedy by injunction? The section therefore does not in any way alter the rights of parties so as to give those who had no legal right before a right to go to any Court for an injunction; but simply says that the Courts may modify the principles upon which they have hitherto proceeded in granting injunctions, and that where there is a legal right which is sought to be protected, or an interference with which is complained of by the plaintiff, there the Court may depart from its old rules, which limited the cases in which injunctions would be granted, and may grant them, where it is just and convenient to do so, for the pur-

pose of protecting or ascertaining legal rights. That is, in my opinion, the real meaning of this section taken throughout, because undoubtedly the Court of Chancery,—although the principle upon which it interfered and protected rights until the final decision of the cause was by interlocutory order, or at the final decision by a final injunction, where the legal remedy would not be sufficient—formerly hampered itself by laying down the rule that in certain cases, although the legal right was being interfered with, it would not grant an injunction either interlocutory or at the trial. It is sufficient, however, to say that the Court of Chancery would not interfere to restrain a trespass either by interlocutory or by final order for an injunction where the legal remedy was sufficient, and would only interfere in cases where the Act was really one of trespass that was done under colour of title. In my opinion all that was done by this section was to give to the High Court, comprising what was formerly the Court of Chancery and the Courts of common law, power to act where some of these Courts did act before, and to exercise all the powers of the divisions of which the Court had previously consisted, and to give a remedy which they formerly would not in that particular case have given, but only a remedy in defence of or to enforce rights which, according to law previously existing, were capable of being enforced in some or one of the different Courts, which no longer exist, but which are now all united in the High Court. But it is the High Court which amalgamates or unites in itself all the jurisdictions which have previously existed, and undoubtedly in that sense a new jurisdiction is given to the Chancery Division now in matters with which the Court of Chancery never could have dealt, but which were dealt with by the Courts of common law dealing with legal rights where the Court of Chancery had no jurisdiction to interfere. In my opinion the general intention of the Judicature Act is this, that where there is a legal right capable of being enforced by action in the High Court either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction to protect that legal or equitable right, which, independently of the Act, could be made the subject of an action either at law or in equity. It has been said that a different interpretation has been put upon section 25, subsection 8, by the Master of the Rolls (Sir G. Jessel). But it seems to me that in no one case does the Master of the Rolls, although he sometimes uses larger language than probably he intended, lay down any principle contrary to that which I have stated is, in my opinion, the true principle of the Act. In *Beddow* v. *Beddow* (3) an injunction was granted to restrain an arbitrator from proceeding, and the Master of the Rolls does there use language which, at first sight, may look as if he thought this section of the Act had given a power to interfere where no Court formerly had power to grant any remedy. Even looking at what the Master of the Rolls there said, it is my opinion that he did not intend so to express himself, when you come to look at the case. What he said is this (at p. 93): "In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles." The meaning of that is that if there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, then, wherever the circumstances do not render it inconvenient or inadvisable to interfere, but render it convenient and advisable to do so, the Court may protect that right by giving the remedy which previously would not have been given—namely, a remedy by injunction. In *Beddow* v. *Beddow* (3), therefore, the Master of the Rolls did interfere where an arbitrator was acting corruptly in the exercise of his jurisdiction under the reference. As regards the case of *Aslatt* v. *The Corporation of Southampton* (5) I do not intend to express any opinion as to whether the Master of the Rolls was right or not. What the Master of the Rolls there proceeded upon was this, that he thought the plaintiff in that action had, independently of the Judicature Act, a legal right of action, and that being so, that

the Act enabled him, in order to do complete justice, to grant the injunction, for he says (at p. 147): "A further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth, that no such injunction was ever heard of formerly; and there was a very good reason for it—namely, that the Courts of common law which exercised jurisdiction over cases of this kind had no power to grant an injunction because the Act enabling them to do so was not passed until a very recent date, and therefore you could not have an injunction so far as the common law was concerned; nor was it the habit of the Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office." The Master of the Rolls there assumed that the plaintiff had a legal right to a remedy at law independently of the Act; and upon that ground he merely followed out what I think is the true principle—namely, that where there was independently of the Act a right which could be asserted either at law or in equity, then section 25, sub-section 8, provides that an injunction may be granted in all cases where it is right to do so in order to do effectual justice. In my opinion the Master of the Rolls did not, either in *Stannard* v. *The Vestry of St. Giles, Camberwell* (7), or in *Hedley* v. *Bates* (6), lay down any principle which interferes with what is, in my opinion, the true construction of the Act of Parliament. What his Lordship says is that in *Hedley* v. *Bates* (6) there was a right under the circumstances of the case before the Judicature Act to apply to a Court of common law for a prohibition, and that being so, as the parties were before him upon other grounds to decide the question with which it was said the magistrates had power to deal, he would, instead of sending the parties to get a prohibition, give them the remedy to which they had a right. I cannot see that the plaintiffs here have brought themselves within the principle which will entitle the Court to interfere upon the ground that the litigation is vexatious, because it is possible that the action may not be proceeded with, but that the defendants may wish to proceed with the arbitration which they had originally instituted, and not with the counter-claim which was commenced as a defence to the claim made by the plaintiffs in the action which was commenced after the dispute had by the desire of the defendants been referred to arbitration.

In my opinion, therefore, there is no ground for asking the Court to interfere in this case by injunction; and the appeal must therefore succeed.

Appeal allowed.

Solicitors—Paines, Layton & Pollock, for plaintiffs; Nelson, Barr & Nelson, for defendants.

1882. March 5, 6, 19. } BURTON AND COMPANY *v.* ENGLISH AND COMPANY.

Ship and Shipping—Charter-party—Carriage of Deck Cargo "at Merchant's Risk"—Loss by Jettison—General Average Contribution.

The plaintiffs chartered a vessel, of which the defendants were owners, to load a cargo of deals at Finnklippen, in Sweden, and deliver them in London. It was a term of the charter-party that "the vessel should be provided with a deck cargo, if required, at full freight, but at merchant's risk." A quantity of timber was loaded on the deck of the vessel, a portion of which was necessarily jettisoned and lost during the voyage in order to save the ship and the rest of the cargo. It was admitted that by reason of a custom to carry deck cargoes of timber on similar voyages, the plaintiffs were entitled to recover a general average contribution in respect of the jettison of the deck cargo, unless the defendants were protected by the terms of the charter-party:—Held, *that the defendants were so protected, and that the words "at merchant's risk" excluded any right on the part of the plaintiffs to have a loss by jettison of a portion of a deck cargo made good by general average contribution.*

Special Case stated by an arbitrator.

The plaintiffs are timber merchants,

carrying on business in London; the defendants are the owners of the steamship *Harvest*.

In June, 1881, the plaintiffs chartered the *Harvest* to load a cargo of wood goods at Finnklippen, in Sweden (in the Baltic), and proceed therewith to London (Surrey Commercial Docks), and there deliver the said cargo on being paid freight as in the said charter mentioned. The following is the material portion of the charter-party:—

"London, 24th June, 1881.

"It is this day mutually agreed between Messrs. English & Co., owners of the good steamship or vessel called the *Harvest* . . . . and Messrs. John Burton & Co., of London, merchants, that the said steamship or vessel, being tight, staunch and strong and every way fitted for the voyage, shall, with all convenient speed after discharge of present cargo, sail and proceed to Finnklippen (Luku district), having liberty to take outward cargo to any port or ports in the Baltic or North Sea, or direct, for owner's benefit, or as near thereunto as she may safely get, and there load, always afloat, from the factors of the said merchants, a full and complete cargo, not exceeding 480 standards of mill-sawn deals, and/or battens, with sufficient ends, eight feet and under, as required by captain for broken stowage only. The steamer to be provided with a deck load, if required, at full freight, but at merchant's risk, which they bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, fuel and furniture; and being so loaded shall therewith proceed to London (Surrey Commercial Docks), or as near thereunto as she may safely get and be always afloat, and deliver the same on being freight as follows: [*rates inserted*] in full of all ports' charges and pilotages, (the act of God, the Queen's enemies, fire, restraints of rulers and princes, and all and every other dangers and accidents of the seas, rivers and steam navigation, and to machinery or boilers, of whatever nature or kind, during the said voyage always mutually excepted) . . . . In case of average, same to be settled in accordance with the law and custom at Lloyd's . . . ."

The vessel duly proceeded to Finnklippen, and there loaded from the agents of the plaintiffs 37,518 pieces of redwood battens under deck, and at the request of the shipowner, made in pursuance of the stipulation in the said charter-party, the said agents also loaded 5,892 pieces of redwood battens on the deck of the ship, and the master of the ship signed a bill of lading for the whole of the said goods.

Pursuant to the stipulation in the margin of the said charter-party—"the master has liberty to load firewood or lathwood for steamer's benefit, also 250 to 300 tons iron as ballast"—the defendants entered into a charter-party with the New Gellivara Company, under which the New Gellivara Company shipped, and the said master took, on board the said ship under deck as ballast 300 tons of iron, for which he signed bills of lading.

It was proved by the plaintiffs that there is a custom or usage for ships carrying timber cargoes upon voyages from Finnklippen, and from other Baltic ports in the neighbourhood, to English ports and ports on the continent of Europe, to carry a deck cargo of timber upon such voyages, and that such custom existed at the time of the effecting of the charter-parties hereinbefore mentioned, and thence and until the arrival of the said ship in London upon the voyage in question in this action.

The vessel sailed on her voyage from Finnklippen to London with the said goods, and on the 12th of July, 1881, stranded, and was in danger of being lost; and, with a view to lighten her and get her off the ground, a part of the deck load of timber was necessarily jettisoned, and was lost; the vessel, being thus lightened, came off the ground and completed her voyage, and delivered the remainder of her cargo safely.

It is admitted that the said cargo was necessarily and properly jettisoned, and that such jettison was necessary to save ship and the rest of the cargo.

From the commencement of the said voyage and until its completion, the cargo of timber was and remained the property of the plaintiffs, and the cargo of iron was and remained the property of the New Gellivara Com-

pany acted as agents for the plaintiffs in the shipment of the said cargo of timber. Before shipment of any of the cargo, wood or iron, the New Gellivara Company were aware of the terms of the charter-party entered into between the plaintiffs and the defendants, and knew that the ship was to carry a deck load.

It was proved by the evidence of eminent average adjusters that it has been the practice of English average adjusters up to the present time, in cases where deck loads are carried under charter-parties or bills of lading providing that such deck loads shall be carried at merchant's risk, to exclude all claims by owners of such deck loads to have losses by jettison of such deck loads made good by general average contribution, and they act in such cases upon the construction which average adjusters put upon the above words, "at merchant's risk," contained in charter-parties and bills of lading. The practice of average adjusters on this and all other points is based upon what the adjusters believe to be English law. There is an association of adjusters at which points of practice are discussed and regulated, and whenever a decision of a competent Court of law is given upon any point affecting their practice, the association holds a meeting and alters their practice so as to accord with the law as laid down by the decision. This evidence was adduced by the defendants to shew the practice of average adjusters, and not (as expressly admitted) any custom at Lloyd's. The average adjusters called were unable to state, in the absence of papers or documents, whether they had been called upon to admit or exclude a claim for a jettisoned deck load, where such deck load had been shipped under a charter-party or bill of lading containing the exact words, "the steamer to be provided with a deck load, if required, at full freight, but at merchant's risk," but stated that, in their view, it was immaterial whether the goods were shipped on deck at the request of the charterer or shipowner. The evidence as to the practice of adjusters was produced by the defendants, and was objected to by the plaintiffs upon the ground that the legal right of the parties could not be affected by the practice of adjusters; that such practice could not amount to a custom; and, if it did, it was not shewn to be a custom at Lloyd's, and was consequently not within the charter-party. The evidence was admitted, subject to the opinion of the Court on its admissibility.

The plaintiffs contended that the value of so much of the deck load as was so jettisoned under the circumstances aforesaid must be made good in general average or contribution, and that they were entitled to recover from the defendants, as owners of the vessel, a general average contribution, or a contribution in respect of the said loss proportioned to the value of the said vessel and her freight. The defendants contended that no general average contribution or contribution of any sort was payable by them in respect of the said jettison of the said portion of the said deck load.

The question for the opinion of the Court was, whether the plaintiffs were, under the circumstances herein stated, entitled to recover a general average contribution, or a contribution, from the defendants.

Cohen, Q.C., and *Gorell Barnes*, for the plaintiffs. — The whole question of the plaintiffs' liability depends on the meaning to be attached to the words "at merchant's risk." A custom having been proved for ships to carry deck cargoes of timber, a right to general average would arise, unless the words "at merchant's risk" contained in the charter-party exclude such a claim being put forward on behalf of the plaintiffs. It is submitted that the term "at merchant's risk" has no reference to the liability to general average contribution. The clause of the charter-party in which the words "at merchant's risk" occur must be construed as meaning that the shipowner shall not be liable so far as relates to the carrying of goods; as regards the contract of carriage it is stipulated that the risk of carriage shall not be the risk of the shipowner, but of the shipper.

They cited on this point *Schmidt* v. *The Royal Mail Steamship Company* (1), *Crookes* v. *Allen* (2), *Wright* v. *Marwood*

(1) 45 Law J. Rep. Q.B. 646.

(2) 49 Law J. Rep. Q.B. 201; Law Rep. 5 Q.B. D. 38.

(3), and *Macauley* v. *The Furness Railway Company* (4).

With reference to the practice of average adjusters, it is contended that the adjusters have mistaken the law, and a practice which is erroneous and inconsistent in law cannot be permitted to acquire the force of law—*Attwood* v. *Sellar* (5).

Myburgh, Q.C. (*Webster, Q.C.*, with him), for the defendants.—It is contended that no claim for general average contribution can in this case arise against the shipowner. The construction contended for by the plaintiffs would give no meaning to the words "at merchant's risk," for the perils of the sea and other like risks are expressly excepted by the terms of the charter-party. It was necessary that express words should be used in the charter-party, in order to exclude a general average claim for the jettison of a deck cargo, since, by reason of the custom which prevailed to carry deck cargoes of timber on similar voyages, the shipowner would have been liable unless he took care to protect himself by the terms of the charter-party. Again, the Court will, in case of doubt, give weight to what has been the practice of average adjusters.

They cited *D'Arc* v. *The London and North Western Railway Company* (6) and *Hall* v. *The North Eastern Railway Company* (7).

Cohen replied, and cited *Stewart* v. *The Pacific Steamship Company* (8), *Birkley* v. *Presgrave* (9), and *Austin* v. *The Manchester, Sheffield and Lincolnshire Railway Company* (10).

Cur. adv. vult.

The judgment of the Court (Cave, J., and Day, J.) was (on March 19) delivered by

CAVE, J.—This is an action by the shipper against the shipowner to recover a general average contribution, or a contribution, for the jettison of a deck cargo of timber, and it is admitted that by reason of a custom to carry deck cargoes of timber on similar voyages the shipowner is liable, unless he is protected by the terms of the charter-party. That instrument provides that the ship shall load a full and complete cargo of deals at Finnklippen, and deliver them at the Surrey Commercial Docks, "the act of God, the Queen's enemies, fire, restraints of rulers and princes, and all and every other dangers and accidents of the seas, rivers and steam navigation, and to machinery or boilers, of whatever nature or kind, during the said voyage, always mutually excepted." The important stipulation is as follows: "the steamer to be provided with a deck load, if required, at full freight, but at merchant's risk." For the plaintiff it was contended that the words "at merchant's risk" had reference solely to the liability of the shipowner as carrier, and do not apply to a claim for general average contribution, which is not a risk to which the shipowner is exposed as carrier, but one to which he is exposed as owner of the ship in common with owners of the cargo; and in support of this contention *Schmidt* v. *the Royal Mail Steamship Company* (1) and *Crookes* v. *Allen* (2) were cited. In the former of those cases it was held that an exception in a bill of lading of "fire on board, and the consequences thereof," did not relieve the shipowner from liability to a general average contribution in respect of damage done to the cargo by pumping in water to extinguish a flame. In the latter case it was held that a condition in a bill of lading, "the shipowner or railway company are not to be liable for any damage done to any goods which is capable of being covered by insurance," did not exempt the shipowner from liability to contribute to a general average loss caused by the ship being scuttled on the occasion of a fire breaking out in the hold. In the former of those cases the exception of fire on board was inserted among other exceptions relieving the shipowner from liability as carrier; and in the latter case

(3) 50 Law J. Rep. Q.B. 643; Law Rep. 7 Q.B. D. 62.

(4) 42 Law J. Rep. Q.B. 4; Law Rep. 8 Q.B. 57.

(5) 48 Law J. Rep. Q.B. 465; Law Rep. 4 Q.B. D. 342.

(6) Law Rep. 9 C.P. 325.

(7) 44 Law J. Rep. Q.B. 164; Law Rep. 10 Q.B. 437.

(8) 42 Law J. Rep. Q.B. 84, 191; Law Rep. 8 Q.B. 88, 362.

(9) 1 East, 220.

(10) 10 Com. B. Rep. 454; 21 Law J. Rep. C.P. 179.

the carriage on board the ship and the carriage by railway were linked together, which went to shew that the exception was to apply to things for which a railway company would be liable in respect of carriage on land, which could not include general average contribution. Mr. Justice Lush however, who took part in the decision of both those cases, laid down the principle that the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities for general average, and that, unless the contrary appears, the words must be construed with reference to the contract to carry. It was contended for the plaintiffs that this principle must apply in the present case, and that as the words "at merchant's risk" are capable of being construed to refer to the negligence of the master and crew, they must be taken to have that meaning.

We do not think that Mr. Justice Lush meant to assert that the language of a bill of lading cannot be construed to apply to general average contribution if that is its more natural meaning. Undoubtedly the ordinary use of a bill of lading is to regulate the respective rights and liabilities of the shipowner and the shipper or his assigns; but there seems no reason why, if the shipowner desires to make any stipulation with regard to his liability or that of the other owners of cargo to general average contribution, he should not introduce it into a bill of lading. Even where the ship is put up as a general ship, and there is a custom to carry deck loads, there is no reason why a shipowner should not, with a view of getting a higher rate of freight from the owners of cargo below deck, stipulate with the owner of a deck cargo that he should make no claim for a general average contribution in respect of the jettison of the deck load, and such a stipulation, if made, would not unnaturally find its place in the bill of lading. What, then, is the natural meaning in this case of the words "at merchant's risk" in the charter-party? Mr. Cohen had some difficulty (looking at the exceptions which applied to the cargo below deck) in pointing out what were the additional matters intended to be covered by the words "at merchant's risk;" but ultimately he contended that it meant risk of loss by the negligence of the master and crew. But this would lead to the anomaly that the shipowner would be liable to general average contribution where, as here, the deck cargo was necessarily and properly jettisoned, but would be free from liability if it was unnecessarily or improperly jettisoned, which seems absurd.

By our law, agreeing in this respect with the law of most foreign countries, deck cargo jettisoned is not entitled to general average contribution, and the reason usually assigned is that it is a dangerous cargo, certain to be jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it, where cargo under hatches would not be. We have, however, introduced an exception to this general rule, where, as here, there is a custom in the trade to carry a deck cargo, although there is no such exception in the absence of such a custom, solely by reason that the cargo has been shipped on deck by agreement with the shipper—*Wright* v. *Marwood* (3).

If in interpreting the words "at merchant's risk" we are driven to choose, as Mr. Cohen seems to admit we are, between the risk of jettison and the risk of all kinds of negligence of the master and crew, we are of opinion that the former is the more natural meaning, and although the plaintiff is not bound by the practice of average adjusters, yet, in a matter of some doubt like this, we are fortified in our opinion by finding it to be in harmony with that practice.

If the plaintiff is not entitled to recover a general average contribution, we think it follows, from *Wright* v. *Marwood* (3), that he is not entitled to recover a contribution of any other kind.

Judgment for defendants.

Solicitors—Waltons, Bubb & Walton, for plaintiffs; H. C. Coote, agent for H. A. Adamson, North Shields, for defendants.

1883. March 17, 21. } HOPKINSON *v.* LOVERING.

Bankruptcy—Trustee—Notice to Disclaim Tenancy—Assignment by Trustee to Pauper — Sham Transaction — Liability for Rent.

A trustee in bankruptcy who is in possession of premises of which the bankrupt was tenant, and who, after notice to disclaim from the landlord, assigns the bankrupt's tenancy to a pauper, is not liable to pay rent in respect of such premises after the date of the assignment, although the jury find that the assignment was a sham transaction, not intended by the pauper to have the effect which it would appear on the face of it to have, and that the trustee knew that.

Further consideration.

Winslow, Q.C., and *J. L. Walton*, for the plaintiff.

Forbes, Q.C., and *Cyril Dodd*, for the defendant.

Cur. adv. vult.

DENMAN, J. (on March 21).—This was an action for two quarters' rent of certain shops and premises at Huddersfield let by the plaintiff to Platts & Midgley, as tenants from year to year, at a rent of 300*l.* per annum, and occupied by them as tenants from the 1st of October, 1877, until the 15th of March, 1882, when they filed their petition for liquidation. On the same day the defendant, an accountant in London, was appointed receiver, and took possession of the premises; and on the 5th of April he was appointed trustee. A distress for the rent due up to the last quarter-day (the 1st of January) had been put in on the 14th of March, which cleared the rent up to the 1st of January. The defendant continued to occupy the premises and carry on the business for some months, and paid the rent which fell due on the 31st of March on the 13th of June. On the 14th of June the plaintiff gave the defendant notice to disclaim the tenancy and not to sever the fixtures. The defendant did not disclaim, but remained in possession of the premises, and before the time within which he might have disclaimed, namely, on the 26th of June, executed what purported to be an assignment of the tenancy, as afterwards to be mentioned. Some dispute or difficulty arose with regard to the fixtures which seems to have created ill-will between the defendant and the plaintiff or his solicitors, and the defendant did not deny that he executed the assignment partly with the motive of annoying the plaintiff in consequence of the disputes between them. On the 26th of June the defendant, having made up his mind to assign the tenancy, gave a sovereign to one Garrett to become assignee. Garrett was a pauper, and the jury found that the assignment to him was a sham transaction, not intended by him to have the effect which it would appear on the face of it to have, and that the defendant must have known that. On this finding it was contended that I ought to give judgment for the plaintiff for the whole amount of the claim—namely, 150*l.*, being the rent due for the quarter ending the 1st of July and the 1st of November respectively (the action having been brought on the 2nd of November). The defendant's counsel admitted that, according to *The Swansea Bank* v. *Thomas* (1), he was liable to pay 65*l.*, which was agreed to be the apportioned amount of rent due down to the 26th of June, when the assignment to Garrett was executed; but contended that, notwithstanding the finding of the jury, the defendant had a perfect right to get rid of all further liability by assigning as he did, and that the finding of the jury was immaterial. In order to appreciate the effect of this finding it is necessary to state the way in which the question came to be left to the jury. At the end of the plaintiff's case, Mr. Waddy, for the plaintiff, suggested that certain questions should be asked. The first question suggested was, in substance, whether the defendant had abstained from disclaiming with the view of defeating the plaintiff's claim by assigning to a pauper. This was admitted to be the fact by Mr. Forbes for the defendant. Mr. Waddy then suggested another question, which was not exactly that which I ultimately put to the jury;

(1) 48 Law J. Rep. Exch. 344; Law Rep. 4 Ex. D. 94.

but before putting any question to the jury, Mr. Forbes called, as a witness for the defendant, his solicitor, Mr. Rookes, who swore that before Garrett executed the assignment he explained to him the liability he would incur, and that Garrett said he had nothing to lose, and executed the assignment, and took the key of the premises and gave a receipt for it; and that the defendant had never since occupied the premises. The assignment contained the words "subject to the rent reserved," and I left to the jury the question whether, looking at the liability to pay rent apparently contemplated by the assignment, and at Garrett's utter inability to pay a farthing, which must have been known to the defendant, they thought the assignment a real or a sham transaction; to which they gave the answer in the finding in question, saying that "they thought it a sham, not intended by Garrett to have the effect on the face of it, and that the defendant must have understood that."

I abstained, at Mr. Forbes' request, from giving judgment, in order that he might maintain his contention as to the rent claimed for the period after the 26th of June, the date of the assignment. The case was very ably argued before me on Saturday by Mr. Winslow and Mr. Walton for the plaintiff, and by Mr. Forbes and Mr. Dodd for the defendant.

Before proceeding further I must say that reading the finding of the jury with my note of what took place at the trial, I am now of opinion that it cannot be taken as meaning that the assignment was not understood by Garrett as being one which would make him liable, or as one different in effect to what it appeared to be, or such that he could have pleaded "*non est factum*," or avoided the assignment on the ground of fraud. All that it seems to me to amount to, is that Garrett, though he made himself liable as assignee to the rent, never intended to pay it, and knew that he never would; and that the defendant must have been aware of that. This, in effect, seems to me to be no more than a finding that the defendant assigned the term to Garrett knowing him to be a pauper, and to leave the question where it was upon Mr. Forbes' admission at the trial that the defendant had assigned to a pauper in order to escape from liability to the rent, and abstained from disclaiming with the view of defeating the plaintiff's claim to rent by assigning to a pauper.

On the argument on further consideration it was argued by Mr. Winslow for the plaintiff, that since the Bankruptcy Act, 1869, a completely new code of law has been created, and that if a trustee under notice to disclaim does not disclaim, he cannot get rid of his liability by assignment to a pauper; that the relief given to trustees is now confined to the modes pointed out by the statute, and that having neglected to avail himself of these he remains still tenant, liable to perform the terms of the tenancy. He cited several cases, but none of them I think support this contention. On the other hand I think it would be impossible so to hold without acting in violation of the principle laid down in every case in which the subject has been dealt with. In *Ex parte Llynvi Coal and Iron Company; in re Hide* (2), Lord Justice Mellish, after saying that "it is perfectly clear that section 23 only applies where there is a disclaimer," proceeds in language which assumes that a trustee may assign to an insolvent person. In *Ex parte Dressler; in re Solomon* (3), though there are expressions of Lord Justice Brett which seem to go the length of saying that if the trustee neglects to disclaim he must be liable to pay rent for the residue of the lease, I do not think those can be taken to mean that the old right to assign to another, and so destroy the privity of estate between him and the landlord which is the sole basis of his liability, is taken away. In Lord Justice Cotton's judgment in the same case, it is put thus, "The power not having been exercised by the trustees in the mode prescribed, they remain liable for the rent as they would have been under the old law." In the case of a contract, not of tenancy, but involving some other onerous obligation, the Court of Appeal held that the provisions of the Act have not altered the

(2) 41 Law J. Rep. Bankr. 5; Law Rep. 7 Ch. App. 34.

(3) 48 Law J. Rep. Bankr. 20; Law Rep. 9 Ch. D. 252.

state of the law affecting a bankrupt's contract unless the trustee disclaims—*In re Sneezum; ex parte Davis, per* Lord Justice Baggallay (4). Again, in *Wilson* v. *Wallani* (5), though the trustee was held liable for want of disclaimer, Mr. Justice Stephen, in his judgment, accepts the view (p. 162) that the principle of the cases since the statute of 1869 is "that the scope of section 23 is not to be extended by implication, and that the trustee is to have the same rights and liabilities as the assignee had before him, unless they are altered by express words." In *Titterton* v. *Cooper* (6) Lord Justice Cotton states the liability of the trustee as follows:—"Like every other assignee he becomes liable for the rent and for the performance of the covenants during the time that the lease is vested in him." In the very case of *The Swansea Bank* v. *Thomas* (1), relied upon by the plaintiff for his claim to the apportioned rent, it never appears to have been suggested that the assignment was invalid merely on the ground that since the Act disclaimer was the only mode of getting rid of the liability to the rent open to the trustee. On the whole I am of opinion that there is no ground for the contention that the Act of 1869 has deprived the trustee of the right to get rid of his liability to the rent and covenants of a lease by assigning it over at any time, even though he may not choose to avail himself of the right to disclaim after notice; nor can I find anything in the Act to prevent him from assigning merely because the notice may have been given and the time allowed for disclaiming not have elapsed at the time of assignment. But it was said this assignment was invalid because, independently of the statute, it was in law fraudulent and void as against the landlord. The case mainly relied upon was *Philpot* v. *Hoare* (7); but that case, when examined, appears to have proceeded, not upon the ground that an assignment to a pauper was void, but that the assignment relied upon was collusive in this sense, that the apparent assignee was merely to manage the property for the apparent assignor, who was to remain the real owner, and receive the profits. And the case is explained on that ground by Lord Hardwicke himself in a subsequent page (548) of the same volume of Atkyns, where he says, speaking of *Philpot* v. *Hoare* (7), "The great point there was that the party to whom the assignment was made, or pretended to have been made, acted really as an agent only for the assignor." The case is explained in the same way in *Onslow* v. *Corrie* (8).

Mr. Winslow and Mr. Walton were unable after all their research to cite any other case which bore the semblance of an authority that the mere fact of the assignee being a pauper would prevent an assignment from having the effect of destroying that privity of estate by which alone (as is well explained in *Paul* v. *Nurse* (9)) an assignee or trustee of a bankrupt becomes or remains liable to the rent or covenants of a lease. All the text-books lay it down to the contrary; and it is contrary to the general law which is laid down in numerous cases, that an assignment to a beggar is not fraudulent (see *Lekeux* v. *Nash* (10) and *Taylor* v. *Shum* (11)).

An attempt was made to shew that this assignment was bad, on the ground that the trustee was bound before assigning to have offered to surrender the term to the plaintiff; but I can nowhere find that the neglect to surrender has been held to estop the assignee or trustee from getting rid of the lease by assigning to another party, or to render him liable to rent accruing after he has destroyed the privity of estate in respect of which alone such liability exists.

For these reasons I am of opinion that, except as regards the 65*l.* (which it was admitted fell within the authority of *The Swansea Bank* v. *Thomas* (1)), the plaintiff cannot recover, inasmuch as his claim could only rest upon privity of estate,

(4) 45 Law J. Rep. Bankr. 137; Law Rep. 3 Ch. D. 476.
(5) 49 Law J. Rep. Exch. 437; Law Rep. 5 Ex. D. 155.
(6) 51 Law J. Rep. Q.B. 472; Law Rep. 9 Q.B. D. at p. 490.
(7) 2 Atk. 219.
(8) 2 Madd. 330, at p. 343.
(9) 8 B. & C. 486; 7 Law J. Rep. K.B. 12.
(10) 2 Str. 1220.
(11) 1 Bos. & P. 21.

Hopkinson v. *Lovering.*

which was destroyed by the assignment to Garrett of the 26th of June.

With regard to costs, I do not think that the case of *Parker* v. *McKenna* (12) has any application to the present case. The allegations of fraud in the present case are not charges of personal fraud, but merely in the nature of assertions that the facts to be proved amount in law to fraud. Inasmuch as the defendant up to the time of trial contested the whole claim, and paid nothing into Court, I think that the plaintiff is entitled to the general costs of the cause, and to the costs of the trial, so far as they were occasioned by the defendant putting him to the proof of the 65*l.*; but that the defendant is entitled to the costs so far as they are due to the proof of the assignment and the establishment of his non-liability for rent accruing after the 26th of June, and that the defendant is entitled to the costs of the argument on further consideration. I therefore give judgment for the plaintiff for 65*l.*, and that the costs be paid and borne by the parties respectively, as above explained.

Judgment for plaintiff.

Solicitors—Peace & Co., agents for Learoyd & Co., Huddersfield, for plaintiff; Rooks & Co., for defendant.

1883. March 9, 20. } MITCHELL *v.* THE DARLEY MAIN COLLIERY COMPANY.

Practice—Costs—Appeal as to Costs only—Inspection of Property on terms of bearing Costs of Inspection—Costs incident to Proceeding in High Court—Judicature Act, 1873, *s.* 49—*Order LII. rule* 3.

A Judge at chambers, on the application of the plaintiff for an order to inspect the defendant's property, made an order that plaintiff should have the inspection asked for, but that he should pay the costs of the inspection.

On appeal by the plaintiff to the Divisional Court against the terms so imposed:—

Held, *that the costs so dealt with by the learned Judge at chambers were costs incident to a proceeding in the High Court, which were by law left to his discretion; the matter therefore came within section* 49 *of the Judicature Act*, 1873, *and being an appeal as to costs only could not be entertained.*

In this case, which was an action between adjoining mine-owners, the plaintiff had applied at chambers for an order that he might inspect the defendants' mine. Hawkins, J., granted the application, and ordered inspection on the terms of the applicant paying the costs of the inspection.

The plaintiff appealed against the imposition of such terms.

Archibald, for the defendants, took the preliminary objection that it was an appeal as to costs only, and would not lie.

Bigham, for the plaintiff.—The plaintiff is entitled to his order on such terms as the Court think just. He might have refused it altogether on these terms, and he has a right to appeal against them as part of the order. These are not costs incident to a proceeding in the High Court; they are costs which will be incurred during the inspection of the mine. That is outside the action, and the inspection may furnish evidence for the action which will conclusively establish the plaintiff's case. In *Vicary* v. *The Great Northern Railway Company* (1) a similar objection might have been raised if it were sound; but the Court there do not suggest that a party is not entitled to question by appeal the right to impose on him such terms as to costs by anticipation.

[CAVE, J.—The question there was as to the power to make the order in the first instance. If there was jurisdiction then, it was admitted that there could be no appeal.]

The costs of doing something which the order directs may be done are not incidental to the order. It is submitted that the Judge had no power to deal beforehand with these costs.

(12) 44 Law J. Rep. Chanc. 425; Law Rep. 10 Ch. App. 96.

(1) 51 Law J. Rep. Q.B. 462; Law Rep. 9 Q.B. D. 168.

Archibald, in reply.—These are costs; and they arise upon the proceedings in the action: they are thus incident to them, and in the discretion of the Judge who is applied to to make an order in the course of the proceedings. The defendant's objection may also be supported by reference to Order LII. rule 3, which empowers a Judge to order inspection upon such terms as may seem just. If, therefore, he makes payment of costs a term, those costs under that rule are in his discretion by law, and cannot be the subject of appeal.

Cur. adv. vult.

The judgment of the Court (Cave, J., and Day, J.) was (on March 20th) delivered by

CAVE, J.—In this case a preliminary objection was taken by Mr. Archibald that the appeal was an appeal as to costs only from an order of a Judge at chambers in a matter where the costs are by law left to the discretion of the Judge.

The learned Judge made an order that the plaintiff should have inspection of the defendant's property, but ordered that the plaintiff should pay the costs of the inspection; and the question is, whether these costs are costs of or incident to a proceeding in the High Court.

We are of opinion that they are costs incident to a proceeding in the High Court. By Order LII. rule 3, a Judge may make an order for the inspection of any property on such terms as may seem just. Now it cannot be doubted that the application for the order, and the making of the order, are proceedings in the High Court, and it seems to follow that the costs of the inspection which is consequent upon the order of the Court, and which, but for that order, would not take place at all, are costs which are incident to a proceeding in the High Court. It was contended that the plaintiff was entitled to appeal in this case, on the ground that the liability to pay these costs was made a condition of the inspection; but that argument goes too far, for it would apply to an order to pay the costs of the application, which undoubtedly are costs of a proceeding. Moreover, the Judge must direct how the costs of inspection are to be paid, or they cannot be recovered by either party, and the construction contended for would give the plaintiff a right to appeal if he were ordered to pay the costs, but none to the defendant if he were ordered to pay them. It was also suggested in the course of the argument that a distinction might be drawn between costs incurred at the date of the order and the costs to be incurred subsequently; but it is every day's practice at chambers to deal with the costs of answering interrogatories or inspecting documents before answer or inspection; and it seems to us impossible to say that such costs are not incident to a proceeding in the High Court, and that such an order is not made by the Judge in the exercise of his discretion. We must consequently hold that the objection is fatal, and the appeal must be dismissed, with costs (2).

Appeal dismissed.

Solicitors—Singleton & Tattershall, for plaintiff; S. B. Somerville, agent for Baxters & Co., Doncaster, for defendants.

1883. March 7.

HAIGH AND OTHERS *v.* THE ROYAL MAIL STEAM PACKET COMPANY (LIMITED).

Carriers, Liability of—Ship—Tort—Injury and Death caused by Collision at Sea—Meaning of Words "Loss or Damage"—Passenger's Ticket.

The defendants, a steamship company, issued a passenger's ticket, which contained the following, among other conditions: "The company will not be responsible for any loss, damage or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers or for their loss of time or any consequence resulting therefrom . . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner":—Held, *that the*

(2) See *The Metropolitan Asylum District* v. *Hill*, 49 Law J. Rep. Q.B. 745 Law Rep. 6 App. Cas. 582.

words "loss or damage arising from the perils of the sea," as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants' servants.

This was a demurrer to a statement of defence.

The plaintiffs, as executors of Charles Schwind, deceased, sued for the benefit and on behalf of his wife and children for damages caused by the negligence of the defendants' servants on board the defendants' steamship *Douro*, whereby the said steamship, on which Charles Schwind was being carried as a passenger from Rio de Janeiro to Southampton, came into collision on the voyage with another ship, and was sunk, and the said Charles Schwind was thrown into the sea and drowned. The following were the important paragraphs of the statement of defence:—

"2. The defendants say that the deceased Charles Schwind was received by them to be carried from and to the places alleged upon certain terms and conditions, which terms and conditions, so far as material, were that the defendants would not be responsible for any loss or damage arising from the perils of the sea, or from any act, neglect or default whatsoever of the pilot, master or mariners."

"5. In the alternative the defendants say that if the death of the said deceased was a consequence of the said collision, it was a loss or damage arising from the matters and things excepted by the contract as hereinbefore stated, and one for which the defendants were by the terms of the said contract not responsible."

By agreement between the parties the above statement was to be taken as amended by setting out the terms of the passenger ticket given to the deceased by the defendants as a receipt for his passage-money. The material part of such terms was as follows:—

"Passengers not embarking after taking their passage will forfeit half the passage money.

"Passengers are to pay for whatever wines, spirits, malt liquors or mineral waters they may order.

"Each adult passenger is allowed to carry twenty cubic feet of luggage; above that quantity will be charged for. All specie, bullion, jewellery or other treasures carried by passengers must be shipped as treasure and paid for at the established rates of freight.

"Children paying half or quarter fees, or those conveyed free, are not to be allowed seats at the saloon table.

"The company will not be responsible for any loss, damage or detention of luggage, under any circumstances.

"All luggage will have to pass through the Customs House abroad, whether British or foreign, and must be distinctly labelled with the passenger's name and destination.

"The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence resulting therefrom, during any detention consequent upon the occurrence of any cause to prevent the vessels from meeting at the appointed places, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner; nor for any consequences arising from sanitary regulations or precautions which the company's officers or local government authorities may deem necessary, or should such sanitary regulations or precautions prevent embarkation or disembarkation.

"No person can be received on board the company's ships when suffering from any infectious disorder, and if in the course of the voyage any passenger should be found to be suffering from a disorder of that character, he will be required, at his own expense, to find accommodation at any port in which the vessel may happen to be at the time, or at the first port she may reach after the discovery of the existence of the disorder, it being understood that when sufficiently recovered, such passenger will be conveyed to his destination in one of the company's vessels.

"Any passenger is liable to a penalty of 100*l.* who carries gunpowder or other goods of a dangerous character (statute 17 & 18 Vict. c. 104)—for example, lucifer matches, chemicals or any articles of an inflammable or damaging nature.

"The steward's fee is charged in the passage-money.

"This ticket must be exhibited on board when required by the company's officers, and must be delivered up to the purser of the ship conveying passengers to their final destination."

A. Cohen, Q.C. (with him *A. T. Lawrence*), for the plaintiffs, in support of the demurrer.—The only question in this case is, whether a stipulation that the company will not be responsible for . . . . "any loss or damage arising from the perils of the sea . . . . or from any act, neglect or default whatsoever of the pilot, master or mariner," means, amongst other things, that the company shall not be responsible for loss of life. It is contended that the words "loss or damage" do not mean loss of life or injury to the person, but loss of property or damage to property, or pecuniary loss, such as may be sustained by a passenger—see *Smith* v. *Brown* (1) and *The Franconia Case* (2). At all events, the phrase being ambiguous, should be construed in the ordinary way against the person for whose protection it was introduced.

Charles Russell, Q.C. (with him *Phillimore*), for the defendants, was not called upon to argue.

CAVE, J.—I do not think we need call upon Mr. Russell. Looking at the terms of this ticket, I am not able myself to entertain any doubt at all that the words "any loss or damage arising from the perils of the sea," &c., are meant in this contract to include injury to life or limb. I do not know that one derives much assistance from considering what is the meaning to be attached to the words "loss or damage" when they occur under other circumstances, and are used with respect to a different subject-matter. One must confine oneself to the actual ticket in which the words occur and the collocation in which they are used; and when I find that there is a special provision with respect to loss, damage or detention of luggage, and that after that the notice goes on to deal with the relation of the company to the passengers, and, in the course of dealing with them, goes on to provide that the company will not be responsible for any "loss or damage" arising from the perils of the sea, &c., I am driven to the conclusion that that means injury to limb or life from the causes there enumerated. That being so, the defendants are entitled to have this demurrer overruled.

DAY, J.—I am of the same opinion.

Demurrer overruled.

(1) 40 Law J. Rep. Q.B. 214; Law Rep. 6 Q.B. 729.

(2) 46 Law J. Rep. Adm. 71; Law Rep. 2 P.D. 163.

Solicitors—C. W. Dommett, agent for Slater & Turnbull, Manchester, for plaintiffs; Wilson, Bristows & Carpmael, for defendants.

1883. March 3. } SVENSDEN *v.* WALLACE BROTHERS.

Ship and Shipping—General Average—Port of Refuge—Expenses of Warehousing and Reloading and Port Charges.

When a vessel goes into a port of refuge in consequence of an injury, whether such injury be the subject of general or of particular average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges in leaving the port, are the subject of general average.

Further consideration.

Cohen, Q.C., Russell, Q.C., and *H. D. Warr*, for the plaintiff.

Myburgh, Q.C., for the defendants.

LOPES, J.—The amount in dispute in this action is small—88*l.* 19*s.* 10*d.*; the principle involved is important. It is intended, as I understand, not only to raise a point not decided in the case of *Atwood* v. *Sellar* (1), but also to test the

(1) 49 Law J. Rep. Q.B. 515; Law Rep. 5 Q.B. D. 286.

propriety of the case of *Atwood* v. *Sellar* (1), decided in the Appeal Court.

The distinction between the present case and the case of *Atwood* v. *Sellar* (1) is this:—In *Atwood* v. *Sellar* (1) the vessel went into a port of refuge in consequence of an injury which was the subject of general average; in the present case, in consequence of an injury which was the subject of particular average.

It was determined by the case of *Atwood* v. *Sellar* (1), that when a vessel goes into a port of refuge in consequence of an injury to her which is the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges in leaving the port, are the subject of general average.

I am bound by the case of *Atwood* v. *Sellar* (1), and if in this case the vessel had gone into a port of refuge in consequence of an injury which was the subject of general average, I mean an act of voluntary sacrifice, I should have been bound to have given the plaintiff judgment for 88*l.* 19*s.* 10*d.*; for the only distinction between that case and the present is the injury which caused the respective vessels to seek a port of refuge.

I have now to determine whether there is any practical difference, so far as the incidence of expenses is concerned, between the case of a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of general average, and a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of particular average. I can see no practical distinction. The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo and freight; and I think every expense consequent upon it incurred to enable the ship afterwards to proceed safely on her voyage with her cargo, so as to earn her freight, is incurred for the common benefit of the adventure, and is chargeable to general average.

There are expressions in the judgments in *Atwood* v. *Sellar* (1), both in the Court below and the Appeal Court, which would seem to cover the point; they are, however, *obiter dicta*, and were not necessary for the decision of that case.

It seems to me that the point relied on by the defendants that the expenses of going out of port are not chargeable to general average, because the cargo is in safety when the port is reached, is unsustainable.

The cargo is in safety when the port is reached. Still it must be admitted that the expenses of unloading are general average expenses. Such an argument would be equally cogent whether the cause of putting into port was a general or particular average damage. In *Atwood* v. *Sellar* (1), however, it was held that the expenses of going out of port were general average expenses.

I am of opinion the plaintiff is entitled to judgment for 88*l.* 19*s.* 10*d.*, with interest in the usual way, and costs.

I have not thought it necessary to cite authorities. So far as the principle involved in *Atwood* v. *Sellar* (1) is concerned, the authorities are most exhaustively dealt with by Lord Justice Thesiger in his most able judgment in that case in the Appeal Court. With regard to the other question raised in this case, and not decided in *Atwood* v. *Sellar* (1), there is little authority to be found.

Judgment for plaintiff.

Solicitors—Field, Roscoe & Co., agents for Bateson & Co., Liverpool, for plaintiff; Waltons, Bubb & Walton, for defendants.

1883. April 10.

BENSCHOR *v.* COLEY.

Practice — Action — Trial — Leaving Party to move for Judgment—Divisional Court—Jurisdiction—Appellate Jurisdiction Act, 1876 (39 & 40 *Vict. c.* 59)—*Rules of the Supreme Court*, 1876 (*Order XXXVI. rule 22a, Order LVIIa.*).

Upon the trial of an action at Nisi Prius, the Judge may, if he think fit, at or after the trial, leave any party to move a Divisional Court for judgment, not-

withstanding the provisions of section 17 *of the Appellate Jurisdiction Act,* 1876, *and the Rules of the Supreme Court,* 1876, *Order XXXVI., rule* 22*a*, *Order LVIIa.*

This was an action tried at Guildhall, on the 15th of March, 1883, before Manisty, J., and a common jury, when a verdict was found in favour of the defendant. The learned Judge at the trial expressed a doubt whether any evidence had been adduced to support the verdict, and he accordingly left the defendant to move for judgment before a Divisional Court.

Finlay, Q.C. (*John F. Clerk* with him), on behalf of the defendant, now moved for judgment.

Edward Pollock, for the plaintiff.—This Court has no jurisdiction to entertain a motion of this kind. A motion for judgment must now be made before the Judge who tried the action—see the Appellate Jurisdiction Act, 1876, s. 17, Order XXXVI. rule 22*a*, and Order LVII*a*. (1). The effect of the above-named section and Orders is correctly stated by Mr. Wilson, in his third edition of the Judicature Acts (at page 327), to be as follows: —The Act of 1876, s. 17, enacts, "as a general rule, that proceedings in an action are to be taken before a single Judge, and proceedings subsequent to trial before the Judge who tries; leaving it to be settled by rules what matters might still be taken before Divisional Courts. The Rules of December, 1876, were framed to give effect to this enactment. They contain an enumeration of the matters to be taken before Divisional Courts; and motions for judgment are not among them. The above rule (Order XXXVI., rule 22*a*), one of those of the same group, accordingly prescribes the courses open to the Judge at the trial of an action. He may order judgment to be entered. He may adjourn the matter for further argument, which must take place before himself. He may leave the matter at large for either party to move for judgment as they think fit; in which case again the application must be made to the Judge himself. There is no longer any power to leave the decision of the case to a Divisional Court."

PER CURIAM (GROVE, J., and FIELD, J.). —We are of opinion that a Divisional Court has still jurisdiction to entertain a motion for judgment. The words "so far as is practicable and convenient," contained in section 17 of the Act of 1876, have been frequently interpreted as authorising a Judge to reserve such a motion for the determination of a Divisional Court.

Objection overruled (2).

Solicitors—Goldberg & Langdon, for plaintiff; Attenborough, for defendant.

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(1) By the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c 59), s. 17: "On and after the first day of December, 1876, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is hereinafter provided, shall, so far as is practicable and convenient, be heard, determined and disposed of before a single Judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order (except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal), shall, so far as is practicable and convenient, be had and taken before the Judge before whom the trial or hearing of the cause took place: Provided, nevertheless, that Divisional Courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by Rules of Court to be heard by a Divisional Court," &c. By Order XXXVI., rule 22*a* (rule 3 of the Rules of the Supreme Court, 1876): "Upon the trial of an action the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge." Order LVII*a*. specifies the various proceedings and matters to be heard and determined before Divisional Courts, and does not include motions for judgment among them.

(2) The case was then heard on its merits, and judgment entered for the defendant.

1883. April 3. } HUNNINGS *v.* WILLIAMSON.

Practice—Discovery—Action for Penalties—Rules of the Supreme Court, Order XXXI. rules 11, 12 *and* 13.

A plaintiff sought discovery from a defendant in an action for penalties:—Held, *that discovery could not be ordered.*

Application referred by Hawkins, J., at chambers, to the Court, to rescind a Master's order, requiring the defendant to make the ordinary affidavit as to documents. The action was an action for penalties under the Metropolis Management Act, 1855, s. 54, and the only question was, whether an order for discovery could be granted against a defendant in an action for penalties.

R. V. Williams, for the defendant.—It would have been altogether contrary to the settled practice to have ordered discovery in this case before the Judicature Acts—*Wigram on Discovery*, 2nd ed. p. 80, and *Hare on Discovery*, 2nd ed. p. 100. The order was therefore wrong.

He referred to *Lyell* v. *Kennedy* (1), and to the decision of Manisty, J., and Stephen, J., in this case (2), that the defendant could not be required to answer interrogatories.

Lumley Smith, Q.C. (*Edward Pollock* with him), for the plaintiff.—The decision of Manisty, J., and Stephen, J., was based on the judgment of the Court of Appeal in *Lyell* v. *Kennedy*, which has since been reversed in the House of Lords (1). It must be conceded that the plaintiff would not, before the Judicature Acts, have been assisted by a Court of equity. But the practice in equity before the Judicature Acts is not binding. A Court of equity before the Judicature Acts would not have granted discovery in aid of an action for a mere personal *tort*; but that rule no longer prevails since discovery is now granted in aid of an action for libel.

He referred to *Webb* v. *East* (3), *Fisher* v. *Owen* (4), *Parker* v. *Wells* (5) and *Bolckow* v. *Fisher* (6).

R. V. Williams was not heard in reply.

WILLIAMS, J.—I am of opinion that the order appealed from must be rescinded. I think the plaintiff is not entitled to discovery. Discovery in this case would be, as Mr. Lumley Smith admits, a novelty; and this novelty has not, I think, been introduced. The Judicature Acts and the Rules of Court have no such effect. The granting of discovery in such a case as this would, before the Judicature Acts, have been contrary, not only to the practice of the Courts, both of law and of equity, but also to the principles on which they acted; it would therefore be contrary to the practice now to be followed.

MATHEW, J.—I am of the same opinion. According to the practice before the Judicature Acts, discovery in such a case as the present would not have been allowed.

Order rescinded.

Solicitors—Angell, Imbert-Terry & Page, for plaintiff; Clapham & Fitch, for defendant.

(1) 52 Law J. Rep. Chanc. 385; Law Rep. 10 Q.B. D. 459.
(2) *Ante* (*nom. Hummings* v. *Williams*), 273.
(3) 49 Law J. Rep. Exch. 250; Law Rep. 5 Ex. D. 108.
(4) 47 Law J. Rep. Chanc. 681; Law Rep. 8 Ch. D. 645.
(5) Law Rep. 18 Ch. D. 477.
(6) *Ante*, p. 12; Law Rep. 10 Q.B. D. 168.

1883. Feb. 14. } HISCOCKS *v.* JERMONSON.

Industrial Schools Act, 1866 (29 *& 30 Vict. c.* 118), *s.* 14—*Industrial Schools Amendment Act*, 1880 (43 *& 44 Vict. c.* 15), *s.* 1.—*Child under fourteen "living in a house resided in or frequented by prostitutes for the purpose of prostitution"—Child living in such House with her Mother.*

[For the report of the above case, see 52 Law J. Rep. M.C. 42.]

1883. March 21. } DAVIS AND SON v. MORRIS.

Practice—Partnership—Action against Firm — Who included — Dissolution of Partners — Liability, how determined — Order IX. rule 6—*Order XVI. rule* 10—*Order XLII. rule* 8.

The operation of Order XVI. rule 10, *which enables any two or more persons liable as co-partners to be sued in the name of their firm, is not limited to the case of a partnership actually existing at the date of the writ.*

Where a plaintiff issues a writ against a number of persons in a firm name, and there have been two distinct partnerships carried on by different sets of individuals under the same firm name, and at the date of the action one of such partnerships has been dissolved and the other is subsisting, it is a question of fact which set of persons has been proceeded against under the name common to both.

The plaintiffs sought, under Order XLII. rule 8, *to issue execution against M., upon a judgment obtained by them against partners in the firm of H. & D., in respect of a sum due upon a bill of exchange. The bill upon which the action was brought was drawn by D., and was by him indorsed in the name of the firm at a time when M. was a partner and when the firm name was H. & D. M. had, however, ceased to be a member of the firm before the issuing of the writ, and was ignorant of the drawing and indorsing of the bill, which was a wholly unauthorised transaction and in no way connected with the partnership business:—*

Held, *that the right to include M. was not affected by the fact that he had ceased to be a partner at the date of the writ. But,* Held *also, that the facts disclosed an intention on the part of the plaintiffs to proceed against H. & D. only and to exclude M., and that as there was nothing in the rules to prevent proper effect being given to the plaintiffs' intentions and acts, M. was not a defendant in the action, and therefore not liable to execution upon the judgment.*

This was an action tried before Williams, J., without a jury, on the 6th and 7th of March. The facts and arguments are fully stated in the judgment.

Holl, Q.C., and *H. T. Atkinson*, for the plaintiffs.

Addison, Q.C., and *Kisch*, for the defendant.

Cur. adv. vult.

The following judgment was (on March 21) delivered by

WILLIAMS, J.—This is an issue, directed under Order XLII. rule 8, of the Judicature Rules, to try and determine the liability of the defendant, against whom the plaintiffs sought to issue execution upon a judgment obtained by them against partners in the firm name of "Harvey & Davids."

The issue was directed under the following circumstances:—

On the 23rd of March, 1881, the plaintiffs issued a writ of summons in the High Court of Justice, Queen's Bench Division, directed to "Harvey & Davids, of 117 Bishopsgate Street, in the city of London." The indorsement upon the writ was as follows:—

"The plaintiffs' claim is 220*l.* 3*s.* due on a bill of exchange."

"The following are the particulars:—

"March 21st, 1881.

"To amount due on a bill of exchange, dated 18 Nov., 1880, and payable four months after date, drawn by Francis Davids upon and accepted by R. T. Whorlow, and indorsed by Francis Davids to the defendants, and by them indorsed to the plaintiffs."

At the date of the writ two persons, namely, George Harvey and Francis Davids, carried on business in co-partnership as auctioneers and estate agents, under the firm name of "Harvey & Davids," at 117 Bishopsgate Street, in the city of London, and at that time they were the only partners in the firm. The writ was duly served upon one of the partners, Francis Davids, at 117 Bishopsgate Street, and the two partners duly appeared individually in their own names, as required by Order XII. rule 12, and the plaintiffs afterwards, upon the 29th of April, according to the provisions of Order XIV., signed final judgment against them in their firm name of "Har-

vey & Davids." The plaintiffs, failing to obtain satisfaction of the judgment from the said partners, applied under Order XLII. rule 8, for leave to issue execution against Frederick Ellis Morris, as a co-partner in the said firm of "Harvey & Davids"; and Morris having disputed his liability, it was ordered that his liability should be tried and determined by the present issue.

The issue was tried before me without a jury, in the Royal Courts of Justice, on the 6th and 7th days of March, 1883, when the following facts were either proved or admitted.

At and previously to the 1st of January, 1880, George Harvey and Francis Davids carried on business in co-partnership as auctioneers and estate agents, at 117 Bishopsgate Street, in the city of London, under the firm name of "Harvey & Davids." On the 1st of March, 1880, the defendant Morris joined the co-partnership, which, however, continued to be carried on in the firm name of "Harvey & Davids," down to the 31st of December, 1880, when the name was changed to "Harvey, Davids & Morris," under which firm name the three partners continued to carry on business until the 18th of March, 1881, on which day the partnership was dissolved by the retirement of Morris, under the circumstances presently stated.

The bill upon which the action was brought was drawn by Francis Davids in his own name, and was by him indorsed in the name of the firm "Harvey & Davids," in November, 1880, at a time when Morris was a partner in the firm, and when the firm name was "Harvey & Davids." By the terms of the deed of partnership, the partners were expressly forbidden to draw, accept or indorse bills in the name of the firm, and it was proved before me, and not seriously disputed, that as a matter of fact it was not necessary or incidental to the business of auctioneers and estate agents to draw or accept bills, and it was wholly contrary to their practice to do so. Morris was wholly ignorant of the drawing and indorsing of the bill, and the transaction was wholly unauthorised, and in no way whatever connected with the partnership business.

Morris having discovered in March, 1881, that his partners had committed a number of financial irregularities, including the drawing and indorsing the bill in question, took steps to withdraw from the co-partnership, and on the 18th of March it was dissolved by his retirement from it; the use of the firm name of "Harvey, Davids & Morris" was at the same time discontinued, and George Harvey and Francis Davids resumed business at the same place as partners under the firm name of "Harvey & Davids," and Morris commenced business in his own name as an auctioneer and estate agent, at 1 and 2 Poultry, in the city.

After the commencement of the action, as before stated, the plaintiffs' solicitors wrote to Morris the following letter:—

"London, 23rd of March, 1881.

"Sir,—We beg to inform you that the bill of exchange for 250*l.* drawn by Mr. Davids and accepted by Mr. Whorlow, and indorsed by Messrs. Harvey & Davids to our clients Messrs. J. Davis & Son, is returned dishonoured, and we have commenced proceedings against Mr. Whorlow and Messrs. Harvey & Davids to recover the amount thereof. In the event, however, of those proceedings proving abortive, our clients will have no alternative but to look to you for payment of the amount of the bill. We are, &c.,

"A. Abrahams & Co.

"To Mr. Morris, 1 & 2 Poultry."

To this letter Mr. Morris's solicitor sent the following reply:—

"London, 24th of March, 1881.

"Dear Sir,—Mr. F. C. Morris has sent me a copy of your letter of yesterday's date having reference to a bill for 250*l.* purported to be accepted by a Mr. Whorlow.

"If you should determine to proceed against my client upon that bill, please send me the writ, and I will undertake to appear. My client denies all liability thereon. Yours truly,

"E. G. Lawrence.

"A. Abrahams, Esq.,
"46 Bedford Row, W.C."

No reply was sent to this letter, nor was any other notice or intimation given to Morris of any proceedings having in fact been taken against him.

The defendants George Harvey and

Francis Davids having appeared individually in their own names, as before stated, the next step taken by the plaintiffs was an application under Order XIV. calling upon the defendants to shew cause why the plaintiffs should not be at liberty to sign judgment against them for the amount indorsed on the writ. The affidavit of the plaintiff Montague Davis in support of the summons was expressed in the following language:—

"George Harvey and Francis Davids (trading as Harvey & Davids), the above named defendants, are justly and truly indebted to us in the amount of the said bill, and I am advised and believe there is no defence to this action, and that the appearance has been entered solely for purpose of delay."

Upon this application an order was made on the 21st of April, 1881, whereby it was ordered that if the defendant Harvey paid into Court within a week the sum of 220*l.* 5*s.*, he should be at liberty to defend, but that if that sum should not be so paid, the plaintiffs should be at liberty to sign judgment against the said defendant Harvey for the amount indorsed upon the writ, and it was further ordered that the plaintiffs might sign final judgment against the defendant Davids for the said amount.

On the 29th of April, 1881, the defendant Harvey not having paid the money into Court, the plaintiffs signed judgment; and the form of the judgment, after reciting the order of the 21st of April in detail and the default of the defendant Harvey, ran in these words:—"It is this day adjudged that the plaintiffs recover against the said defendants 224*l.* 4*s.*, and costs to be taxed."

It is material to the present case to pause here for a moment to point out that, according to the grounds of decision in the recent case of *Jackson* v. *Litchfield & Sons* (1), it is doubtful whether the order of the 21st of April, ordering several judgments against each defendant individually, this being an action against a firm, was correctly made. In that case an action was brought against partners in their firm name of John Litchfield & Sons; the writ was duly served on one of the partners, George Litchfield, who made an affidavit that James Litchfield was one of the partners. All the partners, except James Litchfield, appeared individually in their own names, but no appearance was entered for James Litchfield. The plaintiff thereupon applied to have judgment against him for default of appearance, and his application was refused. There can be no doubt that it was properly refused, because had judgment been signed against James Litchfield personally, execution would have issued against him as a matter of course without leave, which, as he had not been served with the writ, and had not appeared, would have been opposed to every principle of law, and would have completely over-ridden the protection afforded to defendants in such a case by Order XLII., rule 8. The decision, however, is based not upon this, but upon the technical ground of procedure that the judgment must follow the writ, and that as the action was against the partners in the firm name there could be no other judgment against them, or any of them, than one in the firm name. Whether this view is correct may be doubted; but, for the present, I am bound to assume it is a correct exposition of the rule of practice.

The judgment in the present case having been signed in the manner and form before stated, the plaintiffs took out a summons for leave to proceed on the judgment by issuing execution against Frederick Ellis Morris, under Order XLII. rule 8, on the ground that he was liable under the judgment as a co-partner in the firm of "Harvey & Davids." The defendant Morris attended the summons and opposed it, disputing his liability; whereupon, on the 8th of November, 1882, the present issue was ordered to be tried.

The facts may be shortly summarised thus. During the year 1880, different persons at different times carried on business as partners under the same firm name of "Harvey & Davids." From the 1st of January to the 1st of March, 1880, the partners were George Harvey and Francis Davids; from the 1st of March to the 31st of December, 1880, the partners were George Harvey, Francis Davids and Frederick Ellis Morris. It was during

(1) 51 Law J. Rep. Q.B. 327; Law Rep. 8 Q.B. D. 474.

this period, and while the business was being still carried on in the firm name of "Harvey & Davids," that the bill in question was drawn, and afterwards indorsed in the firm name by the partner Davids. Neither the bill nor the transaction in connection with which it was negotiated had anything to do with the affairs of the partnership, and it was indorsed by Davids in the firm name without the authority, either express or implied, of the partnership, and without the knowledge or consent of the partner Morris, and the latter was in no way liable upon the bill, and had a perfectly good defence on the merits to any action that might have been brought against him upon it either in the firm name or otherwise; he was not therefore a person who could be properly described as a person liable upon the bill, or who could be sued with effect.

From the 1st of January, 1881, the three partners continued to carry on the business, but under the new firm name of "Harvey, Davids & Morris," until the 18th of March, 1881, when the partnership was dissolved by the retirement of Morris; after which the partners George Harvey and Francis Davids resumed business under the firm of "Harvey & Davids," at the same place, and Morris commenced business in his own name in Poultry. During this last period the action against "Harvey & Davids" was commenced, and prosecuted to judgment in the form already stated.

The issue to be determined is, whether the defendant Morris is liable to have execution issued against him upon the judgment against "Harvey & Davids," as being a co-partner in that firm. This question, it was stated in argument, depended upon the true construction of the Judicature Rules regulating the novel practice of suing partners in the name of their firm, and respecting which great differences of opinion are said to have been expressed by authorities of no less weight than the Lord Chancellor and Lords Justices Cotton and Brett.

The practice in question had in general no existence before the Judicature Acts. At common law if a plaintiff wished to proceed against a number of persons as defendants, he was in general bound to name each one individually in his writ, and to serve each one with a copy of the writ. This rule occasioned great inconvenience in certain cases, as, for example, in suing the numerous partners in banking and other large co-partnerships; and for the remedy of this inconvenience certain enactments were passed by which certain classes of defined co-partnerships became entitled to sue, and be sued, in the name of a registered public officer, as the representative of the whole body of co-partners—as examples, 7 Geo. 4. c. 46, relating to banking co-partnerships, and 7 Will. 4 & 1 Vict. c. 73, relating to co-partnerships under letters patent, and also a large number of private Acts regulating various trading co-partnerships, may be mentioned. In all these cases the proceedings were carried on in the name of a registered public officer, and a judgment so obtained against him was binding upon each one of the co-partners represented by him. In these cases, however, as in every case in which it was sought to proceed to execution against any one alleged to be liable upon the judgment, but who was not individually named upon the record, it was necessary for the plaintiff to take further steps against the particular individual in order to make him personally a party to the judicial proceedings before execution could issue against him, and this was in general done by a writ of *scire facias quare executionem non*, which called upon him to shew cause why the plaintiff should not be allowed by the Court to proceed to execution against him upon the judgment; and in these new proceedings it was competent for the defendant to dispute his liability upon the judgment. No difficulty or inconvenience was experienced in working this machinery in practice; but then it will be at once observed that under these statutes, by means of the machinery of registration, which included the name of the co-partnership, the names of the individual co-partners, and the dates of all changes in the partnership, and a variety of other details, and also by means of the introduction of substantial changes in the law of partnership liability, all difficulties as to which individual, past or present, partners were liable upon a judgment against a public officer, and to what

extent and in what order the liability of the partners could be enforced, were removed.

Apart from the cases within those particular enactments, the power and liability of co-partners to sue and be sued in their common or firm name as a single person was wholly unknown to the law before the Judicature Rules and Orders of 1873–5; and it becomes now necessary to see from the language of these rules what change has been made in the practice. Order XVI. rule 10, under the head of "Parties," provides as follows:—"Any two or more persons claiming or being liable as co-partners may sue or be sued in the name of their respective firms, if any; and any party to an action may in such case apply by summons to a Judge for a statement of the names of the persons who are co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Judge may direct."

Order IX., rule 6, under the head of "Service of Writ," provides:—"Where partners are sued in the name of their firm the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at the time of service the control or management of the partnership business there."

Order XII. rule 12, under the head of "Appearance," provides:—"Where partners are sued in the name of their firm they shall appear individually in their own names, but all subsequent proceedings shall nevertheless continue in the name of the firm."

Order XLII. rule 8, under the head of "Execution," provides:—"Where a judgment is against partners in the name of the firm, execution may issue in manner following—(*a*) against any property of the partners as such; (*b*) against any person who has admitted on the pleadings that he is or has been adjudged to be a partner; (*c*) against any person who has been served as a partner with the writ of summons and has failed to appear. If the party who has obtained judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to a Court or Judge for leave to do so, and the Court or Judge may give such leave, if the liability be not disputed; or if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried or determined."

The question which is said to arise in the present case upon the construction of these rules is thus stated:—Suppose an action to be brought against several persons sued in a firm name, and it turns out that at different times the firm or partnership has been differently constituted, and that it was differently constituted at the time when the contract sued upon was entered into to what it was when the action was brought, the firm name continuing the same throughout—in such a case is the action to be considered as an action brought against the persons who were the partners carrying on business at the date of action brought, or against the persons who carried on the business at the date of the incurring the obligation sued upon? The question was raised and discussed, but not finally decided, in *Ex parte Young* (2). In that case a debtor's summons had been issued under the Bankruptcy Act, 1869, against Young, upon a judgment signed against a firm of "Griffin, Young, Burbridge & Young," in which it was said that he was a partner. Young applied to the Court to have the summons dismissed, on the ground that, although he had been a partner, yet before the action was commenced the partnership had been dissolved by his retirement from the firm, that the remaining partners continued to carry on the business in the old name, and that he had had no notice of any action having been brought until the present summons was served upon him. To this the creditor replied that the claim in respect of which the action had been brought against the firm had accrued before the dissolution, and during the time that Young was a partner. The Chief Judge in Bankruptcy refused to dismiss the summons, and Young appealed. The appeal was heard before the Lord Chancellor and Lords Justices Cotton and Brett. Lord Justice Brett was of opinion that

(2) 51 Law J. Rep. Chanc. 141; Law Rep. 19 Ch. D. 124.

the debtor's summons was well founded upon the judgment, and ought not to have been dismissed. He was of opinion that the action against the partners in the firm name included Young as a defendant, on the ground that he was a partner in the firm at the time that the liability sued upon was created. He based his opinion upon the particular language of Order XVI. rule 10, which says, not that a firm may be sued, but "two or more persons liable as co-partners may be sued in the name of their firm, if any"—from which language he considers that the rule defines the persons sued in the firm name as being those persons who were liable as co-partners at the time the liability was incurred, and who alone could be said to be liable as co-partners, and who alone could be sued with effect for the claim sought to be enforced.

Lord Justice Cotton, on the other hand, expressed the opinion that the judgment could not be considered as one against Young, and thought that, according to the true construction of the rule, those persons only could be sued in the firm name who were carrying on business and were using that name at the time the action was brought. He arrived at this conclusion from a consideration of the special machinery provided for the service of the writ, and the conduct of the subsequent proceedings in actions against persons in their firm name. The Lord Chancellor agreed with Lord Justice Cotton in dismissing the summons; but he placed his judgment upon the ground that in any view a judgment against persons in a firm name was not a good debt upon which to found a debtor's summons against an individual who up to that time had not been made personally a party to the proceedings; and he considered it neither necessary nor desirable in that form of proceeding to determine the question raised as to the construction of the rules.

Now, it appears to me that, without questioning for the moment the correctness of either the one or the other of the opposite opinions of the Lords Justices as applied to the particular facts of *Young's Case* (2), it may well be considered that neither view presents, as indeed neither professes to present, a full and exhaustive interpretation of the rules as they have to be applied to a different state of facts.

Order XVI. is expressed in somewhat general and ambiguous language, and it seems to me that those who framed the rules had in contemplation nothing beyond the simple proposition of several persons carrying on business as co-partners in a firm name, whom it was desired to sue in the convenient form of their collective name in respect of some co-partnership liability, and that they did not specifically contemplate cases complicated by changes in the constitution of the partnership or otherwise. It becomes necessary, however, in the present case, as in many others, to interpret the language of an enactment in its application to facts which were not present to the minds of those who framed the law.

It certainly seems reasonable and convenient, where several persons are carrying on business as co-partners at a particular place in a firm name, that a writ should issue against them in their firm name, and should be well served upon all the co-partners by service upon one of them, or upon their manager, at their principal place of business, because it would be fair to assume in general that each would do his duty, and, doing so, that each of the co-partners would in due course receive notice of the proceeding, and have an opportunity of defending himself. It becomes, however, a widely different affair when you have to deal with the cases of co-partnerships which have been dissolved, and in which changes have taken place by the retirement of former partners and the introduction of new ones, and possibly changes in the situation of the place of business, and where little or nothing remains unchanged beyond the old firm name; to many of such cases it certainly does seem to me that the new machinery in its present crude form is very ill suited and highly calculated to lead to confusion and injustice.

Lord Justice Cotton considers that where an action has been brought against persons in a firm name, it must be considered as an action against the existing partners in the firm, because, in his view, it is against them alone that the rules authorise an action to be brought in that

form. Lord Justice Brett applies an entirely different test, considering that, according to the true construction of the rule, the right to sue in this form is not limited to the case of existing partnerships, but extends in terms to any case where persons carrying on business as co-partners have contracted a liability; and he points to the language of the rule, which declares, not that a partnership, which might mean an existing partnership, may be sued, but that, "any two or more persons being liable as co-partners may be sued in their firm name, if any," which certainly does not in terms limit the use of this form of proceeding to the cases of persons actually carrying on business as partners at the time of action brought. Upon this point, judging from the language used in *Young's Case* (2), especially from that of the Lord Chancellor, a contention was put forward on the part of Young which ought to be noticed, and it was this—that partners cease upon a dissolution of partnership to be liable as co-partners upon debts contracted during the continuance of the partnership. This contention seems to me to be wholly untenable. The liability of partners as such is nothing more than the liability of co-contractors, and rests upon the principle of agency, each partner having a certain implied power to bind the others; and it is impossible to say that the mere dissolution of the partnership and the determination of this implied power absolves the partners from obligations already incurred, or deprives the partners of the implied power of binding each other in carrying out and fulfilling partnership obligations still in dependence at the date of dissolution.

If, however, what was meant by the contention was that by the dissolution the partners were deprived of the power of accepting service of a writ for their co-partners, it is altogether inapplicable, because partners as such have no such power even during the continuance of the partnership. It appears to me that the words "two or more persons liable," as used in the rule, are words of mere description, referring to the persons whom a plaintiff seeks to sue and make liable, and that they cannot be treated as words of definition intended to determine by the test of liability what persons are to be regarded as the defendants, in case an action has been brought against a number of individuals sued in a collective name. It must not be lost sight of that the question in these cases is, whether a particular individual is or is not a defendant in an action brought against a number of persons in a collective or firm name, and it would certainly produce some curious consequences in certain cases if this is to be determined by the simple test of liability as a co-partner in respect of the cause of action sued upon. It is scarcely necessary to point out that a person may have been a member of a co-partnership at the date of an obligation alleged to be binding upon the firm, and yet that he may not be liable as a co-partner, or at all. May it, however, be said that the words "liable as a co-partner," when used in this way as a test, mean "liable, assuming that there is a partnership liability"? This, however, is a variation of the language, and does not follow the words of the rule upon which so much stress is laid, and is not, I think, an admissible interpretation. In the present case the defendant Morris was certainly not a partner in the firm of "Harvey & Davids" at the time the action was brought against that firm; therefore, according to one construction of the rule, he was not a defendant in that action and not liable upon the judgment, and therefore not liable to have execution issued against him. But it is equally clear that, although he was at one time a partner in the firm of "Harvey & Davids," and also at the time when one of the partners, assuming to act with the partnership authority and in the partnership name, incurred the obligation upon which the action was brought, yet, to follow the words of the rule, he was not a "person liable as a co-partner," and therefore, according to another construction of the rule, he was not a defendant, and therefore not liable to execution on the judgment. Therefore, *quacunque via*, the defendant would not be liable to the execution. It appears to me, however, that, according to the true construction of the rule, the words, "two or more persons being liable as co-partners may be sued," &c., are, as I said before, mere words of description, and that

the rule confers upon a plaintiff, if he desires to sue several persons whom he seeks to charge jointly as co-partners, the right and option of suing them in the collective name, if they have been in the habit of using such a name, and that this right is not limited by any words in the rule, or by necessary implication from the language, to the case of a partnership actually existing at the date of the writ. It may be that in certain cases, after a dissolution of partnership, a plaintiff may find it very difficult, and perhaps impossible to serve the writ, so as to avoid future embarrassments. But when a plaintiff issues a writ against a number of persons in a firm name, and there have been, as in the present case, two distinct partnerships carried on by different sets of individuals under the same firm name, and at the date of the action one of such partnerships has been dissolved and the other is subsisting, then, in my opinion, it becomes a question of fact which set of persons has been proceeded against under the name common to both.

In the present case, when the plaintiffs brought their action against "Harvey & Davids," were they proceeding against George Harvey and Francis Davids only, or were they proceeding against George Harvey, Francis Davids and Frederick Ellis Morris? Now, in the first place, whatever doubts may exist as to the right of the plaintiffs to sue the three partners in the early name of their dissolved partnership, no one can doubt their right to sue the two persons George Harvey and Francis Davids in their newly adopted style, and not the less so because it was the ancient firm name in use when there were other partners in the firm. The only question then is, did they do so, or did they sue the firm as formerly constituted? To which conclusion do the facts point? In my opinion the facts shew that they intended to sue the two partners in the existing firm. Then, is there anything in the language of the rules themselves, or any single fact in the case, which forbids this conclusion and requires the action to be necessarily regarded as having been brought against the former partners? I own I can see nothing. It was clearly competent to the plaintiffs to sue the two partners exclusively in the form which they adopted; it was clearly their intention to do so; every step in the action shews that they in fact did so, and that they excluded Morris; and there is nothing in the law or in these rules to prevent proper effect being given to their intention and their acts, and any other conclusion would, in my opinion, be contrary to the law and the facts and the justice of the case.

Morris was therefore not a defendant in this action, and not liable to execution upon the judgment.

Assuming, however, this conclusion to be erroneous, and that, according to the correct interpretation of the rules and a correct application of them to the present facts, Morris was made a defendant in the original action and was bound by the judgment, there is still a further view, according to which the plaintiffs ought not to be allowed to issue execution against him, and it is this: assuming that the judgment is one binding upon the defendant Morris so long as it stands, it ought, in my opinion, to be set aside altogether, upon the ground that the plaintiffs by their conduct misled the defendant, and by causing him to believe that no action had been brought against him, induced him to abstain from taking proper steps to defend himself, as he might and could have done, successfully, if he had not been so misled by them.

The only doubt that I entertain upon this point is, whether it can be made available upon the trial of this issue, and whether the trial of the issue ought not to proceed upon the footing of the judgment being valid and unimpeachable. I think, however, the point is open to the defendant, and it will be found, according to the old practice in *scire facias*, that although it was not competent in general for a defendant to plead in the *scire facias* matter of defence to the original action, yet it was competent for him to shew that the judgment had been obtained by collusion between the plaintiff and the nominal defendant, or to shew that as to some of the causes of action included in the judgment he personally was not liable.—See *Phillipson, Earl of Egremont's Case* (3),

(3) 6 Q.B. Rep. 587; 14 Law J. Rep. Q.B. 25.

Fowler v. *Rickerby* (4), *Harvey* v. *Scott* (5) and *Dodgson* v. *Scott* (6).

I find the issue, therefore, in favour of the defendant, and I state the foregoing facts as a special finding and verdict for the purpose of disposing of the plaintiffs' pending summons for leave to issue execution (7).

Judgment for defendant.

Solicitors—A. Abrahams, for plaintiffs; Lawrence & Son, for defendant.

[IN THE COURT OF APPEAL.]

1883. May 10. } MUNSTER *v.* RAILTON.*

Practice—Action against a Firm—Appearance by one Member of Firm only—Judgment against that Member—Application to amend Judgment and issue Execution against another Member—Rules of Court, Order XVI. rules 10 *and* 10*a*, *Order XLII. rule* 8.

The plaintiff issued a writ against R. J. R. & Co.; the appearance was entered for R. J. R., trading as R. J. R. & Co.; the statement of claim was entitled R., sued as R. J. R. & Co., and described him as the sole defendant. At the trial a verdict was taken for the plaintiff by consent, and judgment was entered by consent for the plaintiff against R. J. R., sued as R. J. R. & Co. The plaintiff then discovered that C. had been a member of the firm of R. J. R. & Co., and obtained an order from the Queen's Bench Division amending the proceedings by striking out the words "R. J. R., sued as," and for the trial of an issue between the plaintiff and C., to try whether C. was liable to have execution issued against him upon the judgment so entered up:—Held, *reversing the judgment of the Queen's Bench Division, that the order ought not to be made; that the plaintiff had elected to proceed against R. J. R. as an individual, and had not proceeded under the provisions of the Rules of Court with respect to suing partners in the name of their firm; and that the trial having been conducted against and the judgment having been entered against a single defendant, the judgment ought not to be altered so as to include C., who was not at any time a party to the action.*

Appeal by R. Cox from an order of the Queen's Bench Division amending a judgment entered in the action of *Munster* v. *R. J. Railton and Company.* The action was brought for a libel, published in a newspaper owned and published by R. J. Railton & Co. The writ, dated the 1st of February, 1882, was entitled between "Henry Munster, plaintiff, and R. J. Railton & Co., defendants," and was served on R. J. Railton, at Duke Street, Brighton, the place of business of R. J. Railton & Co. There was no service upon any one else. The appearance was for "Richard Johnson Railton, trading as R. J. Railton & Co., the defendant in this action." The statement of claim stated in the first paragraph that Richard Johnson Railton was the sole defendant.

The action came on for trial before Hawkins, J., and a special jury, when the jury found by consent a verdict for the plaintiff for 40*s.*, and the Judge by consent ordered judgment to be entered for the plaintiff for 40*s.*, with costs to be taxed as between solicitor and client. This judgment was entitled "between Henry Munster, plaintiff, and Richard Johnson Railton, sued as R. J. Railton & Co., defendant."

The plaintiff having subsequently discovered that Richard Cox had been a member of the firm, though it appeared that a memorandum for the dissolution of the partnership had been signed in January, 1882, after the publication of the libel complained of, but before the issue of the writ on the 1st of February, 1882, applied for an order to amend the judgment and the pleadings if necessary by striking out the words "R. J. Railton, sued as R. J. Railton & Co.," so as to make the record correspond with the writ of summons, and that thereupon the plain-

(4) 2 Mac. & G. 760; 3 Sc. N.R. 138; 10 Law J. Rep. C.P. 149.
(5) 11 Q.B. Rep. 92; 17 Law J. Rep. Q.B. 9.
(6) 2 Exch. Rep. 457; 17 Law J. Rep. Exch. 321.
(7) See the next case.
* *Coram* Cotton, L.J., and Bowen, L.J.

tiff should be at liberty to issue execution upon such judgment against Richard Cox as partner in the firm of R. J. Railton & Co.

The Master and the Judge at chambers refused to make the order; but the Divisional Court ordered that the proceedings be amended by striking out the words "Richard Johnson Railton, sued as," and ordered that the parties should proceed to the trial of an issue in the High Court of Justice, in which Henry Munster should be plaintiff and Cox defendant, and that the question to be tried should be whether Cox was liable to have execution issued against him upon the judgment as entered up.

Cox appealed.

W. Willis, Q.C., and *F. C. Gore*, for the appellant.—The plaintiff having elected to proceed against the defendant as an individual, and having taken satisfaction by consent from that individual, cannot now have judgment against any one but that individual. The writ was addressed to the firm. The plaintiff could have obtained the names of the partners in the firm under Order XVI. rule 10, but he did not do so. The writ must be construed by the statement of claim, and this makes it clear that the plaintiff did not proceed under the special provisions of the Rules of Court with regard to partners. Reliance is placed by the defendant on *Jackson* v. *Litchfield* (1), and it is said that the judgment must accord with the writ. That may be so where no pleadings have intervened, where, as in *Jackson* v. *Litchfield* (1), there has been no statement of claim; but that is not so in such a case as the present, for it is settled practice that if the statement of claim is amended it is not necessary to amend the writ. This is an attempt to get judgment against a person who is not charged in the pleadings as a defendant, against whom nothing was proved at the trial, who was never served, and who is in fact a stranger to the action.

Kendall v. *Hamilton* (2) was cited.

Woollet, H. T. Atkinson and *D. H. Coghill*, for the plaintiff.—The conduct of Cox was such as to mislead the plaintiff, and the Court will alter the judgment if there has been fraud on the part of Cox or the defendant Railton, or even if they have so acted as to mislead the plaintiff. This libel was published in a paper owned and published by Railton & Co., in which Cox was once, if he is not now, a partner. If Cox is not really liable he will not be injured by an issue directed under Order XLII. rule 8. It is admitted that Cox introduced the defendant Railton to his solicitor, that he was present at the trial, and that he knew all that was going on.

Ex parte Young (3) and *Davis* v. *Morris* (4) were cited.

COTTON, L.J.—This is an appeal from an order of the Divisional Court, by which a judgment signed against "R. J. Railton, sued as R. J. Railton & Co.," was amended by making it a judgment against R. J. Railton & Co. The object of this amendment was to make Cox, who was at one time a partner in the firm of R. J. Railton & Co., liable to the consequences of the judgment. The action was begun in February, 1882, in a form which did not exist before the Judicature Act came into force—that is to say, it was brought pursuant to the provisions of Order XVI. rule 10, against R. J. Railton & Co., that is, against a firm in the firm name. Cox was at one time in partnership with the defendant Railton; but it appears that in January, 1882, a deed was entered into, or a memorandum drawn up, dissolving that partnership. It has been decided in *Jackson* v. *Litchfield* (1) that where a writ has been issued against a firm, if one of the partners makes default in appearing to the writ, judgment cannot be separately entered against that individual partner, but that judgment must be against the firm, and then execution must issue according to the provisions of Order XLII. rule 8. In the present case the writ addressed to R. J. Railton & Co. was served on R. J. Railton, and he appeared as R. J. Railton, trading as R. J. Railton & Co. The plaintiff then assumed that the

(1) 51 Law J. Rep. Q.B. 327; Law Rep. 8 Q.B. D. 474.

(2) 48 Law J. Rep. C.P. 705; Law Rep. 4 App. Cas. 504.

(3) 51 Law J. Rep. Chanc. 141; Law Rep. 19 Ch. D. 124.

(4) *Ante*, p. 401; Law Rep. 10 Q.B. D. 436.

defendant had no partner, and without making any enquiry he continued the proceedings against Railton as an individual. The statement of claim stated that Railton was the sole defendant, and the plaintiff did not follow the provisions of the Judicature Act, but obtained judgment against R. J. Railton as an individual. The Divisional Court has amended that judgment so as to enable the plaintiff to proceed under Order XLII. rule 8, and thus to obtain execution against Cox as a member of the firm by which the *tort* was committed. Cox objects to this, and I am of opinion that we ought not so to amend the judgment. If the plaintiff had proceeded with his action, in accordance with the provisions of the Rules of Court relating to proceedings against firms, then he could have obtained judgment against the firm, and afterwards he could have proceeded, under Order XLII. rule 8, against any one who was liable as a member of the firm. But the plaintiff, who has not proceeded under those Rules of Court, cannot now seek to take the benefit of them; he has elected to proceed against the defendant as an individual, he has taken by consent from that individual a judgment for 40*s.*, and costs as against an individual; and I think that he cannot take the benefit of the trial against the individual, and then seek to bring in some one else as a person liable under the judgment so obtained. It has been said that there was deceitful conduct on the part of Cox which misled the plaintiff. I am not satisfied that this allegation can be substantiated; but even assuming that it could be, still the plaintiff would then only be entitled to ask to have the proceedings set aside, and to have a new trial. It is too late when the action has been tried out for the plaintiff to ask to have the benefit of the judgment obtained on that trial enforced against different persons who were not parties to that trial. In allowing this appeal I do not consider that we are in any way going contrary to the decision in *Jackson* v. *Litchfield* (1).

BOWEN, L.J.—I am of opinion that this appeal must succeed. To those who do not consider the matter carefully it might appear that this judgment is technical in a high degree; but if the matter be looked into, it will be seen that we are only technical in the sense that we are abiding by sound definite rules, to disregard which would be to administer what may be called Oriental justice. This action was begun against the firm; but at a given moment the plaintiff made it, by his own election, an action against an individual. The trial was had as between the plaintiff and an individual, the judgment was against an individual, and then the plaintiff attempted to proceed, under certain rules made under the Judicature Act, not to amend the judgment, but to alter the judgment which had been properly signed against an individual, and he attempted to convert it into a judgment against the firm, so that he might thereby bind a person against whom his action was not brought.

To the action thus begun against the firm, R. J. Railton appeared, not as an individual, nor exactly in the firm's name. The writ was served at the place of business of Railton & Co., and so far it might be a service on the firm.

Order IX. of the Rules of Court provides by rules 6 and 6*a* for service of writs on partners sued in the name of their firm, and if those rules are followed, and if Order XII. rule 12, is complied with, then all the subsequent proceedings continue in the name of the firm, and the action is then to be against the firm, under the provisions of those rules which first gave this mode of suing a firm.

R. J. Railton in this case entered an appearance to this writ, as though he were the sole person in the firm; if there then was any other member of the firm, that may be said to be delusive, and it may be said that he thus led the plaintiff off the scent and caused him to pursue a wrong track, the consequence of which was that the plaintiff converted his action into an action against the individual called R. J. Railton, and proceeded against him, and not against the firm, and from that moment the action ceased to be an action against the firm. The writ could, if it had been necessary, have been amended at any time; but this was not necessary, because the statement of claim is really the vital thing—the writ is needed to bring the parties before the Court; but

when the statement of claim is delivered, then the writ can, if necessary, be read by the light afforded by the statement of claim.

The trial then came on, and it is clear that Cox shewed an interest in the progress of the action and in the conduct of the trial; he introduced the defendant to his solicitor, it may be he supplied funds; but that does not make him a defendant. The trial was a trial of an action against Railton; it was Railton who gave the consent to the verdict. Yet the plaintiff asks this Court, not to open the proceedings by undoing all that has been done since the time when he converted the action into an action against the individual, but he asks us to amend the judgment without amending the previous proceedings, and asks us to convert that which is a judgment against the individual Railton into a judgment against him and another person. It was urged that there had been deception, and that Cox had purposely misled the plaintiff; but even if that were so—I have not the materials before me for saying it was the case—we should only amend the proceedings starting from the point at which Cox misled the plaintiff. The plaintiff could at any time have applied to the Court, under Order XVI. rule 10, to order Railton to state the names of the persons who were partners in the firm, and then the plaintiff would have learned whether or no Cox was a partner. This appeal must succeed, and the judgment of the Divisional Court be reversed.

Appeal allowed.

Solicitors—W. Brewer, for plaintiff; Palmer & Bull, agents for Lamb & Co., Brighton, for Cox.

[IN THE COURT OF APPEAL.]

1883. May 11.

GRAY v. STAIT.*

Landlord and Tenant — Distress — Fraudulent Removal of Goods after Rent has become Due—Seizure of Goods after Expiration of Tenancy—8 *Anne*, c. 14. *ss.* 6 *and* 7—11 *Geo.* 2. *c.* 19. *s.* 1.

A landlord is not justified, under 11 *Geo.* 2. *c.* 19. *s.* 1, *in following and seizing, after the expiration of the tenancy and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for the rent, for that statute applies only to a case where the landlord has a right to distrain either at common law or under* 8 *Anne, c.* 14. *ss.* 6 *and* 7, *and it is a condition of the statute of Anne, in order to make it applicable, that the tenant must be in actual possession.*

Appeal from a judgment of Lopes, J., on further consideration.

The plaintiff was yearly tenant to the defendant of certain premises. The tenancy expired, by due notice to quit, upon the 29th of September, 1881, on which day the plaintiff gave up possession. Upon the 27th, the plaintiff began removing his goods, and continued to do so on the 28th, and finally removed the remainder off the premises upon the 29th, the day upon which the rent became due. The defendant followed and seized the goods within thirty days of their removal. In an action for illegal distress the defendant justified such seizure under the provisions of 11 Geo. 2. c. 19. s. 1 (1). At the trial

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

(1) 11 Geo. 2. c. 19. s. 1, provides ". . . . in case any tenant or tenants, lessee or lessees, for life or lives, terms of years, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises his, her or their goods or chattels to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due or made payable: it shall and may be lawful to and for every landlord, &c. . . . . or any person or persons, by him, her

the jury found that the plaintiff had fraudulently removed the goods in order to prevent a distress being made for the rent; but Lopes, J., upon further consideration, entered judgment for the plaintiff for 1*s.* damages, upon the ground that 11 Geo. 2. c. 19. s. 1 (1), and 8 Anne, c. 14. ss. 6 and 7 (2), did not apply to a case where goods were seized by a landlord after the tenancy had expired.

The defendant appealed.

J. M. Moorsom, for the defendant.—The question is, whether the defendant was justified, under the provisions of 11 Geo. 2. c. 19. s. 1, in seizing the goods which were removed by the plaintiff from the demised premises on the day upon which the rent became due. It is contended that the statute applies even where the goods have been seized by the landlord after the expiration of the tenancy, provided that the removal took place after the rent had become due and payable and before the tenancy had expired. The jury found that the plaintiff had fraudulently removed the goods with the intention of defeating the landlord's right to distrain. The case of *Dibble* v. *Bowater* (3) shews that the statute applies to the case of goods fraudulently removed from the demised premises upon the quarter-day. In *Opperman* v. *Smith* (4), Best, J., says that "it is the duty of every tenant, when he is about to quit his residence, to pay his landlord his rent before he removes his goods, and the fact of removing the goods before the rent is paid or in any manner provided for, implies something very like an intention to evade the payment altogether. The statute 11 Geo. 2. c. 19, in my opinion, applies to all cases where the landlord is by the conduct of his tenant turned over to the barren right of bringing an action for his rent." Those words, although not used with reference to the question whether the tenancy had expired or not, tend to imply that it might have expired. But in no case does it appear whether the tenancy had expired or not. It is, however, contended for the plaintiff that the defendant could not have distrained for the rent under the earlier statute—8 Anne, c. 14. ss. 6 and 7—even if the tenant had remained upon the premises; but that statute is not confined to the tortious holding over of the premises by the tenant, but applies where a tenant continues in possession by permission of the landlord—*Nuttall* v. *Staunton* (5).

Upjohn, for the plaintiff.—The statute 11 Geo. 2. c. 19, merely confers upon a landlord the power to distrain upon a stranger equivalent to the power which he would have had to distrain upon the demised premises but for the act of the tenant in removing the goods. The object of the statute is to rehabilitate the landlord in the right of distress which he would have had but for the fraudulent act of the tenant; but it does not confer upon the landlord a power of distress which he could not have exercised upon the demised premises. The question here is whether the landlord, even if the goods had been left upon the premises after the expiration of the tenancy, would have had power to distrain. Section 6 of 8 Anne, c. 14 (2), is limited by the proviso in section 7 that the distress may be made within six months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due. The tenant here

or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found as a distress for the said arrears of rent . . . ."

(2) 8 Anne, c. 14. s. 6, provides ". . . . it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years or at will ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined."

Section 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

(3) 2 E. & B. 564; 22 Law J. Rep. Q.B. 396.

(4) 4 Dowl. & Ry. 33, 36; 2 Law J. Rep. K.B. (o.s.) 106.

(5) 4 B. & C. 51; 6 Dowl. & Ry. 155; 3 Law J. Rep. K.B. (o.s.) 135.

gave up possession, as he was obliged to do, after the expiration of the tenancy, and that fact distinguishes the case from that of *Dibble* v. *Bowater* (3), where the tenant was still in possession. If the plaintiff, after he had given up possession, had gone on to the demised premises to take his goods, he would have been a trespasser. The defendant is not protected by 11 Geo. 2. c. 19. s. 1 (1), if he had no power to distrain under 8 Anne, c. 14 (2).

Rand v. *Vaughan* (6) and *Taylerson* v. *Peters* (7) were also referred to.

Moorsom, in reply.—The words "during the possession of the tenant" in section 7 of 8 Anne, c. 14, do not mean that the tenant himself must be actually upon the premises, but merely that he must not have abandoned possession. If the landlord had parted with his interest in the premises, as, for instance, by parting with his reversion, the new landlord could not distrain under the section. In *Taylerson* v. *Peters* (7) the tenant had given up possession, and a new tenant had actually entered into possession.

Turner v. *Barnes* (8) was also cited.

BRETT, M.R.—In this case the action is brought for the wrongful seizure of goods by a person who had been in the relation of landlord to the plaintiff. The goods which were seized had been upon the premises which were the subject-matter of the tenancy. The rent had become due during the existence of the tenancy, and as regards a portion of the goods so seized the rent was due at the time when they were removed; but as regards the remainder of the goods they had been removed before the rent had become due. The jury found that the goods had been fraudulently removed in this sense, that they had been removed by the tenant with the intention to prevent the landlord seizing them for his rent. So far I should agree with the jury that the tenant had been guilty of fraud. But Mr. Justice Lopes, notwithstanding the finding of the jury, and although he agreed with it, held that the seizure of the whole of the goods was wrongful, upon the ground that the only justification which the landlord could have for seizing them would be a justification under 11 Geo. 2. c. 19, s. 1, but that none of these goods were within the protection given to the landlord by that statute. I think that with regard to the goods which were removed before the rent was due there could be no question; for the seizure of those goods must have been held to be a seizure of undistrainable goods, and therefore a trespass. If that be so, it clearly is not within the protection given by the statute. Then comes the question as to the other portion of the goods which were seized. The point is a nice one, and is raised for the first time. In the result I am sorry to say that I think that the landlord remains unprotected by the statute. I think that the decision of Mr. Justice Lopes, which seems to me to be upon the exact point argued before us, was right. The utmost that can be said for the statute of 11 Geo. 2. c. 19, is that where goods have been fraudulently removed from the demised premises by the tenant, in the sense that the tenant removed them with the intention to prevent the landlord exercising his right of distress, the statute gives a power to the landlord to seize them in all cases where, if they had not been fraudulently removed, he would have had the right to seize them either at common law or under the statute of 8 Anne, c. 14. That statute applies not only to cases where goods which have been found to have been fraudulently removed have been seized at common law, but also to cases where goods which have not been fraudulently removed could have been seized by distress under the statute of Anne. The statute of Geo. 2 might, under certain circumstances, apply to a seizure of goods after the expiration of a lease; but it can only apply where the goods could be seized under the statute of Anne, sections 6 and 7, by the provisions of which they can be seized for arrears of rent after the determination of the lease, in the same manner as if the lease had not determined. But there is this proviso, that the distress must be made during the continuance of the landlord's title or interest, and "during the possession of the

(6) 1 Bing. N.C. 767; 4 Law J. Rep. C.P. 239.
(7) 7 Ad. & E. 110.
(8) 2 B. & S. 435; 31 Law J. Rep. Q.B. 170.

tenant from whom such arrears became due." I think that the tenant would be in possession within the meaning of the statute, although in possession wrongfully or at will, after the determination of the tenancy during which the rent became due, or if only in possession by sufferance; and that a distress may be made upon goods which are upon the premises for rent which has become due under the lease, so long as the tenant is in actual possession. It is a condition of the statute that, in order to make it applicable, the tenant must be in actual possession. The statute of Geo. 2 does not therefore help a landlord as regards the fraudulent removal, if he seizes goods at a time when he could not have seized them under the statute of Anne if they had remained upon the demised premises—that is, if the tenant had ceased to have actual possession. Here the goods were seized after the tenant had ceased to have actual possession, whether rightful or wrongful. The case, therefore, is not within either of the statutes. Under these circumstances the decision of Mr. Justices Lopes was right, and the appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. The statute of Geo. 2 was intended in terms only to prevent the landlord's right to distrain being interfered with by the fraudulent removal of a tenant's goods, and nothing more. We must therefore see whether, if the landlord could not distrain at common law, the statute of Anne gives him the right to do so. Section 6 of that statute, which says that the distress may be made after the determination of the tenancy, cannot be taken alone. Section 7 subjects the power given in that section to the proviso that the power of distress shall be put in force during the possession of the tenant from whom such arrears of rent became due. That must mean during the possession of the tenant, whether wrongful or not. But here there was no such possession. It was not suggested that he was in actual possession, but only that he would have been in possession if he had not fraudulently removed the goods. I am unable to construe the words "during the possession of the tenant," as if they meant during the time when the tenant would have been in possession if he had not done something which he did do. In my opinion the power to distrain given to the landlord by section 6 of the statute of Anne can only be exercised when the tenant is in actual possession. The appeal must therefore fail.

BOWEN, L.J.—I am of the same opinion. The statute of Geo. 2 was intended to prevent the right of the landlord to distrain being defeated. The difficulty which the defendant is in is that he was endeavouring to construe what the tenant did as within the statute when he would have had no right to distrain if the tenant had not done it. It is obvious that a removal which defeats the right to distrain could only be said to be fraudulent within the meaning of the statute if it defeats the right to distrain which could otherwise have been lawfully made. At common law the landlord could not have distrained; but it is said that the statute enables the distress to be made after the determination of the tenancy at any time during the possession of the tenant. But here there was no such possession. The statute says that the power is to be exercised during the possession of the tenant; it does not say during the time when the tenant would have been in possession. It does not follow that if a man leaves goods upon the premises he could himself remain in possession within the meaning of the statute of Anne. If Mr. Moorsom's contention be right it must be left to the jury to say whether, if the tenant had not gone out of possession and taken the goods with him, but had only gone out and not taken them with him, he would have been in possession. That is a question which would depend upon the circumstances under which the goods had been left there, and is one which no jury could answer.

Appeal dismissed.

Solicitors—Thomson & Ward, for plaintiff; T. Skewes-Cox, for defendant.

[IN THE COURT OF APPEAL.]

1883. April 25. } HUNNINGS *v.* WILLIAMSON.*

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 54 *and* 60—*Penalty—Vestryman interested in Contract made with Vestry prior to Election—Vestryman acting as such after ceasing to be Member of Vestry—Evidence of acting as Member of Vestry.*

Section 54 *of the Metropolis Local Management Act*, 1855, *which provides that any member of a vestry, who, being interested in a contract made with the vestry, acts as a member after ceasing to be such member, shall be liable to a penalty, applies to the case of a person who being interested in a contract made with a vestry is afterwards elected and then acts as a member of such vestry.*

The defendant advanced money to his brother to enable him to carry out a contract which he had made with a certain vestry. The contract was assigned to the defendant by his brother as security for repayment of the advance.

The defendant, after the assignment of the contract, was elected a member of the vestry, and attended several meetings of the vestry. At each meeting a signature book was provided, in which each member who attended the meeting signed his name. A minute book was also provided, and duly signed by two members of the vestry, under section 60, *into which the minutes of the proceedings were entered, and into which the names of those who signed the signature book were copied:—*

Held, *that the defendant was interested in a contract made with the vestry, within the meaning of section* 54. Held *also, that the minute book, being duly signed, under section* 60, *was prima facie evidence to shew that the defendant had acted as a vestryman after ceasing to be such, within the meaning of section* 54.

This was an action brought by an informer, under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 54 (1), to recover five penalties of 50*l.* each from the defendant for acting as a vestryman after ceasing to be a vestryman by reason of being interested in a contract made with the vestry.

In March, 1882, a brother of the defendant entered into a contract with the vestry of St. Mary, Islington, for the watering, cartage and horse hire required by the vestry. The defendant advanced money to his brother to enable him to carry out the contract; the repayment of which advance was secured by an assignment of the contract to the defendant. Subsequently, in May, 1882, the defendant was elected a vestryman, and afterwards attended five meetings of the vestry. It appeared that an attendance or signature book was provided by the vestry at every meeting, in which each member, including the defendant, entered his name; there was also another book in which were entered the minutes of the proceedings at each meeting, and the names of the members who signed the attendance book were copied by the clerk of the vestry into the minute book. This latter book was duly signed by two members of the vestry who were present, in accordance with the requirements of section 60 of the Act of 1855 (2).

At the trial before Pollock, B., the jury

* *Coram* Brett, M.R., and Bowen, L.J.

(1) 18 & 19 Vict. c. 120. s. 54: "In case any member of any vestry . . . . in any manner be concerned or interested in any contract or work made with or executed for such . . . . vestry, in every such case such person shall cease to be such member . . . . as aforesaid; . . . and any person who acts as a member of any such . . . . vestry . . . . after ceasing to be such member shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the superior Courts of law, with full costs of suit. . . ."

(2) 18 & 19 Vict. c. 120. s. 60: "Entries of all proceedings . . . . of any such vestry with the names of the members who attend each meeting shall be made in books to be provided for that purpose under the direction of the . . . . vestry, and shall be signed by the members present or any two of them; and all entries purporting to be so signed shall be received as evidence without proof of any meeting of the . . . . vestry having been duly convened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the . . . . vestry, or of the signature of any person by whom any such entry purports to be signed, all which matters shall be presumed until the contrary be proved. . . ."

found a verdict for the plaintiff for the full amount claimed, 250*l.*

The Divisional Court (Grove, J., and Smith, J.), having refused to grant a rule *nisi* calling upon the plaintiff to shew cause why the verdict and judgment should not be set aside and judgment entered for the defendant, the defendant now moved the Court of Appeal to grant the rule *nisi*.

Talfourd Salter, Q.C. (with him *J. Ogle*), for the defendant.—The allegation being that the defendant was interested in the contract at the time when he was elected a member of the vestry, the defendant is not liable to these penalties. The words of section 54 (1) are that a person interested in any contract made with the vestry "shall cease to be a member" of the vestry. The interest relied upon, on the part of the plaintiff, being an interest existing at the time of the defendant's election, the defendant never became a member at all, and therefore he never "ceased" to be a member, and cannot have incurred a penalty for acting after "ceasing" to be a member. The case of *Fletcher* v. *Hudson* (3) is distinguishable; there the contract was made after the defendant had been elected a member.

Next, the signature book under section 60 (2) is merely evidence of the fact that the defendant attended the meetings. It is not evidence that the defendant acted as a member; it is consistent with the evidence that the defendant merely signed his name, and then went away, taking no further part in the proceedings of the vestry. The word "acts" in section 54 (1) must be taken to mean that the defendant did some act which would result in something. The statute is a penal one, and should be strictly construed. Lastly, the defendant was not interested in the contract within the meaning of the section: it was made by the vestry with the defendant's brother, and not with the defendant.

BRETT, M.R.—The first objection taken is that section 54 (1) does not apply to a case where a member of a vestry acts as such, although interested in a contract made with the vestry, if his interest existed before he became a member of the vestry; and it is said that the section applies only to the case of a person who after he has become a member of the vestry has entered into a contract with the vestry, and then acts as a member. It is not alleged that any other section of the statute is applicable to the present case. Assuming the argument to be correct, and that the case is not within the section, it follows that if a person at the time when he is made a member of the vestry is interested in a contract, he may go on acting as a member during the whole of the time that he is interested in the contract, and even with regard to that very contract itself, without incurring a penalty. It is difficult to suppose that the Legislature made such a slip as that. Section 54 (1) provides that in case any member of any vestry be in any manner concerned or interested in any contract made with such vestry, in every such case he shall cease to be a member. Now there is nothing in that section about the future: there is nothing which says that it is to be confined to the case of a contract which is entered into after the person has become a member. The whole of the section is in the present tense. There is nothing there to prevent the electors from electing as vestryman a person who is interested in a contract made with the vestry. There are no words which state that such a person shall be disqualified from being elected. The meaning of the section is, that if a man, either before or after he has in fact been elected a member of the vestry, is or becomes interested in a contract with the vestry, he ceases to be a member, notwithstanding that he has in fact been so elected. The first point therefore does not seem to me to be a valid one. It is not true to say that because the defendant was interested in a contract at the time when he was elected, therefore the case is not within the section. The defendant was made a member of the vestry, and by the fact of his interest in the contract he ceased to be a member, and could not act as such without making himself subject to a penalty.

The next point was that there was no evidence to shew that the defendant acted

(3) 51 Law J. Rep. Q.B. 48; Law Rep. 7 Q.B. D. 611.

as a vestryman. The only evidence given as to that was as follows: There was a book which purported to be kept by the vestry for the purpose of vestrymen who attended the meetings signing their names in it. Then another book was produced, which purported to contain the minutes of the business done at each meeting. This book was duly signed by two members of the vestry. It was urged that that book was no evidence against the defendant of his having acted as a vestryman. It was not denied that the signature book was evidence against him that he went to the meeting and signed the book as a member of the vestry; but it was said that if that was all that he did, it is no evidence that he acted as a member of the vestry. I should, however, be inclined to say that if this had been the only book put in at the trial, it would be *prima facie* evidence of the defendant having acted as a member of the vestry, because that book is evidence of the persons who attended the meetings, and I am inclined to think that by the fact of the defendant signing the book he attended the vestry meeting as a member; he would be a mere interloper, unless he intended by signing the book to say that he was a member of the vestry. It also seems to me that the minute book was properly admitted in evidence, under section 60 (2), for the purpose of shewing that the vestry meetings were held and as *prima facie* evidence that the things mentioned in the minutes were done at those meetings. That, however, depends upon the true construction of the section. The section merely says that the book so signed shall be received as evidence; but it does not say of what it shall be evidence.

The section is therefore to be read that the book shall be evidence to shew that what is stated in the minutes took place, and that the persons mentioned in the minutes as having signed their names, or moved or voted, actually did so. It seems to me that although section 60 (2) is drawn without any definite statement as to what the book is to be evidence of, yet it is to be evidence of the facts stated in it. If so, the minute book was properly put in at the trial as evidence of particular steps.

Then the signature book is evidence against the defendant to shew that he was present at the meeting at which the things referred to in the minute book took place, and is therefore *prima facie* evidence that he acted at the meetings in the matters which were done, and which were acts of the vestry.

Another point taken was that the defendant was not interested in any contract made with the vestry. It was said that the contract was entered into with his brother. But the defendant lent money to his brother, and was to be repaid out of the earnings made by the contract. If that is not an interest in the contract I am unable to say what it is. For these reasons I think that the Divisional Court was right in refusing the rule.

BOWEN, L.J., concurred.

Rule refused.

Solicitors—Clapham & Fitch, for defendant; Angell & Imbert-Terry, for plaintiff.

1883. April 5, 7. } SPACKMAN AND ANOTHER v. FOSTER.

Limitations, Statute of—Fraudulent Deposit of Title-deeds—Detinue—Demand and Refusal.

Title-deeds were fraudulently deposited by a person not having the right to their custody with a solicitor, who, with no knowledge of the fraud, advanced money on the security of such deposit,—Held, *that until the delivery of the deeds had been demanded from the innocent and bona fide holder and refused, there was no conversion; and that the Statute of Limitations began to run only from such demand and refusal.*

This was an action brought by the plaintiffs for the delivery up of certain title-deeds which, in the year 1859, had been deposited with the defendant by a son of one of the plaintiffs by way of security for an advance, but without any authority from the plaintiffs, the rightful owners of the deeds, to deposit the same. It was tried at the Cambridge Assizes, when a

verdict was found for the plaintiffs, with 200*l.* damages, and judgment passed for the plaintiffs for that amount, to be reduced to 1*s.* on the return of the deeds.

The defendant obtained a rule *nisi* for a new trial, on the ground that the learned Judge was wrong in having directed the jury that the Statute of Limitations ran from the date of the demand and refusal of the deeds, and not from the date of the deposit.

Lumley Smith, Q.C. (with him *Cockerell* and *Horace Browne*), shewed cause.—These deeds are title-deeds, and savour of the realty—*Plant* v. *Cotterill* (1)—and have no value in themselves, but represent the estate. The holder of them holds in trust for the real owner—*Newton* v. *Beck* (2), *Easton* v. *London* (3) and *Harrington* v. *Price* (4). There must be a refusal to return the goods before the action will lie —*Bryant* v. *Herbert* (5).

Philbrick, Q.C. (with him *R. Vaughan Williams*), in support of the rule.—The possession of the defendant here was adverse from the very first, and there was no fiduciary relation as in *Plante* v. *Cotterill* (1). Demand and refusal do not constitute conversion, but only evidence of it. The substance of the old action of *detinue* was a *tort*. Here the *tort* was the deposit of the deeds, and the statute runs from that time. The mere possession of the defendant as pledgee was, as against the plaintiffs, tortious.

In *Wilkinson* v. *Verity* (6) there was a trust created, and it was held that the defendant could not take advantage of his own breach of that trust.

There is no contract between the plaintiffs and the defendant. The true rule as to the necessity for a demand and refusal is laid down in *Williams' Notes on Saunders' Reports* (7). If there is any act of ownership, no demand is necessary—*e.g.* taking goods by assignment—*McCombie* v. *Davies* (8). Ratification of a conversion by an agent was held a conversion by the principal—*Hilbery* v. *Hatton* (9). The statute runs from the moment the holding is inconsistent with the rights of the true owner.

GROVE, J. (on April 7).—This is an action brought by two plaintiffs, John Spackman and William Spackman, who are the owners of certain property at Cottenham, in the county of Cambridge, for the detention of certain title-deeds by the defendant, a solicitor at Cambridge. The plaintiffs, till the year 1880, had not for many years had any occasion to refer to their deeds of title. In that year, however, being desirous of selling the property, they went to the place where the deeds had been deposited, but could not find them. On enquiry, it appeared that in the year 1859 the deeds had been deposited with the defendant by a son of one of the plaintiffs as security for an advance. The defendant refused to give up the deeds, and in answer to an action pleaded that the Statute of Limitations had run against the plaintiffs. Whether that is so depends on the question as to what condition precedent is necessary to the right of action. If a demand and refusal was necessary before the plaintiffs could sue, the statute in this case has not run; but if the plaintiffs could have brought an action without any demand or refusal, the statute began to run at the time of the deposit of the deeds. It was argued that a demand and refusal constituted a condition precedent to an action; and also, that these being title-deeds, are not in the same position as ordinary chattels as regards the statute. It was further contended that Courts of equity did not treat the Statute of Limitations in the same way as the common law Courts; but held that, where there is fraudulent concealment, the statute does not run as between the taker and the owner, and that that doctrine applies when the holder has obtained the chattels from the thief. As to this there is no direct decision. We think that a demand and refusal, or at least a notice of claim, is a necessary condition precedent

(1) 5 Hurl. & N. 430; 29 Law J. Rep. Exch. 198.
(2) 3 Hurl. & N. 220; 27 Law J. Rep. Exch. 272.
(3) 33 Law J. Rep. Exch. 34.
(4) 3 B. & Ad. 170.
(5) 47 Law J. Rep. C.P. 670; Law Rep. 3 C.P. D. 189.
(6) 40 Law J. Rep. C.P. 141; Law Rep. 6 C.P. 206.
(7) Vol. 2, p. 47.
(8) 6 East, 538.
(9) 2 Hurl. & C. 822; 33 Law J. Rep. Exch. 190.

to an action. The defendant simply kept these deeds as a depositee, bound to deliver to the person from whom he received them, and not as against the real owner. It does not follow that if requested by the real owner he might not have given them up. Therefore his possession was not necessarily adverse to the real owner; and there is, until refusal, nothing to shew that he had converted them to his own use. Here the defendant is in a similar position to the finder of lost property, and there must at all events be a notice before action that the plaintiff claims the property as owner. There had been no such notice or demand until 1880 in this case, and there is no evidence of conversion.

The *dictum* of Lord Ellenborough in *McCombie* v. *Davies* (8) is *pro tanto* in favour of the defendant's contention; but it was no more than a *dictum*, and not necessary to the decision of the case, and it assumes that the defendant in that case did claim a right to deal with the goods adversely to the real owner by disposing of them. In the present case the defendant did not assume the right of property or of disposal, but only a right to keep the deeds safely till the money was repaid. As between the defendant and the depositor a kind of estoppel may perhaps be said to arise, but there is no claim to the power of disposal. In *McCombie* v. *Davies* (8), the other Judges, while assenting, think it necessary to add that the defendant had refused to deliver up the goods. I think, therefore, that the statute did not begin to run till 1880; and the rule must be discharged, with costs.

STEPHEN, J.—I am of the same opinion. The old forms of action, though abolished by the Judicature Acts, are useful as affording by the procedure under them a test of the extent of the rights of the parties. A man may come into the possession of the goods of another either by force or fraud, as where the goods are stolen; by contract express or implied, as in a bailment for safe keeping; or independently of force, fraud or contract, as where the goods are found. If the possession is gained by force or fraud or contract, the remedy was an action of *detinue*, and neither demand nor conversion was necessary. But if the possession is by innocent means, the right of action does not accrue at the time of the commencement of the possession, but on a refusal to deliver the goods. As between the plaintiffs and the defendant there was no contract, and the case is analogous to the case of goods found, and till conversion there is no cause of action. Till refusal to deliver there was no conversion, and this action was therefore brought in due time.

DAY, J., concurred.

Rule discharged, with costs.

Solicitors—Dubois & Reid, agents for Ellison & Co., Cambridge, for plaintiffs; Field, Roscoe & Co., agents for Fosters & Co., Cambridge, for defendant.

1883. March 10, 12.

STOTT v. FAIRLAMB.

Promissory Note—Payable on Demand—Previous Liability to pay in Three Years—Want of Consideration—Admissibility of Evidence—Parol Agreement to vary Note.

A parol agreement contemporaneous with a promissory note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, is immaterial and inoperative to contradict the terms of the note.

Woodbridge v. Spooner (3 B. & Ald. 233) *followed.*

The existence of an agreement by which A has undertaken, for good consideration, to pay B a sum of money at a stipulated time, is not a good consideration for a promissory note for the same sum given by A to B, and payable on demand.

Upon a dissolution of partnership, an agreement was entered into, which, after reciting that one of the partners had brought 2,000*l. into the business, provided that the other partner should pay him that sum within three years, with interest at five per cent., in full satisfaction of all his share in the stock, credits and effects of the partnership, and should indemnify him against*

the debts of the partnership. Subsequently, a promissory note for the same 2,000*l.*, *payable on demand, was given to the retiring partner:—*

Held, *that there was no consideration for the note.*

Further consideration.

A. Wills, Q.C., and *Cyril Dodd*, for the plaintiff.

Waddy, Q.C., and *Wilberforce*, for the defendant.

Cur. adv. vult.

The facts and arguments sufficiently appear from the judgment.

DENMAN, J. (on March 12).—This was an action brought by the plaintiff, as executrix of one Stott, on a promissory note, dated the 31st of July, 1881, whereby the defendant promised to pay Stott, or order, on demand, 2,000*l.*, with interest at five per cent. The making of the note was admitted in the pleadings, and also the liability of the defendant, subject to two defences to be mentioned presently.

The burthen of proof being upon the defendant, she was the first witness called, and proved that in August, 1880, Stott had become partner with her in a business formerly carried on by her father and afterwards by herself; that the defendant had brought 2,000*l.* into the business; that it did not prosper, losses to the extent of 1,800*l.* having been incurred within a year; and that on the 31st of July, 1881, a dissolution was discussed, and on the 8th of August an agreement in writing was entered into, whereby, after reciting the partnership, the payment by Stott "into the business" of 2,000*l.*, and that "there was then due and owing to Stott the sum of 2,000*l.*," it was agreed—first, that Stott should retire as from the 31st of July, 1881; secondly, that the defendant should pay to Stott 2,000*l.* within three years of the date thereof, with interest at five per cent. on the same or the instalments thereof for the time being remaining unpaid, computed from the said 31st of July, 1881, and indemnify Stott against the debts of the partnership; thirdly, that Stott should accept the said sum of 2,000*l.* in full satisfaction of all his share in the stock, credits and effects of the partnership; and, fourthly, that a proper deed should be executed to carry the agreement into effect.

Having given this agreement in evidence, the defendant's counsel proposed to give the evidence, to which I will refer presently, in support of the 4th and 5th paragraphs of the statement of defence. These paragraphs were as follows:—4th. The said promissory note was given by the said defendant to the said Charles Henry Stott in respect of the said sum of 2,000*l.*, so payable by virtue of the said agreement of the 8th of August, 1881, and in respect of no other sum, and there was no value or consideration for the making or giving of the said promissory note other than the liability of the said defendant under and by virtue of the said agreement of the 8th of August, 1881. 5th. The said promissory note was given by the said defendant to the said Charles Henry Stott, and was accepted by him subject to the conditions contained in the said agreement of the 8th of August, 1881, and the same is not payable until the expiration of three years from the 8th of August, 1881.

I was inclined to think at the trial that the evidence tendered was inadmissible, understanding that it was tendered with the view of proving a contract inconsistent with the terms of the note. But I admitted the evidence subject to Mr. Wills' objection; and I see by my note that Mr. Waddy tendered it, not only with that object, but also as going to prove that there was no consideration for the note as between the immediate parties, Stott and the defendant; upon which ground I think it was clearly admissible. It was also admissible to shew that the 2,000*l.* and interest covered by the note were the same moneys as those covered by the agreement of the 8th of August.

The evidence so admitted, and which the jury must be taken to have believed, was to the following effect. After the agreement of the 8th of August was signed, Stott called upon the defendant. He told her that he wanted something to shew his own people, that they were not satisfied with the agreement, and wanted a promissory note. Upon the defendant saying, "What if anything should happen

to you?" he promised to send a letter to the effect that the note should not be put in force until the three years mentioned in the agreement should have expired; and added, "I can trust you; can't you trust me?" whereupon the defendant said, "Yes," and gave him the note. This took place in September; but the note was dated back the 31st of July, because that was the date of the arrangement being made which was embodied in the agreement of the 8th of August. The jury found the 5th paragraph of the defence proved. It is not necessary to state the evidence more fully. It is enough to say that if the parol evidence admitted was admissible for the purpose of proving such a parol contract as that set up in the 5th paragraph, it was sufficient to go to the jury in support of the contract alleged.

But Mr. Wills contended that such a parol contract would not be of any avail; and that the evidence was not admissible for the purpose of proving it, because it would be a parol contract in contradiction to the terms of the note itself, and he cited *Abrey* v. *Crux* (1) in support of his contention. I have considerable doubt whether that case is intended to go the full length of holding that an agreement to suspend the operation of a note "payable on demand," come to by the original parties to such a note, would be inconsistent with the note. There are expressions in the judgments in *Abrey* v. *Crux* (1) upon which an argument to the contrary might be founded. But the case of *Woodbridge* v. *Spooner* (2) certainly does go that length, and seems to me to be entirely in point for the plaintiff. So far, then, as the case depends upon the establishment of a parol agreement contemporaneous with the note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, I think the defendant's case fails, inasmuch as, although the jury have found a parol contract proved, such contract is immaterial and inoperative to contradict the terms of the note.

It was contended by Mr. Waddy that here the agreement relied upon was not a parol, but a written agreement. But I think this cannot be maintained. The note, though antedated, was given in September, long after the written agreement of the 8th of August. The agreement set up by the defendant, though it was to the effect that the same terms as to repayment of the 2,000*l.* and interest should remain in force as those contained in the written agreement, was itself a mere parol agreement. It may be that, inasmuch as there were two written agreements uncancelled between the same parties, the two ought to be so construed, if possible, as not to conflict with each other. But, assuming this to be so, I apprehend that the note, being the later document, containing a contract to pay "on demand," would be more entitled to prevail, with the effect of limiting the time "within three years," during which the money must be paid, than the contract to pay "within three years" would be entitled to be so construed as to extend the time contemplated by the words "upon demand" contained in the promissory note.

The 4th paragraph of the statement of defence alleged that the note was given by the defendant to Stott in respect of the 2,000*l.* payable by virtue of the agreement of the 8th of August, 1881, and that there was no value or consideration for the note other than the liability of the defendant under that agreement. That this was so in fact was undisputed. The question then is, What is the legal result? It was argued in answer to this objection that an antecedent liability is a good consideration for a bill or note, and is to be "deemed to be valuable consideration" by 45 & 46 Vict. c. 61. s. 27. But I do not think that this section goes so far as to declare, nor do I think there is any authority for holding, that where by an antecedent agreement A has agreed for good consideration to pay B a sum of money at a stipulated time, the mere existence of that agreement will be a good consideration for his agreeing to pay the same sum on demand. In the present case there was no antecedent liability at the time of the agreement of August on the part of the defendant to pay Stott 2,000*l.* The partnership indeed owed Stott 2,000*l.* (his capital), subject to his proper share of the losses, and to proper accounts being

(1) 39 Law J. Rep. C.P. 9; Law Rep. 5 C.P. 37.

(2) 3 B. & Ald. 233.

taken with reference to the terms of the partnership. This, in my opinion, is all that is meant by the recital in the agreement. It certainly cannot mean that the defendant was absolutely indebted to Stott in 2,000*l.*, independent of all other questions between them. Then by the agreement several matters are dealt with, some for the advantage of one party and some for the other. The defendant indemnifies Stott against the partnership debts and liabilities. Stott takes the 2,000*l.*—not on demand, but to be paid within three years—in full satisfaction of all his share and interest in the partnership credits and property, with five per cent. on the instalments unpaid. Independently of that agreement there was no absolute liability on the defendant's part to pay 2000*l.* or any other sum.

This 2,000*l.* and five per cent. so dealt with in the agreement of the 8th of August was the very 2,000*l.* and interest secured by the note.

As it was forcibly put by Mr. Wilberforce, what possible advantage could accrue to the defendant, or what burden to Stott, by their respectively entering into a fresh contract that she should be liable to pay, and he entitled to receive, the 2,000*l.* and interest on demand? I can discover none.

This being the case, I can see no consideration for the note between the parties to it, nor between the plaintiff (the executrix) and the defendant. I think it was a mere *nudum pactum*, upon which, if Stott had sued, he must have failed, and that upon this ground the defendant is entitled to judgment. I therefore give judgment for the defendant, with costs.

Judgment for defendant.

Solicitors—Peace & Co., agents for G. Rhodes, Halifax, for plaintiff; J. W. Sykes, agent for Ramsden, Sykes & Ramsden, Huddersfield, for defendant.

1883. March 7. } FRASER *v.* MASON AND ANOTHER.

Copyhold—Fine on Admittance—Procedure—Assessment of Amount of Fine.

A lord of a manor, who is by custom of the manor entitled to a fine amounting to three years' improved annual value upon the admittance of two joint lives to a copyhold hereditament, is entitled to bring an action for the purpose of ascertaining the amount or sum certain as the amount of such improved annual value, or of such fine, without first fixing or ascertaining the exact amount of the fine.

This was a Case stated by consent and by order of a Master for the purpose of taking the opinion of the Court upon a question of law arising on a statement of claim and defence.

The plaintiff, as lord of the manor of Oldbury Walloxall, in the county of Worcester, was entitled by the custom of the manor to a reasonable fine from the defendants in respect of each of four admittances to certain copyhold hereditaments situate within the manor.

The plaintiff accordingly assessed the several fines due from the defendants in respect of such admittances at three years' improved annual value of the several tenements to which the defendants were admitted.

The plaintiff claimed that the said improved annual value of each of the several tenements to which the first and third of the said admittances respectively related amounted to 340*l.* 2*s.* 6*d.*, and the improved annual value of each of the several tenements to which the second and fourth of the said admittances respectively related amounted to 363*l.* 15*s.*, and had requested the defendants to pay to him the said sums; but the defendants had not paid the same or any of them in respect of the said fines.

The plaintiff claimed—first, a declaration that a fine in respect of each of the said admittances was due from the defendants to the plaintiff, amounting to three years' improved annual value of the tenement to which such admittance related; secondly, the payment with interest of the said four sums assessed; thirdly, if neces-

sary to have an enquiry as to what was the improved annual value of the said tenements respectively, and payment by the defendants of fines amounting to such improved annual value for three years of the said respective tenements.

By their statement of defence the defendants admitted a reasonable fine, in respect of each of the said four admittances respectively, being due from the defendants, and that such reasonable fine amounted to three years' improved annual value of the several tenements to which the defendants were admitted. They denied, however, that the improved annual value amounted to the sums claimed by the plaintiff, and further alleged that no other sum or sums whatsoever had been, before action commenced, assessed and demanded by the plaintiff from the defendants in respect of the said fines; and that by reason of the premises, no necessity had arisen or could arise for an enquiry in the action as to what was the improved annual value of the said tenements respectively. The opinion of the Court was asked upon the following question of law:—Whether the lord of a manor, who is by custom of the manor entitled to a reasonable fine on each admittance to a copyhold hereditament, is, on the admittance of two lives to a single copyhold hereditament, entitled to assess the fine at three years' improved annual value, and, without fixing or assessing any amount or sum certain as the amount of such improved annual value, or of such fine, to bring an action for the purpose of ascertaining the same, and obtaining payment accordingly.

Anstie, Q.C. (*John Rose* with him), for the plaintiff.—The substantial question here is, whether the lord of the manor is entitled to sue for a fine without having demanded a definite sum. The *dictum* of Lord Mansfield in *Grant* v. *Astell* (1) is an authority for the course which has been adopted by the plaintiff. There a lord of the manor claimed to recover the sum of 46*l.* 17*s.* 6*d.* as a reasonable fine, which the jury found ought only to have been for 46*l.* 4*s.* 3*d.*; and it was held that the plaintiff could not have a verdict for that smaller sum, but must recover either to the exact amount of the fine or not at all. Lord Mansfield, however, said, in the course of his judgment (see page 732), "It would have been enough if the plaintiff had stated that he had assessed the sum of 46*l.* 17*s.* 6*d.* as a fine, and that such sum was reasonable; and it would then have been a matter of evidence, just as it was on this record, whether the sum assessed exceeded two years' value or not. . . . . We give no opinion whether the lord might not have assessed a fine for two years' value, and made that solely the foundation of his action." [They were stopped by the Court.]

Jelf, Q.C. (with him *Shiress Will*), for the defendants.—There is nothing beyond the mere *dictum* of Lord Mansfield in *Grant* v. *Astell* (1) to support the plaintiff's contention. It is a condition precedent to the right of recovery of the fine that the lord should assess and demand a reasonable amount as a fine upon admittance before he can recover the fine. There is no such thing as a *quantum meruit* for a copyhold fine. There must be a fixed, certain, absolute and legal sum assessed to be due to render the title to it complete—see the judgment of Martin, B., in *Hayward* v. *Raw* (2). They also cited *Trotter* v. *Blake* (3) and *Verulam* v. *Howard* (4).

CAVE, J.—In this case I am of opinion that the lord of the manor is entitled to assess the fine at three years' improved annual value, which is admitted to be reasonable. The defendants' contention has been that he should go on to fix the amount or sum certain as the amount of such improved annual value. Lord Mansfield, however, has said, in a case to which our attention has been called, that this need not be done; and though no doubt what was said was a mere *obiter dictum* on the part of that learned Judge, it is one which is deserving of the highest respect; and no case has been cited to the contrary. The only question that can arise is,

(1) 2 Dougl. 722.

(2) 6 Hurl. & N. 308; 30 Law J. Rep. Exch. 178.

(3) 2 Mod. 229.

(4) 7 Bing. 327.

whether the sum fixed upon the above basis is a fair and reasonable one, and this can be best ascertained by a surveyor, it being open, of course, to the defendant, if he thinks the sum fixed upon is unreasonable, to appoint his own surveyor, and to pay into Court, under the provisions of the Judicature Act, such sum as the latter may determine to be just and reasonable. There must be judgment for the plaintiff.

DAY, J.—I agree, for the reasons given, that the question submitted to us must be answered in the affirmative.

Judgment for plaintiff.

Solicitors—Needham, agent for E. & A. Caddick, West Bromwich, for plaintiff; Taylor, Mason & Taylor, for defendants.

1883. April 30. TOMPSON *v.* DASHWOOD.

Libel — Privilege — Communication to Wrong Person by bona fide Mistake.

A communication which if made to the person to whom it was intended to be made would be privileged, is privileged although made to another person by a bona fide mistake.

Rule for a new trial in an action of libel, on the ground that the Judge misdirected the jury in holding that the occasion was privileged.

At the trial before Cave, J., at the last Warwick Winter Assizes, it appeared that the plaintiff was managing director of the Birmingham Vinegar Brewing Company, Limited, and the defendant was a director of the same company. In November, 1882, the plaintiff and defendant were about to make a journey on the Continent together on the company's business; and before leaving, the defendant wrote a letter beginning "Dear Colonel Wood," in which the following passage occurred—"Should you come to Birmingham, take a look over the secretary's cash-book, and see the amounts paid to J. L. T. (the plaintiff) from petty cash, right hand column, for expenses, &c., in the months of October and November. To my mind they are enormous, but do not mention me in the matter. Of course they may be all right and genuine travelling and other expenses. I am going to pay my own this journey to keep them separate, and have drawn 10*l.* for that purpose." Colonel Wood was the chairman of the company; but the defendant put the letter by mistake in an envelope addressed to the secretary of the company, and put another letter intended for the secretary in the envelope addressed to the chairman. The secretary, who was the plaintiff's brother, took a copy of the letter and handed it to Colonel Wood. The Judge left to the jury the question whether the letter was defamatory, and told them that if it was defamatory, the occasion was privileged, so that they could not find a verdict for the plaintiff, unless there was malice. The jury found a verdict for the defendant. A rule having been obtained for a new trial,

Dugdale, Q.C., and *V. Fitzgerald*, for the defendant, shewed cause.—The defendant's position is not worse than if he had intended the letter for the secretary, and the publication to the secretary was privileged (1). If a person prepare a letter intending to send it to a person in whose hands the communication would be privileged, and by a *bona fide* mistake he sends it to another person, the occasion is still privileged. The *bona fides* of the defendant must be assumed, because the jury have found in his favour. The following cases were referred to—*Fox* v. *Broderick* (2), *Waring* v. *McCaldin* (3), *Parsons* v. *Surgey* (4), *Lawless* v. *The Anglo-Egyptian Cotton and Oil Company* (5) and *Harrison* v. *Bush* (6).

(1) This question was hardly argued at the Bar, and was not considered on the Bench, as appears from the judgment. It must be observed that the letter was sent by a director to the secretary, and not by a stranger. *Quære* also, whether privilege can be claimed in respect of an unintentional publication.

(2) 14 Ir. C.L. Rep. 453.

(3) Ir. Rep. 7 C.L. 282.

(4) 4 Fost. & F. 247.

(5) 10 B. & S. 226; 38 Law J. Rep. Q.B. 129.

(6) 5 E. & B. 344; 25 Law J. Rep. Q.B. 99.

Tompson v. *Dashwood.*

Lawrance, Q.C., and *Graham*, supported the rule.—The defendant was bound to see that his communication reached the right quarter. A man who writes defamatory matter and puts it in a wrong envelope is guilty of culpable negligence.

WILLIAMS, J.—I am of opinion that this rule must be discharged. The action is for falsely and maliciously writing certain defamatory words—that is, injurious words. The plaintiff was the managing director of the company, and the publication complained of was made to the secretary, whose duty it was to keep the books in which the plaintiff's accounts were passed. Certain suspicions were entertained by the defendant as to the accuracy of the accounts, which turned out to be unfounded. The defendant wrote a letter to the chairman of the company directing attention to facts and imputing dishonesty in the plaintiff. He also wrote to the secretary a letter of altogether a different kind. Quite unintentionally he put the wrong letters into the envelopes. The secretary received it and handed it to his brother. The plaintiff brings his action on the allegation that the defendant falsely and maliciously published the letter. The Judge held the occasion was privileged unless there was actual malice. The jury found for the defendant, and that verdict is complained of. If a man publishes a defamatory and untrue statement of another the law implies malice, and the plaintiff need not give any evidence beyond the defamatory character of the statement. But, on certain occasions, the law regards the defendant as so placed as to negative malice—that is, if he has an interest. The question here is, whether the defendant was so circumstanced as to rebut the *prima facie* implication of malice. It is admitted that the defendant is under the privilege so far as publication to Colonel Wood is concerned. It is said that because the defendant in dealing with a thing of a dangerous character like a defamatory letter carelessly puts it in an envelope so that it reaches a person with whom there is no privilege, the law implies malice. I see nothing in that fact why the law should take the letter out of the category of privileged communications. There seems no express authority on the point; but, in my opinion, mere accident or inadvertence will not supply the necessary malice. I therefore think the Judge's direction was right, and there ought to be no new trial.

MATHEW, J.—I am of the same opinion. There was no evidence of a malicious publication, only of a negligent publication. Writing the letter was honest, preparing to post it was honest, the despatch of it was due to negligence. The defendant is not responsible if he meant to do what he did not. The case is as if the defendant had carelessly left defamatory matter about his room, and the evidence of negligence is extremely slight. I see no ground for creating an authority such as we should create if we did not discharge the rule.

Rule discharged.

Solicitors—Robinson, Preston & Stow, agents for Rowlands, Bagnall & Co., Birmingham, for plaintiff; Coopers, Newcastle-under-Lyme, for defendant.

1883. May 2. BEER *v.* FOAKES.

Accord—Debtor and Creditor—Agreement to accept a Less Sum—Payment to Creditor's Nominee.

An agreement by a debtor to pay to the creditor or his nominee a less sum than the debt payable to the creditor is a sufficient consideration for an agreement by the creditor not to take further proceedings.

Rule for a new trial on the ground of misdirection of an issue ordered under Order XLII. rule 19, in an action in which judgment had been recovered by the plaintiff for 2,077*l.* 17*s.* 2*d.* for debt, and 13*l.* 1*s.* 10*d.* for costs, on the 11th of August, 1875. The issue was whether any and what amount was due upon the judgment on the 1st of July, 1882.

At the trial before Cave, J., and a common jury, on the 22nd of February, the following agreement was proved on behalf of the plaintiff:—

Beer v. *Foakes.*

"Memorandum of agreement made this 21st day of December, 1876, between Julia Beer, of Douglas Villas, High Road, Lee, in the county of Kent, widow, of the one part, and John Weston Foakes, of No. 10 South Street, Grosvenor Square, in the county of Middlesex, M.D., of the other part.

"Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in Her Majesty's High Court of Justice Exchequer Division, for the sum of two thousand and ninety pounds, nineteen shillings. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions: Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of 500*l.*, the receipt whereof she doth hereby acknowledge, in part satisfaction of the said judgment debt of 2,090*l.* 19*s.*, and on condition of his paying to her, or her executors, administrators, assigns or nominee, the sum of 150*l.* on the 1st day of July and the 1st day of January, or within one calendar month after each of the said days respectively, in every year until the whole of the said sum of 2,090*l.* 19*s.* shall have been fully paid and satisfied, the first of such payments to be made on the first day of July next: then she, the said Julia Beer, hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment. As witness the hands of the said parties,

"John Weston Foakes,
"Julia Beer.

"Received the day and year first within written of and from the within John Weston Foakes, the sum of five hundred pounds as within mentioned, to be paid by him to me, } 500*l.*

"Julia Beer."

The sum of 2,090*l.* 19*s.* was paid by the defendant to the plaintiff's nominee; but the plaintiff's case was that interest was still due under the judgment. The Judge held that the defendant had paid all that was due under the agreement, and that, whether the judgment was satisfied or not, the plaintiff was not entitled to issue execution for any sum on the judgment.

Holl, Q.C. (*Winch* with him), for the defendant, shewed cause.—The plaintiff is not entitled to interest on the judgment. The agreement is binding, and has been fully carried out.

Gaskell, for the plaintiff, supported the rule.—The agreement is not satisfied until the whole judgment debt with interest is paid off. That is the true construction of the agreement, otherwise it is without consideration and void, as providing for the payment of a less sum in satisfaction of a debt—*Cumber* v. *Wane* (1), *Sibree* v. *Tripp* (2) and *Goddard and Son* v. *O'Brien* (3).

WILLIAMS, J.—I am of opinion that this rule must be discharged. The issue directed under the Judicature Rules is whether the plaintiff is entitled to issue execution on this judgment for 2,000*l.* The question is whether the judgment is satisfied. An arrangement was come to, the substance of which is that 500*l.* down should be paid, and sums from time to time to the plaintiff or her nominee. No reference is made to interest, so that the agreement is to pay less than what is due on the judgment; but Mrs. Beer undertakes to take no further proceedings. Until to-day Mrs. Beer never put her case that the agreement was invalid and only an act of grace; but it was contended that on the true construction of the agreement she was entitled to interest. I do not think that contention is well founded; but I do not stop there. The plaintiff is wrong in issuing execution, because the agreement is good, and one from which the plaintiff is not at liberty to retire. The doctrine of *Cumber* v. *Wane* (1) is a mere technicality, and took its origin from a state of English law in regard to evidence which is no longer the law. It is agreed on all hands that the doctrine is a reproach. The doctrine is that an agreement

(1) Str. 426; 1 Sm. L.C. 341.
(2) 15 Mec. & W. 23; 15 Law J. Rep. Exch. 318.
(3) Law Rep. 9 Q.B. D. 37.

to pay a less sum in satisfaction of a debt is without consideration. The English law forbids such an agreement. That is the law in its naked simplicity. But I think a very little departure from the mere agreement to pay a less sum will make the agreement good. If the creditor says, "You owe me a large sum of money; I am willing to accede to your request for time, but you must enter into an agreement in writing, at your expense (as it would be), and you shall pay the money to me or to any person I may name at my election." That I think is enough to make this agreement not a *nudum pactum*. The plaintiff ought not in equity and conscience to be permitted to repudiate it.

MATHEW, J.—I am of the same opinion. It was unfortunate, if this point was intended to be raised, that it was not put before the Judge. It was incumbent on the plaintiff to say that there was no consideration for the agreement. No such point was made, and I am not satisfied that there was not abundant consideration. That would be sufficient to dispose of the matter; but is the principle available? It is noticeable that the agreement is framed so that it casts an obligation which would not otherwise have existed. The agreement to pay the creditor's nominee renders it a document available as a security. On the authority of the class of cases of which *Sibree* v. *Tripp* (2) is an example, I think there was abundant consideration.

Rule discharged.

Solicitors—H. W. Mackreth, for plaintiff; W. H. Hudson, for defendant.

1883. Feb. 19.

BURDICK *v.* SEWELL AND ANOTHER.

Ship and Shipping—Bill of Lading—Indorsement by Shipper to secure Advances—Property in Goods—Title of Indorsee—Liability for Freight—Bill of Lading Act (18 & 19 *Vict. c.* 111. *s.* 1).

The defendants were indorsees of a bill of lading for the mere purpose of securing certain sums of money advanced by them to N. The goods represented by the bill of lading had been shipped by N. in London in a vessel belonging to the plaintiff, and carried to Russia. Subsequently the goods in question, not having been cleared within a given time after their arrival at the port of destination, were sold in accordance with Russian law, and realised only sufficient to meet the claims of the custom-house officials. Thereupon the plaintiff brought an action to recover from the defendants payment of freight and charges due to him, on the ground that the property in the bill of lading and goods had passed to the defendants within the meaning of the Bills of Lading Act:—Held, *by* FIELD, J., *upon further consideration, that the transaction between the defendants and N. was one of mere pawn or pledge, by which no sufficient property passed to render the defendants liable for freight and charges incurred by the shipowner in the carriage of the goods.*

This was a case tried before Field, J., and afterwards reserved for further consideration. The facts and arguments are fully stated in the judgment.

Charles Hall, Q.C., and *Edwyn Jones*, appeared for the plaintiff.

A. L. Smith and *Danckwerts* were for the defendants.

Cur. adv. vult.

The following judgment was (on the 19th of February) delivered by

FIELD, J.—This action was tried before me without a jury, and raises a difficult and important question as to the effect of the Bills of Lading Act (18 & 19 Vict. c. 111) in transferring liability to freight from the shippers to an indorsee of the bill of lading.

It was brought by the plaintiffs, the

owners of the ship *Zoe*, to recover 174*l.* 8*s.* 9*d.*, freight and charges in respect of sixty cases of machinery shipped by one Nercessiantz, and carried to Poti, in the Black Sea, under a bill of lading dated the 21st of September, 1880, whereby the goods were made deliverable to shipper "or assigns," and of which bill of lading the defendants became the indorsees under the following circumstances. On the 26th of October, 1880, Nercessiantz, who had been engaged in previous business transactions with the defendants, bankers at Manchester, applied to them for an advance of 300*l.* to enable him (as he said) to complete his payment in this country for the machinery represented by the bill of lading in question, which he had caused to be manufactured in this country to supply an order in Georgia, and as a security for the advance he proposed to indorse the bill of lading to them. He had, however, already (as he said) sent out one of the parts, and the defendants, whilst declining to make the full allowance without the deposit of the third part, consented to advance 50*l.* conditionally, upon his undertaking to procure and deposit the third part against the advance of the balance by way of security for the whole. Accordingly, on the 30th of November, Nercessiantz brought the third part and deposited it indorsed in blank (the other two having been already indorsed), and obtained the balance of the advance, saying that he was shortly going out to Poti to superintend the receipt and delivery of the machinery, that the amount advanced would be repaid before he left England, and that he would call again and make definite arrangements for that purpose. This, however, he never did, and the defendants, in consequence, in the following month of February, indorsed and sent out one part of the bill of lading to their agents at Tiflis, with instructions to make enquiries and protect their interests there. In the meantime, and as far back as September, 1880, the *Zoe* had arrived at Poti, and, no one appearing to clear the goods, they were, on the 14th of October, landed and warehoused at the Russian custom-house with (as I infer) the usual stop for freight. Things remained in this state until the month of September in the following year, Nercessiantz not only not appearing to clear the goods, but taking no notice of the communications addressed to him by the agents of the ship, and also those of the defendants.

By the Russian law goods landed and not cleared within twelve months are liable to be sold for duty and charges, the only mode of avoiding the sale being to reship the goods to some other than a Russian port; and in August, 1881, the defendants' agents at Tiflis advised them of this state of the law and of the imminence of sale for those claims, and asked for instructions. The member of the defendants' firm who had made the advance to Nercessiantz, and was conversant with his affairs, was at this time on his way to Poti in reference to these and other matters of business there, and the defendants' firm in England wrote to the ship's agents at Poti advising them that they held the bills of lading, and that Mr. Sewell would probably communicate with them. This he appears to have done, and the defendants, on the 28th of September, also wrote to the plaintiffs' agent in London to the same effect, and requested him to hold for them any proceeds of the sale beyond what were sufficient to answer for freight and charges. The sale, however (which soon afterwards took place), by the Russian custom-house officials appears to have produced no more than sufficient for their own claim, and the plaintiffs thereupon required payment of the freight and charges from the defendants, and on refusal brought the present action.

Upon the argument before me it was contended on their behalf that the "property" in the bill of lading and goods had under the above circumstances passed to the defendants within the meaning of the Bills of Lading Act, and that they, as indorsees, were liable. The defendants, on the other hand, contended that the transaction was one of mere "pawn or pledge," by which no property passed sufficient to render the defendants liable.

In order to see which of these two contentions ought to prevail, the intention of the parties to the contract, as gathered or to be implied from the circumstances of the transaction, must be looked at. Now,

advances against deposit of goods are probably some of the most ordinary transactions either of common or commercial life, and if there is delivery, and there are no terms expressed, either verbally or in writing, giving any larger effect to the contract, the latter is known as a contract by way of "pawn or pledge," the legal effect of which is that only a special property passes from the borrower to the lender, although coupled with a power of selling the pledge and transferring the whole property in it, on default in payment at the stipulated time, if there be any, or at a reasonable time after demand and non-payment, if no time for repayment be agreed upon—see *Pothonier* v. *Dawson* (1) and *Donald* v. *Suckling* (2). Moreover, until such default, though the lender may assign the pledge to another to the limited extent of his own interest in it—that is, as a security for the amount due—he cannot pass the whole and entire property in the goods to another, for by the contract the general property remains in the pawnor, who, by virtue of that general property, may determine the special property by tender of the secured amount, and may immediately recover the pledge on refusal in a possessory action. Delivery is, however, an essential element of every contract by way of pledge. Such delivery may be actual, as is the every-day life transaction with the pawnbroker; or it may be constructive, either by making the custody of the pledgor that of the pledgee—*Reeves* v. *Capper* (3)—or (if the goods are still under the operation of a bill of lading) by indorsement of the bill; and it is the latter form of transaction which is the one commonly adopted in commerce. As, however, in the case of land, by a conveyance by way of mortgage, so also in that of goods, a more effective security may be created by bill of sale; and by the usual terms of such an instrument the whole and entire property in the goods is assigned and passes to the lender subject to usual stipulations as to possession and sale, but leaving nothing in the way of legal property in the borrower, only a right to redeem.

This latter form of security, although very usual in money-lending transactions of a mere individual character, is not, I believe, usually adopted in those purely commercial transactions where advances are obtained against goods represented either by warrants or bills of lading.

These being two of the ordinary modes by which goods are made a security for an advance, and within one of which the transaction now in question must be ranged, the question in the present case resolves itself into whether the security was intended to operate, or, by implication of law arising upon the undisputed facts, operated in the same way as an assignment by a bill of sale or as a mere pledge. If the former, the whole and entire property would pass, and, as a consequence, the liability to freight would be transferred to the defendants; for although, as suggested by defendants' counsel, it is highly probable that neither Nercessiantz nor the defendants had in their minds at the time the liability to freight, yet, if the latter took the security of a contract by which "the property" passed to them, they cannot take the good and reject the bad. On the other hand, if the contract, although carried out by the indorsement of the bill of lading, remained merely a pledge, I think it clear that "the property," as expressed in the Act, did not pass, for by those words I understand the whole and entire legal property, and not merely the limited interest which is transferred by the contract of pledge.

Now, the plaintiffs' counsel contended that the former was the true effect of the indorsement, and he relied upon the opinion to that effect expressed by Lord Justice Brett in the recent case of *Glyn Mills & Co.* v. *The East and West India Dock Company* (4). The learned Judge, in the course of his judgment, made the following observations:—"Upon consideration I am of opinion that an indorsement of a bill of lading for an advance does, by the mercantile law of England, pass absolutely the legal property in the goods to

(1) Holt's N.P. Cases, 383.

(2) 35 Law J. Rep. Q.B. 232; Law Rep. 1 Q.B. 585.

(3) 5 Bing. N.C. 136; 6 Scott, 877.

(4) 50 Law J. Rep. Q.B. 62; Law Rep. Q.B. D. 475.

the indorsee, and a consequent right in law of immediate actual possession against all the world, except some one who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which is still an equity though recognised by the common law Courts." I apprehend, however, that the language of the learned Lord Justice must be read as applied to the facts of that particular case; and as I on the hearing came to the conclusion in that case that the intention of the parties and the implication of law from their dealings was that the whole and entire property did pass, I agree in the view of the Lord Justice, thus limited and understood. I thought in that case of *Glyn* v. *The East and West India Dock Company* (4) that the indorsement, coupled with the terms of the instrument of the 15th of May, 1878, and the transactions between the parties, did amount in effect to a mortgage—see *Flory* v. *Denny* (5)—and that the right of property as well as that of possession had passed to the plaintiff; and although my judgment was reversed in the House of Lords upon another ground (which the learned counsel for the plaintiff declined to argue before me), my view as to the property passing was supported by Lords Justices Baggallay and Brett, *dissentiente* however Lord Justice Bramwell, and *abstinente* the House of Lords on the final appeal. Lord Bramwell considered the transaction in that case of *Glyn* v. *The East and West India Dock Company* (4) as not amounting to any more than a pledge, and both he and Lord Justice Brett agreed that, if only a pledge, the Bills of Lading Act would not apply. It is between these conflicting views of such high authority that I have to find my way to a result in the present case. In the view of the limited effect of the observations of Lord Justice Brett which I have expressed the learned counsel for the plaintiff did not concur. He contended that it was the intention of the Lord Justice to enunciate the general proposition that by the law merchant of England the necessary legal implication from or effect of an indorsement of a bill of lading for an advance was that by it the whole and entire legal property passed, or at least he said that that was the true deduction from *Lickbarrow* v. *Mason* (6), referred to by the Lord Justice, as well as from subsequent authorities; and I proceed, therefore, to the consideration of them. In *Lickbarrow* v. *Mason* (6) the action was brought by an indorsee for value of a vendee against persons claiming under the vendor, and the question to be decided was whether under the circumstances the vendor could stop *in transitu* the goods comprised in the bill of lading, the vendee having become insolvent. The question, therefore, to be decided was not limited, as in the present case and that of *Glynn* v. *The East and West India Dock Company* (4), to the claim of two rivals immediately claiming title under the indorsement of different parts of the bill of lading, but as to the effect of a general and unrestricted indorsement to a third party claiming *bona fide* and for value, and without notice of any contract or equities existing between the immediate parties to the indorsement. The Court of Queen's Bench held that as between the parties the property passed to the indorsee free from any restriction just as if the goods had actually been delivered to him, and gave judgment for the plaintiff. The Court of Exchequer Chamber reversed this judgment, on the ground that the operation of the indorsement was no more than an indication to the master of the person to whom the goods were to be delivered, and that the indorsee had no better title than his indorser, and gave judgment for the defendant. The judgment of the Exchequer Chamber was, however, in its turn reversed by the House of Lords, presumably on the basis of the reasoning of Mr. Justice Buller in the opinion delivered by him in the

(5) 7 Exch. Rep. 581; 21 Law J. Rep. Exch. 223.

(6) 1 Sm. L.C., 8th ed., 753.

House. But I do not understand that case as holding that as between the immediate parties the law merchant implies that of necessity the indorsement has that operation; and, indeed, in the case of *Hibbert* v. *Carter* (7) Mr. Justice Buller seems to me to have laid down the contrary. *Hibbert* v. *Carter* (7) was an action on a policy of insurance with a denial of interest. The plaintiff had effected the insurance on instructions and "account" (as expressed in the policy) of Kerr, whom he made his general consignee; but Kerr had, before the insurance was effected, unknown to the plaintiff, indorsed the bill of lading to a creditor named Delpratt, and Mr. Justice Buller at the trial (there being no evidence of the circumstances attending the indorsement) held that by this indorsement the whole property had passed to the latter, and would have nonsuited the plaintiff but that the defendants had omitted to pay the premium, for which premium therefore the plaintiff had a verdict. In banc, however, the Court modified the general proposition thus apparently laid down, holding that, although generally where a bill of lading is taken by a creditor as a security for the debt the whole property passes, parties are always at liberty to vary this general rule by entering into any particular agreement between themselves; and upon evidence being given upon affidavit that the consignor had no intention of passing the whole property to Delpratt by the indorsement, but merely intended to give him a charge upon the net proceeds in the plaintiff's hands, the Court directed a new trial, upon which the plaintiff had a verdict. Mr. Justice Buller, before whom the case was again tried, laid it down that the *prima facie* transfer of the whole property is subject to be controlled by the evident intention of the parties. This case was thus decided before the case of *Lickbarrow* v. *Mason* (6), and was referred to in that case and with approval by Mr. Justice Buller. It could not, therefore, have been his intention in *Lickbarrow* v. *Mason* (6) to have said anything in conflict with it; and if the language of Mr. Justice Buller and the other Judges is read bearing this in mind, I do not think Mr. Hall's contention is supported by that decision. In *Lickbarrow* v. *Mason* (6) in the Court below, Mr. Justice Ashurst made use of the following language during the course of his judgment: "When a man sells goods he sells them on the credit of the buyer; if he deliver the goods the property is altered, and he cannot recover them back again though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the meantime, the vendor may stop the goods *in transitu*. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud." Then he says, "If the consignee had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only; but he has made it an indorsable instrument. So it is like a bill of exchange, in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and the indorsee." Then he goes into the reasons of that, and says, "The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed, but the effect of that indorsement is a question of law—which is, that as between the original parties the consideration may be enquired into, though when third persons are concerned it cannot. This is also the case with respect to a bill of lading." It would appear, therefore, that Mr. Justice Ashurst did not intend to lay down as a general proposition that a mere indorsement of necessity passed the property, but only as between third parties. Mr. Justice Buller's judgment in that Court does not deal with the particular question, and I will advert presently to his opinion delivered in the House of Lords. Mr. Justice Grose said, "I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does (carefully guarding his proposition to that particular relation, and not giving it any

(7) 1 Term Rep. 645.

greater effect). In the Exchequer Chamber Lord Loughborough delivered a very celebrated judgment, which was afterwards reversed; but the judgment is none the less valuable as a clear statement of his view. He reasoned upon different principles altogether; he took it that the bill of lading was a contract, as undoubtedly it is, between the shipper and the shipmaster, and is no contract with anybody else: that it contains merely the terms upon which the master says, "I receive the goods," and contains his undertaking to deliver them; so that it was no more than a receipt, or no more rather than a direction to the master as to whom he was to deliver the goods. He says, "By the delivery on board the shipmaster acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods." And further on he says, "Goods in pawn, goods bought before delivery, goods in a warehouse or on shipboard, may all be assigned." And he winds up the result by saying that it passes such right, and no better, as the person assigning had in it. When the case came before the House of Lords, there was a considerable difference of opinion among the Judges, and there has never been a positive decision reported anywhere of the House of Lords; but the opinion of Mr. Justice Buller has always been taken as the law, and been adopted and followed as the law, up to the present day. I refer to his language to shew that he only decides the point as between third parties and not as between the immediate parties. He says, speaking of the case of *Godfrey* v. *Furzo* (8):—"The next point there stated is, what is the law in the case of a pure factor without any demand of his own? Lord King says he would have no property. The expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is because, in this case, the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property" (Lord King held that no property passed by the indorsement of the bill of lading); and then he says:—"But then it remains to be proved that a man who is in advance or under acceptances on account of the goods is simply and merely a servant or agent—for which no authority has been, or, as I believe, can be produced." Then he says, after going into the facts:—"As between the principal and mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will; whether they be actually in the factor's possession or only on their passage makes no difference, the principal may countermand his order; and though the property remain in the factor till such countermand, yet, from that moment, the property revests in the principal, and he may maintain trover."

It is true that the terms of the special verdict which were found in the *venire de novo* awarded by the House of Lords, on account of some informality in the original proceedings in the Queen's Bench, are in more general terms, and without the limitation either as to the parties or in reference to the operation as a mere complement of delivery as supported by Lord Loughborough. But I apprehend that this also must be read as applied to the facts of that particular case; and that Lord Tenterden considered that the effect of that case was so limited, as I have suggested, is clear from his statement of it in *Abbott on Shipping*, 7th ed. 533, and 11th ed. 432, in which he says:—"It is now the admitted doctrine of our Courts that the consignee may, under such circumstances, confer an absolute right and property upon a third person indefeasible by any claim other than that on the part of the consignor." But in the more recent case of *Meyerstein* v. *Barber* (9), relied upon by Mr. Hall, the

(8) 3 P. Wms. 185.

(9) 36 Law J. Rep. C.P. 289; Law Rep. 2 C.P. 661; in *Dom. Proc.* 39 Law J. Rep. C.P. 187; Law Rep. 4 H.L. Cas. 317.

question as to the effect of such an indorsement as between the immediate parties did arise, and the facts seem to be undistinguishable from those of the present. There was in that case, as in this, simply an advance and deposit of an indorsed bill of lading by way of security, and no formal instrument of any kind executed; and the question in that case arose thus—the plaintiff was indorsee of the bill of lading, first in point of time, but having only one part, and the only possession, or right of possession, which he had at the time of the conversion by the defendant was that which was given him by the indorsement. The defendant, Barber, on the other hand, was indorsee by subsequent indorsement and delivery to him of the second part of the bill of lading, and he had clothed his title with possession by obtaining warrants in his own name, and thus been guilty of a conversion. Upon the argument the plaintiff's case was that the indorsement was by way of pledge, and that by it a sufficient right of property had passed to him to entitle him to maintain trover against the defendant; and the defendant's argument (based upon the contention that both transactions were only by way of pledge) was, that inasmuch as the plaintiff had not, and the defendant had, obtained delivery—which is, as I have before observed, the essential complement of a pawn—the latter had a better title. In the Court of Common Pleas, and also in the Exchequer Chamber, the transaction was treated by everybody as one of pledge, the language of Chief Justice Erle, Mr. Justice Williams and Mr. Baron Martin being expressly to that effect, and concurring in holding that the mere indorsement of the bill of lading was such a delivery of the goods as amounted to a valid pledge entitling the plaintiff to hold the goods as against Abraham, his indorser, and all claiming title under him, and this judgment was affirmed by the House of Lords. It is no doubt true that Lord Hatherley and Lord Westbury, in expressing their advice to the House of Lords, used language which appears to be to the effect that by the indorsement the whole and entire property passed to the plaintiff. But reading those expressions as applicable to the particular facts of the case, I do not think that the learned Lords intended to say anything more than that, as between the first and second indorsee, sufficient property had passed to the plaintiff to entitle him to maintain the action, and that the indorsement *per se* amounted to a delivery. Lord Hatherley speaks of the transaction as a pledge, and it must be recollected that a mere pledge with its limited operation passes property quite sufficient to maintain a possessory action against a wrong-doer. See also *Ayers* v. *The South Australian Banking Company* (10). The decision in that case really was, that under the circumstances the bill of lading had not fulfilled its office, and was therefore capable of assignment.

Having thus considered the authorities, I have come to the conclusion that, so far from supporting the proposition contended for by Mr. Hall, they shew that as between the immediate parties the intention must prevail. And in the present case I come to the conclusion upon the facts that the parties did not intend anything more than a pledge—that is, not to take the whole property out of Nercessiantz, but to leave the general property with him, contemplating that he would deliver the goods to the parties for whom he had bought them, and that the possession of the bill of lading would enable the defendants to stop their advance out of the proceeds by making them a necessary party to the delivery; or at the lowest to put it in their power to compel the borrower to redeem the pledge, and thus obtain the only instrument by which the borrower could obtain delivery of the goods and perform his contract. So viewed, no sufficient property passed to render the defendants liable, and though the question in the present state of the authorities is not free from difficulty, I have done my best to arrive at a result, which is, that there should be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors—Lowless & Co., for plaintiff; Hare & Co., agents for H. J. Leach, Manchester, for defendants.

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(10) 40 Law J. Rep. P.C. 22; Law Rep. 3 P.C. 548.

1883. May 2. GREEN *v.* DUCKETT.

Distress Damage Feasant—Cattle impounded on Premises—Tender of Damages after the Impounding—Exorbitant Demand—Payment under Protest—Money Had and Received.

The placing of cattle that have been distrained damage feasant in a private pound does not necessarily cause a subsequent tender of amends made by the owner to be too late.

The defendant placed a bull that was trespassing on his farm in a shed belonging to him. The plaintiff, the owner of the bull, within a reasonable time tendered to the defendant 1*s.* 6*d.*, *which was more than the amount of damage the bull had done. The defendant refused to release the bull unless the plaintiff paid him* 2*l. The plaintiff paid him* 2*l.*, *under protest, and brought an action against him to recover* 1*l.* 18*s.* 6*d.*:—

Held, *that the plaintiff was entitled to recover the amount claimed.*

Special Case stated by way of appeal from the decision of the County Court Judge.

This was an action brought to recover two sums of money—namely, 12*s.* 6*d.*, as to which no dispute arises, and which was paid into Court by the defendant before the trial of this action, and 1*l.* 18*s.* 6*d.*, claimed by the particulars of demand as "amount paid under protest to the defendant for the purpose of obtaining possession of a bull wrongfully detained by him." Judgment was given for the plaintiff in respect of the said sum of 1*l.* 18*s.* 6*d.*, the facts under which that sum is claimed being proved to be as follows:—

1. In the month of August, 1882, a bull belonging to the plaintiff trespassed upon the defendant's land and did damage, and was distrained by the defendant damage feasant.

2. Immediately upon the said bull being distrained as aforesaid, it was impounded by the defendant upon his own land. It was admitted that there was no proper (or convenient) pound in the locality to which it could have been sent. Subsequently to the impounding the plaintiff demanded back the bull, and tendered the sum of 1*s.* 6*d.* as compensation for the damage done by such bull.

3. The defendant alleged that the damage done by the said bull amounted to 2*l.*, and refused to give it up unless such amount of 2*l.* was paid by the plaintiff. The plaintiff accordingly paid to the defendant the sum of 2*l.*, but under protest as to the sum of 1*l.* 18*s.* 6*d.*, the difference between the sum of 1*s.* 6*d.*, so tendered as aforesaid, and the sum of 2*l.*, so paid to the defendant as aforesaid.

4. I found as a fact that the sum of 1*s.* 6*d.*, so tendered by the plaintiff as aforesaid, was sufficient to cover the amount of all the damage actually done by the said bull.

5. After taking time to consider I gave a written judgment in favour of the plaintiff for the sum of 1*l.* 18*s.* 6*d.*, the amount of the difference between the said sum of 1*s.* 6*d.* (so found by me as aforesaid to be sufficient amends for all the damage done by the said bull) and the said sum of 2*l.* (so as aforesaid paid by the plaintiff).

My said judgment was as follows:—

In this case the plaintiff's bull strayed and entered the yard of the defendant, where it was alleged that it had upset a meal-tub. The defendant in consequence distrained it damage feasant, and impounded it in a shed in the yard. The plaintiff came to enquire, and was told by the defendant that it was there, but that it would not be given up except upon payment of 2*l.* for the damage done. The plaintiff, having endeavoured in vain to ascertain the damage, and believing there was no damage, tendered to the defendant 1*s.* 6*d.* for damages and expenses, and demanded the bull. The defendant refused, and the plaintiff, to obtain possession of the bull, paid to the defendant, under protest, 2*l.*, and received the bull.

This action was brought to recover the excess.

I find as facts that the plaintiff made a legal tender of 1*s.* 6*d*; that 1*s.* 6*d.* was amply sufficient to cover the real damage and expenses; that the plaintiff was compelled to pay the excess to obtain the bull; and that he paid it under protest. The question then arises whether he can legally recover the excess thus obtained from him.

Green v. *Duckett.*

The difficulty is well stated in *Woodfall's Landlord and Tenant* (1): "Thus a tender comes too late after the impounding to enable the owner to maintain replevin, or detinue, or case, or trespass. The distrainer may take amends tendered after the impounding if he chooses, and let the distress out; but he is not legally bound to do so, and may therefore safely practise some extortion, say to the extent of 10*l.* (or even more), which the party distrained on must either submit to, or incur the trouble and expense of a replevin, including the costs of an unsuccessful action of replevin, wherein sufficient amends must be paid into Court; or he must make up his mind to lose the cattle or goods distrained, rather than submit to such extortion, or incur such trouble, expense and costs. He cannot pay under protest the amount claimed, and afterwards recover back the excess in an action for money had and received for his use."

Mr. Hobbs, for the defendant, relied upon the law as stated here and in a similar passage in *Addison on Torts*, contending that, even if the proper amount had been tendered, the excess demanded and obtained could not be recovered back; and admitting, when pressed, that his contention would be the same if the defendant had succeeded in exacting an excess of 50*l.* or 100*l.* The cases cited in *Woodfall* in support of this doctrine, no doubt, appear *prima facie* to justify the contention; but when carefully examined it will be found that nearly all of them turn upon the form of action or the mode of pleading. The owner cannot, it is said, maintain trespass, citing *Ladd* v. *Thomas* (2). Of course not, where the original taking was, as in the present case, lawful. "Or case," citing *Sheriff* v. *James* (3). There, no doubt, the very point was raised, excepting that the distress was still detained, the plaintiff stating that he tendered the proper amount and that a larger sum was extorted; but a non-suit was affirmed in the Common Pleas, on the ground that such an action had never been brought before, Burrough, J., saying, "This is probably the invention of some young pleader, and never was thought of before"; and the same attempt was disposed of in the same way in *Anscomb* v. *Shore* (4), Heath, J., saying that it would put an end to special pleading. He cannot, it is said, maintain "replevin," citing *Thomas* v. *Harries* (5), or detinue, citing *Singleton* v. *Williamson* (6). There the point was raised in the same way as it was in the case of *Sheriff* v. *James* (3), and Martin, B., said: "There is the law no doubt as decided, but it seems to me it is a very odd and absurd law." He said also in the same case, "I never could comprehend the cases, or the reason why an action will not lie after tender." He cannot, it is said, recover in assumpsit for money had and received, citing *Gulliver* v. *Cosens* (7). *Lindon* v. *Hooper* (8) is to the same effect. But in those cases it is to be observed there had been no tender of the right amount. The cases too, to some extent, bear out the proposition that formerly the only alternative to submitting to extortion was to bring an action of replevin, which must be unsuccessful; and for that the passage in *The Six Carpenters' Case* (9) is usually cited: "Tender after the distress and before the impounding makes the detainer and not the taking wrongful. Tender after the impounding makes neither the one nor the other wrongful, for there it comes too late, because then the cause is put to the trial of the law to be there determined. But after the law has determined it, and the avowant has return irreplevisible, yet if the plaintiff makes him a sufficient tender he may have an action of detinue for the detainer after, or he may, upon satisfaction made in Court, have a writ for the delivery of the goods." In many of the cases it seems to have been considered that this was the only remedy, whilst in some of them it is assumed that there is no remedy—that is, I suppose, practically none. See Martin, B., in *Singleton* v. *Williamson* (6); and Erle, J.,

(1) 9th ed. pp. 651 and 652.
(2) 12 Ad. & E. 117; 9 Law J. Rep. Q.B. 345.
(3) 1 Bing. 341; 2 Law J. Rep. (o.s.) C.P. 5.
(4) 1 Taunt. 261.
(5) 1 Mac. & G. 695; 9 Law J. Rep. C.P. 308.
(6) 7 Hurl. & N. 747; 31 Law J. Rep. Exch. 287.
(7) 1 Com. B. Rep. 788; 14 Law J. Rep. C.P. 215.
(8) 1 Cowp. 414.
(9) 1 Sm. L.C. 143; 8 Coke, 147*a*.

in *Loring* v. *Warburton* (10), almost echoes the words of Martin, B., saying, when speaking of *Glynn* v. *Thomas* (11), "There was in that case a grievous wrong, and the law gives no remedy; I always wondered why." So that this must be taken to have been the law, and whether it arose from the rigid adherence to certain well-defined forms of action and to certain rules of pleading, or from the impossibility then of making a tender continuous, as it ought to be, up to the time of trial, by payment into Court, which could not then be done in trespass, case, detinue or replevin, I do not propose further to enquire. Possibly, in the present case, I might rely upon the *dicta* of the Judges in *Gulliver* v. *Cosens* (7), expressed thus in the marginal note—that the plaintiff cannot, "without tendering amends, pay under protest and recover in money had and received"; for in this case amends were tendered. Or perhaps I might rely upon the strong opinion of all the Judges who decided the case of *Browne* v. *Powell* (12), and upon the judgment of Maule, J., in *Thomas* v. *Harries* (5), that when the distress is impounded upon the premises, as it was in the present case, a tender after such impounding is not too late, though it would be too late if the distress were placed in the public pound. But I prefer to rest my judgment upon this broad ground, that the defendant, by holding the pledge, has obtained satisfaction, and that in addition he has made use of his position to extort a large excess; so that there is a *damnum cum injuria*, for which the plaintiff ought to have a remedy, either legal or equitable. I shall, if necessary, amend the particulars in any way, and they may be treated as so amended. Special forms of action, special pleading, difficulties as to payment into Court, or otherwise, no longer hamper the High Court; still less do they hamper the County Court; and I am of opinion that the plaintiff is entitled to recover this money just as he would be in any other case of money extorted from him by withholding his property. I shall be glad if the defendant will take the case to a higher Court, and so ascertain authoritatively whether the statement in *Woodfall* is right or not, that he may "safely practise some extortion, say to the extent of 10*l.* (or even more)."

Judgment for the plaintiff.

Leave to appeal, upon condition that if by case the case be completed and lodged in Court on or before the 13th of February, and that this judgment form part of it.

The question for the opinion of the Court is whether my judgment for the plaintiff for 1*l.* 18*s.* 6*d.* above-mentioned is correct. If in the opinion of the Court such judgment is correct, then judgment is to stand for the plaintiff, with costs. If in the opinion of the Court my above judgment is erroneous, then judgment is to be entered for the defendant, with costs.

W. J. METCALFE, Judge.

February 13, 1883.

G. Pitt Lewis, for the appellant.—There is a series of cases in which it has been held that neither trespass nor case can be brought to recover back money paid to release an animal impounded. The proper course to take in order to recover the animal is to bring replevin. The first decision was in 1766, and that has been followed ever since. After goods are impounded, they are in the custody of the law. The law provides a mode of releasing them, which must be followed. In *Woodfall's Landlord and Tenant* (13), the law is stated to be that "a tender comes too late after the impounding," and that the distrainer "may safely practise some extortion," "which the party distrained on must either submit to or incur the trouble and expense of a replevin." "He cannot pay under protest the amount claimed, and afterwards recover back the excess in an action for money had and received."

[DENMAN, J.—The case of *Gulliver* v. *Cosens* (7) applies where the impounding is not on the premises. Is the tender too late so long as the animal is on the premises?]

There are *dicta* in *Browne* v. *Powell* (12) to the effect that such a tender is not too late; but it is submitted that those *dicta*

(10) E. B. & E. 507; 28 Law J. Rep. Q.B. 31.
(11) 11 Exch. Rep. 870; 25 Law J. Rep. Exch. 125.
(12) 4 Bing. 230.
(13) 9th ed., p. 651.

cannot be supported. *Thomas* v. *Harries* (5) is the other way.

[HAWKINS, J.—That was a distress for rent. The statute 11 Geo. 2. c. 19. s. 10, authorises impounding on the premises in the case of a distress for rent.]

If a man chooses to pay money to save himself the trouble of replevin, he cannot recover it. If a man pays money voluntarily, he cannot recover it back.

He cited *Lindon* v. *Hooper* (8), *Glynn* v. *Thomas* (11) and *Skeate* v. *Beale* (14).

B. Coleridge, for the respondent.—*Ashmole* v. *Wainwright* (15) is a later case than *Skeate* v. *Beale* (14), and was decided by the same Judges, *Skeate* v. *Beale* (14) being cited. *Ashmole* v. *Wainwright* (15) follows *Astley* v. *Reynolds* (16).

[He was then stopped by the Court].

DENMAN, J.—I think that in this case the County Court Judge has taken the right and sensible view, both of the law and of the facts. The facts are very simple. The plaintiff had a bull, which trespassed on the defendant's farm and did some damage, something between a farthing and 1*s.* 6*d.* The defendant seized the bull upon his farm and put it in a shed; that was the only impounding that took place. The plaintiff, as soon as he had the opportunity, tendered to the defendant 1*s.* 6*d.* for the damage done, and asked for his bull. The defendant said, You shall not have it back unless you pay me 2*l.* The plaintiff paid the 2*l.* under protest, and sued the defendant for 1*l.* 18*s.* 6*d.* in the County Court. It is admitted by Mr. Pitt Lewis that if the *dicta* in *Browne* v. *Powell* (12) are right, he is wrong, subject only to the question whether this was a voluntary payment. The *dicta* in *Browne* v. *Powell* (12) are to the effect that if cattle distrained damage feasant are still in the custody of the distrainer when tender of amends is made, the tender is in time, subject only to the question as to the tender being made within a reasonable time after the distraining, which does not arise here. I think those *dicta* are good law; and there is nothing in any of the cases to shew the contrary. The case most relied on by Mr. Pitt Lewis is *Thomas* v. *Harries* (5). There, no doubt, the tender was held to be too late. But that case was a different one. That was a case of distress for rent, and turned upon the words of 11 Geo. 2. c. 19. s. 10, enabling persons to "impound or otherwise secure the distress, of whatever nature it may be, on such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient, and may appraise, sell and dispose of the same upon the premises." That seems to me to be altogether different to the case of impounding cattle damage feasant at common law. Here the cattle are impounded damage feasant upon the premises, as in *Browne* v. *Powell* (12). A sufficient tender is made within reasonable time upon the premises. I think that the *dicta* in *Browne* v. *Powell* (12) cover this case, that they are sound law, and that the County Court Judge had their authority for deciding as he did. But then it is said that this was a voluntary payment, and cannot, therefore, be recovered. I think the case that Mr. Coleridge cited of *Ashmole* v. *Wainwright* (15) is a complete answer to that contention. There the defendants carried goods for the plaintiff, and charged him 5*l.* 5*s.*, which he paid under protest; and it was held that he could recover back in an action for money had and received the difference between 5*l.* 5*s.* and the sum that the defendants were entitled to receive for the carriage. It was also held, in a case in 2 *Strange* (16), that a payment is not voluntary if a person who has the possession of another's goods insists upon an exorbitant payment before giving up the goods. I think that this was not a voluntary payment at all.

There are two other grounds upon which I should have been prepared to decide this case. The first is a doctrine of the common law that, no doubt, requires to be very carefully applied—I mean the maxim "*De minimis non curat lex.*" I should have been prepared to hold that that applies to this case. It would not have applied in the County Court; but I think it does here. If the damage caused by the bull was something ranging between a farthing

(14) 11 Ad. & E. 983; 9 Law J. Rep. Q.B. 233.
(15) 2 G. & D. 217; 11 Law J. Rep. Q.B. 79.
(16) 2 Str. 915.

and 1*s.* 6*d.*, it would be a violation of the maxim to allow it to be said, There is a Court open to you; you must go through the process of replevin to get back your bull.

Supposing, however, that not to be so, I should, in the second place, have been prepared to hold that where there is such a case of pure extortion as we have here, the case of a man who says, "I will keep your animal until you pay me a sum of money altogether independent of the amount of damage done"—to say at the present day that replevin must be resorted to would be preposterous. I think that extortion is an element which does not exist in any of the cases that were cited by Mr. Pitt Lewis.

HAWKINS, J.—I am of the same opinion. Mr. Pitt Lewis's client was clearly within his legal rights in detaining the bull which he found trespassing on his premises. The question is whether he was entitled to detain him after tender of the amount of damage done. Mr. Pitt Lewis says, Yes; he is entitled to keep him, and the plaintiff must resort to replevin in order to recover him. It is not necessary to say what would have been the case if the bull had been removed to a pound; but he was not moved from the defendant's premises, and had remained under his control up to the time of the tender. Then the plaintiff comes and tenders to the defendant 1*s.* 6*d.*, at which he estimates the amount of damage that the bull has done. The County Court Judge has found that he was clearly and abundantly right in that estimate. Then the defendant says, I will not accept your 1*s.* 6*d.* I cannot shew you that your bull has done any damage, it is true; but I will extort from you a further sum of 1*l.* 18*s.* 6*d.* Unless you pay me 2*l.*, you shall not have your bull. The plaintiff says, I protest against being called upon to pay 2*l.*, under pretence of damage done by my bull, when my bull has done no damage at all; but I will pay it to get my bull. Mr. Pitt Lewis says that the defendant having put the bull into his pound, the owner cannot tender amends, but must have recourse to replevin; and that this is a fair punishment on the owner for allowing it to trespass. I think that there is a great distinction between a public and a private pound. When anything is in a public pound, it is in the custody of the officer of the law; and I can understand that when it is in the hands of the pound-keeper, no tender to the person who impounded it would do. But that is not the case here. The bull is in a private pound; it is in a shed; it is in a shed belonging to the defendant. The defendant is at no cost at all. He has to go nowhere off his premises; he simply turns the key and lets the animal out. The judgment of the County Court Judge certainly is sense, and seems to me to be good law. It is in accordance with what was said by Chief Justice Best in *Browne* v. *Powell* (12): "It is not necessary now to decide that point, but it seems that the pound of the lord of the manor is the only pound for such a purpose; if it were otherwise, the distrainer, by impounding on the spot where he takes the cattle, or very near, might exclude the possibility of any tender of amends being made. The pound, therefore, which will exclude such a tender, must be a pound in which the cattle are no longer in the custody of the party." I am of opinion in this case that a tender of sufficient amends having been made while the bull was in the custody of the distrainer, the tender was not too late. Then, is the 2*l.* paid under the circumstances I have mentioned a voluntary payment, so that an action for money had and received will not lie? I am of opinion that it is not, and am very glad to find that the case which Mr. Coleridge has cited (15) is an authority for our holding that such a payment is not voluntary. Mr. Pitt Lewis's contention is that a man may, by false, fraudulent and extortionate pretences that he has sustained damage to a much larger extent than he knows he has, obtain a larger sum than is due to him, and that the person paying it has no remedy. I think that it would be monstrous to hold that a man is entitled to keep money so obtained.

Judgment for plaintiff.

Solicitors—Prior, Bigg & Co., agents for Welsh & Son, Wells, Somerset, for plaintiff; Bolton, Robbins & Busk, agents for S. Hobbs, Junr., Wells, Somerset, for defendant.

1883. May 22. } COLLINS *v.* STIMSON (FRANCE, *claimant*).

Vendor and Purchaser — Fraudulent Purchase by Bankrupt—Non-Completion of Purchase—Deposit Money paid to Stakeholder—Forfeiture—Following Money—Title of Trustee in Bankruptcy.

W. having secretly realised the greater part of his available property and effects, absconded with the proceeds. W. was subsequently adjudicated a bankrupt, and on the 4th of October, 1882, *the plaintiff was appointed a trustee of the estate. On the 10th of October W. entered into an agreement in an assumed name with F. for the purchase of certain house property, and paid to the defendant, as stakeholder under the agreement, a certain sum by way of deposit, which it was admitted formed part of the proceeds of the secret realisation. The agreement provided, inter alia, that the deposit money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase. W. was shortly afterwards arrested and convicted as an absconding bankrupt, and the purchase of the property was consequently never completed. It was admitted that both the defendant and F. had acted throughout bona fide in the ordinary course of business, and that the non-completion of the agreement was not caused by any default on the part of F. The plaintiff having claimed to have the deposit money paid over for the benefit of the bankrupt's estate,*—Held, *that, inasmuch as it was of the essence of the contract that the deposit money should be forfeited if the purchase was not completed, such money belonged to F. and could not be followed by the trustee of the bankrupt's estate.*

Special Case.

1. J. C. Wilson, of Regent Street, Swindon, in the county of Wilts, grocer and provision dealer, was adjudicated a bankrupt on the 20th of September, 1882, and the plaintiff was on the 4th of October, 1882, appointed the trustee of his estate.

2. On the 26th of August, 1882, the said J. C. Wilson, having just before secretly realised the greater part of his available property and effects, absconded from Swindon, taking with him a large sum of money in bank notes and gold, the proceeds of such realisation, and opened an account at the London and South Western Bank, Clapham Branch, with a portion of the said moneys.

3. He was subsequently traced to London, where it was discovered that he was passing under the name of John Watson; and on the 31st of October, 1882, a warrant for his apprehension as an absconding bankrupt was issued. He was arrested on the 10th of November, 1882, and on the 12th of January, 1883, was tried at the Wilts Assizes, and sentenced to nine months, with hard labour.

4. Whilst so in London the said J. C. Wilson, on the 10th of October, 1882, in his assumed name of John Watson, and purporting to act for and as agent of a Miss Tomkinson, but in fact (although unknown to the defendant or the claimant as hereinafter stated) acting on his own behalf, entered into an agreement in writing with the claimant for the purchase from him of certain house property situate at Wandsworth, for the sum of 950*l.*

5. At the same time the said J. C. Wilson paid to the defendant, who is an auctioneer and valuer, the sum of 95*l.*, being a deposit of ten per cent. upon the said purchase-money. This sum was paid to the defendant as stakeholder under the said agreement, which provided, *inter alia*, that the deposit money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase.

6. The said payment was made by the said J. C. Wilson by means of a cheque signed in the name of John Watson upon the Clapham branch aforesaid, which was duly paid by them out of moneys with which he had shortly before opened an account as aforesaid.

7. Neither the defendant nor the claimant knew, nor had they any reasonable means of knowing, at the time of the said agreement being entered into, nor at the time of the payment of the said deposit, that the said person representing himself as John Watson was in fact one and the same as J. C. Wilson, nor that the said John Watson was a bankrupt, nor that he had secretly realised any of his available property, nor that he had absconded with a sum of money in bank notes and

gold, which were the proceeds of the secret realisation; nor that the deposit money so paid by the said John Watson was part of the same; nor that he was contracting on his own account, and not on behalf of Miss Tomkinson.

8. At the time of the said agreement being entered into, and at the time of the deposit being paid, the defendant and the claimant believed that the said John Watson was acting as the agent of Miss Tomkinson, and that he entered into the agreement and paid the deposit for and on her account and as her agent, and the defendant and claimant acted throughout *bona fide* in the ordinary course of business.

9. The purchase of the property was, under the circumstances above stated, not completed as by the agreement provided, or at all; but it was admitted that such non-completion was not caused by any default on the part of the claimant.

The question for the opinion of the Court was whether, upon the above facts, the plaintiff was entitled to have the said deposit money paid over to him.

Lamaison, for the plaintiff.—The question here is, whether the trustee can follow these moneys in the hands of the auctioneer. Trust property may be followed into the agent's hands where, as here, it is sufficiently earmarked—*Taylor* v. *Plumer* (1) and *In re Hallett's Estate* (2).

[He was stopped by the Court.]

Temple Cooke, for the claimant.—These are moneys which the trustee cannot follow. The deposit was paid in the ordinary course of business, and the agreement in question might have been enforced but for what transpired subsequently. The fact that the agreement was entered into in the name of another person cannot, upon the findings of the case, affect the claimant's position. The deposit was paid by the vendee to secure any damage which might arise from the failure on his part to complete the purchase. As regards the deposit money being in the hands of the defendant as stakeholder, a stakeholder holds it as trustee for the parties until a certain event, namely, the failure of the vendee to complete the contract, after which the stakeholder became a trustee for the vendor. The deposit was forfeited by the breach of the contract, and the claimant then took the place of the stakeholder so far as the right to the possession of the deposit money is concerned. He cited *Ex parte Dewhurst* (3).

Lamaison, in reply.—The title of the vendor to the deposit money was not complete, and until the time for completing the purchase arrived the stakeholder was an agent for the purchaser. The stakeholder only becomes the vendor's agent when he pays over the money. At all events these moneys can be followed by the trustee, under the refined rules of equity elaborately explained by the late Master of the Rolls in *Hallett's Case* (2), until such time as they are actually paid over and the means of ascertainment becomes impossible. He referred to 32 & 33 Vict. c. 71. s. 17.

POLLOCK, B.—I think that the claimant is entitled to our judgment in this case. It appears that Wilson, who lived at Swindon, was adjudicated a bankrupt on the 20th of September, 1882. Prior to the adjudication, Wilson, for the purpose of defeating his creditors, secretly realised the greater part of his available property, and absconded from Swindon with the proceeds. He then assumed the name of Watson, and shortly afterwards entered into an agreement with France, the present claimant, for the purchase from him of certain freehold property; and a sum of money was paid, as a deposit, by Wilson to the defendant, an auctioneer. One of the terms of the agreement provided that if the purchaser neglected or failed to comply with the conditions contained in it, the deposit money should be forfeited to the claimant.

Now the position of an auctioneer, whether conducting a sale by auction or by private contract, is well defined; he acts as an agent for both parties, and represents the interest of both parties. Now Watson, as vendee, clearly could not ask for the money back, because the vendor

(1) 3 M. & S. 562.

(2) 49 Law J. Rep. Chanc. 415; Law Rep. 13 Ch. D. 696.

(3) 41 Law J. Rep. Bankr. 18; Law Rep. 7 Chanc. 185.

Collins v. *Stimson.*

was ready to carry out the contract; and the only question is, whether the plaintiff, as a trustee of the bankrupt's estate, can recover this specific sum paid as deposit money on the ground that it was money which belonged to the estate of the bankrupt. The case has been very clearly argued by Mr. Lamaison, and I go with him to a considerable extent. I think that this case comes within the doctrine laid down in *Taylor* v. *Plumer* (1), so far as relates to the moneys being capable of being identified. I think, also, in accordance with the refined doctrine of equity expressed by the late Master of the Rolls in his very learned judgment in *In re Hallett's Estate* (2), that the trustee could follow the money, and that if the contract had been completed it could have been claimed as the property of the trustee.

That doctrine would apply here if the money in question had been deposited in a clear and unmistakable manner with the bankrupt's bankers, or had been lent to somebody as a loan, or if it had been a mere chattel—as a horse left with a livery-stable-keeper. But here the case is, that the bankrupt entered into a contract, one of the conditions of which was that if he did not carry it out he should forfeit the deposit money. That being so, can we say that money paid under such circumstances ought to be regarded as being in the same position as money paid into a banker's? I think not. It is found, as a fact, that both the claimant and defendant throughout acted in a perfectly *bona fide* manner, and without any knowledge of the bankrupt's proceedings. Now a term of the contract was that the deposit money should be forfeited if the purchaser neglected to carry out the agreement, and he has so neglected. The consideration for the contract is just as good as if there had been a payment on account of an hotel bill, or for clothing, in either of which cases the money could not be recovered back. Here there was property to sell, and some expenses have been incurred, such as for the making of the agreement; the matter goes on until the vendee is compelled to admit his inability to complete the purchase. It was of the essence of the contract that the sum of money paid as a deposit should be forfeited if the contract was not carried out, and I know of no authority whatever for saying that under such circumstances money can be followed up, burdened as it is with a contract of this kind. Our judgment must therefore be in favour of the claimant.

Lopes, J.—I agree. The only question before us is whether the trustee of the bankrupt can follow this sum of money under the circumstances stated in the Special Case. It is clear that the money could have been followed up under ordinary circumstances, being capable of ascertainment; and if the contract had been completed, I think the benefit of it would have belonged to the trustee. But here the deposit money was the price paid for the contract, and the vendor has been induced to alter his position and has incurred certain expenses. I confess, therefore, I am quite unable to distinguish the case from that of money paid for the purchase of a horse or ordinary chattel, which clearly could not be followed.

Judgment for the claimant.

Solicitors—Crafter & Burton, for plaintiff; J. D. Peard, for claimant.

[IN THE COURT OF APPEAL.]

1883. Feb. 14. *In re* CAREY. THE QUEEN *v.* NASH.*

Infant—Custody of Illegitimate Infant—Writ of Habeas Corpus—Rights of the Mother.

Now that all the Courts are Courts of equity as well as of law, the Court, on a writ of habeas corpus issued to obtain the custody of an illegitimate infant, will have regard to what is for the benefit of the infant, and to the rights and wishes of the natural blood relations of the infant.

Where an illegitimate child, aged seven years, had been since its birth in the care of foster parents in very poor circum-

* *Coram* Jessel, M.R.; Lindley, L.J., and Bowen, L.J.

stances, and the mother was the kept mistress of a man not the father of the child, the custody of the child was, upon the application of the mother, given to a sister and brother-in-law of the mother, who were respectable persons, and in a superior station in life to that of the foster parents.

This was an appeal from an order of a Divisional Court of the Queen's Bench Division (consisting of Pollock, B., and Manisty, J.), directing that a writ of *habeas corpus* should issue, requiring a Mr. and Mrs. Nash to bring up Rose Ethel Carey, an illegitimate infant, and deliver her over to the custody of a Mr. and Mrs. Wright, a sister and brother-in-law of the child's mother.

It appeared from the affidavit of Rose Carey, the mother of the infant, that the child was born in May, 1876, and that the putative father denied the paternity, and made no claim to the custody of the child; that very shortly after the child's birth it had been placed out to nurse with Mr. and Mrs. Nash, persons with whom, except once for a short interval, it had since remained; and that the Nashes were persons in very poor circumstances, subsisting partly upon charity, and partly upon odd jobs obtained by William Nash, the husband, as a day labourer. In answer to this, affidavits were filed by the Nashes, denying that they lived upon charity, and asserting (as the fact was) that they had maintained and educated the child at their own expense, and that she was being well brought up. They also alleged that the child's mother gained her living by prostitution, and that their reason for desiring to keep the child was their affection for her, and their desire to save her from a life of immorality.

Upon this evidence North, J., sitting at chambers, refused to issue a writ of *habeas corpus* for the delivery of the child to its mother, on the ground that she was not a proper person to have charge of it.

The mother then appealed to the Divisional Court, asking that the child should be given, not into her own keeping, but into that of Mr. and Mrs. Wright. Upon this application she filed a further affidavit, in which she gave the following account of herself:—"I was seduced when I was not yet fifteen years of age by a well-to-do gentleman, an officer in her Majesty's army, whilst I was living with my parents at Kingston, Surrey. When it was discovered that I had been seduced my mother was in failing health. My father is a gardener, living at Kingston, and he insisted that I should take proceedings against the father of my child. That I refused to do, and was consequently turned out of doors. My mother died two months before I was confined. I had known Mr. and Mrs. Nash since I was six years old. They lived at Surbiton Hill, near my father's house. They were very poor people, and the only persons I could think of, or turn to, to mind my child, as my sisters were then out at service. . . . I subsequently got a situation as waitress in an eating-house, where I continued until it was conclusively proved that the work was too much for me, and I was laid up for three months in an infirmary. When I came out I was offered the protection of a gentleman, and under such protection I have since lived in a respectable way."

Mr. Wright also made an affidavit, in which he said:—"I am, and have been for the past eleven years, since I was fifteen years of age, a clerk in the employ of the Press Association, Limited, of Wine Office Court, Fleet Street. I married a sister of Rose Carey, the mother of the infant in this case, and I have had by my wife one child, who is now living. I am acquainted with the manner of living of Rose Carey, and she is not a prostitute. I am quite willing to take the guardianship of the infant, and to bring her up with my own child."

Upon this evidence, the Divisional Court directed the writ of *habeas corpus* to issue for the delivery of the child to Mr. and Mrs. Wright.

An appeal was now brought from this order, nominally by Mr. and Mrs. Nash, but in fact by philanthropic persons who had placed the child in one of Dr. Barnardo's Homes, and who were desirous of keeping her there.

H. L. Fraser, for the appellant.—Strictly speaking, an illegitimate child is, in the eye of the law, *filius nullius*, and

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consequently has no legal guardians, not even the mother or the putative father—*Simpson on Infants* (1) and *The Queen* v. *Felton* (2).

But, assuming that the mother has, as against strangers, a right to the child, the Court will nevertheless have regard to what is for the benefit of the child—*Andrews* v. *Salt* (3).

Here the mother has abandoned her child for nearly seven years, and in the meantime an affection has naturally sprung up between it and its foster parents the Nashes. It would not be for the benefit of the child to be taken from them, and given into the charge of its mother, who is leading an immoral life; for to give to the mother's sister is practically to give it to the mother herself. The case is very similar to *In re White* (4). There the mother left her child, a girl of a year old, to the custody of a friend who kept her for seven years. As she seemed to be well cared for, and wished to stay where she was, Wightman, J., refused to give her into the mother's custody, saying that the child being illegitimate, neither the father nor the mother had any particular right to its custody. I submit that the Court should see the child, and ascertain her wishes.

[JESSEL, M.R.—The Court never consults a child under seven years of age.]

The child is being well brought up where she now is, but the mother proposes to bring her up for the stage. It is very doubtful whether such a professional career will be for the future welfare of the child.

H. Reed, for the respondents, was not called upon.

JESSEL, M.R., said:—If ever there was a judgment which was right it is the one now appealed from. This unfortunate young woman was seduced when she was under fifteen years of age, and she became in consequence the mother of a child. Upon that her father turned her out of doors. She found herself, therefore, obliged to place her child with two very poor people to nurse, intending to pay them for doing so, and it appears she did give them some money which she obtained from her seducer. She then came up to London, and found a situation as a waitress. After a time her strength failed her, and she was obliged to give up her situation, and went into an infirmary. On coming out, she fell in with a gentleman, with whom she lives as a kept mistress. In that sense, therefore, she is leading an immoral life. The child, in the meantime, was maintained by the poor people in whose care it had been placed. She now wants her child, and these other people, the appellants, want to keep it from her. They are pure strangers to the child, and they have not a particle of right to do so, yet they set up the case that the child's natural mother is no relation to it, and has no more claim to its custody than any stranger. The absurdity of that contention cannot be exaggerated by any words of mine. It is true that in *In re Lloyd* (5) the late Mr. Justice Maule, a very eminent Judge, is reported to have asked, "How does the mother of an illegitimate child differ from a stranger"? I should have thought the answer to that would be, "Because she is the mother." That question, however, was asked, not in delivering judgment, but during the course of the argument, and knowing as I do what that learned Judge was, I rather think that the observation must have been intended as a joke. But there are, according to my recollection, many cases in which the right of a mother to the custody of her illegitimate child has been recognised. In the case of *Ex parte Knee* (6), before Sir J. Mansfield, it was held that she had such a right, unless ground was shewn for displacing it. And the Poor Law Acts now recognise the mother, and impose upon her the liability of maintenance.

Moreover, now that all the Courts are Courts of law and equity, the question does not depend upon the mere legal rights upon *habeas corpus*, but upon equitable doctrines, and regard is always had to the mother, the putative father, and the relations on the mother's side. There is in such a case that sort of blood relationship which, though not legal, gives the natural relations a right to the custody

(1) P. 126.
(2) 1 Const. 478.
(3) Law Rep. 8 Chanc. 622.
(4) 10 Law Times, 349.
(5) 3 Mac. & G. 547.
(6) 1 Bos. & P. N.R. 148.

of the child. Here the mother wishes her child to be given up to her sister, who is a respectable married woman, and who is quite ready to take the child, and the husband is a clerk in the Press Association, and is therefore in a station superior to that of the appellants, and he also is willing to take care of the child, and able to give her a better education than the appellants can do. How it can be contended that it is for the benefit of the child to remain with the appellants I do not see. It is the plainest possible case for giving up the child to its blood relations.

LINDLEY, L.J., said:—I am of the same opinion. In some respects, no doubt, the case is a very painful one. There is no ground for taking away the child from the appellants except the superior right of the mother. It is not suggested that they have been in any way unkind or neglectful; but they have no more right to the child than any other stranger. The question is, not whether the mother is the legal guardian of the child, but whether, as between her and strangers, the Court ought not to have regard to the natural relationship of the mother. It appears that the child is now at school, and I have little doubt that the explanation of the whole thing is that she has been taken up by some district visitor.

BOWEN, L.J., said:—I am of the same opinion. No doubt the appellants are acting with the best motive, but philanthropy sometimes makes mistakes. It is said that the mother has no legal right. But that is not the question. The question is whether, in considering what is for the benefit of the child, the Court will have regard to the natural relations. As a general rule, the mother is the proper person to have the custody of a child. In this case, when we consider what is for the benefit of the child, the scale is turned by the respectability of the persons with whom she is to be placed. I am satisfied that the judgment of the Divisional Court was right in principle, and on the merits.

Solicitors—A. R. O. Stutfield, for appellant; T. D. Dutton, for respondents.

[IN THE COURT OF APPEAL.]

1883. April 9, 12. ORMEROD AND OTHERS *v.* THE TODMORDEN JOINT STOCK MILL COMPANY.*

Riparian Owner—Water—Easement—Grant of Easement to non-Riparian Owner—Right of Grantee to send down water diminished in quantity and deteriorated in quality.

A riparian owner granted by deed to the defendants, who were not riparian owners, the right, liberty, authority and privilege to place fix and lay waterpipes in and through a piece of land extending from their mill to the river. Under this grant the defendants took water from the river, used it for condensing purposes, and returned it diminished in quantity and deteriorated in quality.

In an action by a lower riparian proprietor,—

Held, *that the plaintiffs were entitled to recover, that the defendants not being in fact riparian proprietors the grant to them by the riparian proprietor did not give them the rights of riparian proprietors, and therefore that they were not entitled so to use the water, even though their use might be in the district in question an ordinary and not an extraordinary use.*

The Stockport Waterworks Company *v.* Potter (31 Law J. Rep. Exch. 9) *approved.*

Appeal from the judgment of Cave, J., on further consideration, after trial with a jury.

Action for damages for wrongfully turning water in a highly heated condition into the river Calder above the plaintiffs' mills, and for impounding the water in the river, and diverting and abstracting water from it, and for an injunction.

The judgment of Cave, J., of which the material parts are set out, sufficiently states the facts of the case.

CAVE, J.—The plaintiffs in this case are riparian owners on the river Calder, near Burnley, and have for many years been in the habit of conducting water from the river to their mill, and there using it for condensing purposes; and they com-

* *Coram* Brett, M.R.; Lindley, L.J., and Bowen, L.J.

plain that the defendants have injuriously affected their rights as such riparian owners by conducting part of the water of the river to the defendants' mill, where some of it is used or lost, and the remainder is returned to the river in a heated condition, so that the quantity of the water when it arrives at the plaintiffs' land is sensibly diminished, and its quality sensibly deteriorated. The evidence adduced by the plaintiffs was very loose and vague; that of the defendants was more precise; and, according to their witnesses, the following appear to be the facts of the case.

The river Calder is a small stream, and there was no very satisfactory evidence as to what was the average quantity of water running down it.

The defendants are not riparian owners, but by means of a pipe laid through the land of a riparian owner about fifty yards above the plaintiffs' intake they conduct thirty-eight feet of water per minute to their works. This water they use for condensing purposes, and, after using it, they return thirty-seven feet per minute to the river three or four yards below the point at which it was taken out; and the remainder is consumed at the defendants' works or lost in its passage to and from them.

[The learned Judge then discussed the evidence, and continued:]

The evidence of any actual damage to the plaintiffs from the difference between thirty-eight feet of water per minute taken out by the defendants and thirty-seven feet per minute returned was very unsatisfactory. Upon this evidence I asked the jury—first, assuming the defendants not to be riparian owners or entitled to the same right as riparian owners, but to be mere strangers, does the use made by them of the water sensibly affect, or is it, if continued, capable of sensibly affecting the plaintiffs' right to have the stream flow to their clow undiminished in quantity and undeteriorated in quality? Secondly, assuming the defendants to be riparian owners, or to be entitled to the same rights as riparian owners, is the use made by them of the water a reasonable use under all the circumstances of the case? These questions, being put to the jury, were submitted to the counsel on either side, who stated they could not suggest any alteration or addition.

The jury found in answer to the first of these questions, "We are agreed that the water is affected; but the plaintiffs have failed to shew that for practical purposes they are sensibly damaged." They answered the second question in the affirmative. Looking at the evidence and the questions put, I understand the first answer to mean that the plaintiffs' right as riparian owners to have the water flow undiminished in quantity and undeteriorated in quality, without reference to any actual use they may make of it, was sensibly affected; but that, looking to the use they actually made or could practically make of the water, they had not sustained and would not in the future sustain any substantial damage so long as the water is not affected further than it is at present affected by the defendants—or, in other words, that what the defendants do is not sufficient of itself to produce substantial damage to the plaintiffs, but that it is of a nature, if done to a sufficient extent, to produce substantial damage, and consequently that in that way the right of the plaintiffs is affected. The first contention of the defendants was that proof of substantial damage was necessary to the maintenance of the action, and consequently that upon this finding they are entitled to the verdict. Now, whatever the case might be, if what is here complained of had been done by the defendants accidentally on a single occasion, I am of opinion that, as the defendants claim to do this continuously as a matter of right, it is not necessary for the plaintiffs to prove that they have sustained actual damage—*The Swindon Waterworks Company* v. *The Wilts and Berks Canal Navigation Company* (1). If twelve other parties were to use the water in the same way and to the same extent as the defendants, it cannot be doubted that the plaintiffs would sustain substantial and serious injury; yet, if this contention of the defendants is correct, the plaintiffs would have no remedy against any one of the thirteen, because no one of them alone caused substantial damage. If I

(1) 45 Law J. Rep. Chanc. 638; Law Rep. 7 E. & Ir. App. 697.

am right in this view, it is incumbent on the defendants to justify their interference with the plaintiffs' rights by shewing either that they are themselves riparian owners, in which case the finding of the jury in answer to the second of the above questions would entitle them to the verdict, or that, if not riparian owners, they are, nevertheless, entitled to affect the plaintiffs' rights to the same extent as they might have done if they were riparian owners. Now it is admitted that the defendants are not riparian owners; but they have a grant from a riparian owner of the right to lay a pipe into the bed of the river, for the purpose of conveying water through the land of such riparian owner; and they have the unwritten consent of other owners of the land between the land of the riparian owner and the defendants' mill to their continuing this pipe through the lands of such intervening owners to their mill.

It was contended also that a riparian proprietor, as a part of his right to what Lord Kingsdown calls the extraordinary use of the water, may sell or give it to persons who are not riparian proprietors, subject to the limitation which applies to the use of it by himself for extraordinary purposes—namely, that he does not thereby interfere with the lawful use of the water by other proprietors, and inflict upon them a sensible injury.

As to this contention, it seems to me that the decision of the majority of the Court in *The Stockport Waterworks Company* v. *Potter* (2) is in point, as expressly deciding that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and that any user of the stream by a non-riparian proprietor, even under a grant from a riparian proprietor, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors. The case of *The Stockport Waterworks Company* v. *Potter* (2) was discussed in *Nuttall* v. *Bracewell* (3), and also in *Holker* v. *Porritt* (4), but is not, I apprehend, overruled by either of those cases, and is therefore binding upon me; and in accordance therewith I hold that the defendants have not acquired any rights as against the plaintiffs to the use of the water of the river Calder. There must therefore be judgment for the plaintiffs.

Then, as to the claim to an injunction. The defendants have offered to submit to an injunction, so far as the sale of the water by them to Fielding is concerned. As regards the use by the defendants themselves, I am of opinion that no injunction should be granted. In the first place, the plaintiffs have acquiesced for a long time in the user of the water by the defendants; in the second place the amount of water abstracted by the defendants, and the extent to which it is heated, is capable of being ascertained, and therefore the observations of Mr. Justice Fry in *Pennington* v. *Brinsop Hall Coal Company* (5), as to the injury varying from day to day, do not apply with the same force; in the third place the plaintiffs have accepted compensation from Messrs. Horsfall & Stevenson, and from Messrs. Shepherd, thus shewing that in their opinion it is not impossible to fix the compensation for the future injury.

I have not been asked by either of the parties to award damages by way of compensation for the future injury—indeed, I have been asked by the plaintiffs not to do so, and therefore I make no such award.

If, however, I ought to make such an award, then, looking at the facts that the defendants make use of double the quantity of water which the other two mill-owners do, but that their outlet is fifty yards from the plaintiffs' intake, while the outlet of the other two mills is only thirty-three yards from the plaintiffs' intake, I should arrive at the conclusion that the amount the defendants ought to pay should be calculated proportionately to that which has been fixed by agreement between the plaintiffs and the other two mill-owners, and should therefore be 200*l*. As I have said, however, I abstain from awarding this sum, and only name 200*l*. in order that if the Court of Appeal should be of

(2) 3 Hurl. & C. 300.

(3) 36 Law J. Rep. Exch. 1; Law Rep. 2 Exch. 1.

(4) 44 Law J. Rep. Exch. 52; Law Rep. 10 Exch. 59.

(5) 46 Law J. Rep Chanc. 773; Law Rep. 5 Ch. D. 769.

opinion that I ought to have awarded compensation for the future injury they may be in possession of my views as to what the amount of the compensation ought to be.

There must therefore be judgment for the plaintiffs, with costs, and an injunction to restrain the defendants from continuing to convey the water to Fielding, or permitting him to take it through their pipes.

The grant to the defendants to which reference was made was, as far as is material, as follows :—

By an indenture dated the 24th of December, 1859, Schofield granted, leased and demised to the defendants "the right, liberty and authority and privilege to place, fix and lay waterpipes in and through a certain plot of land, . . . extending from Row Street to the river Calder; and also the right, liberty, authority and power for the purpose of laying such pipes, and from time to time and at all times hereafter during the said term repairing and relaying with same, to enter upon the said plot of land, and do all such works therein as shall be necessary for effecting and enjoying the rights aforesaid: the said company doing such works with all reasonable expedition, and restoring the land to its former state." There was also power reserved to the grantor to stop up the pipes if the rent reserved remained unpaid for a specified time.

The defendants appealed from this judgment, and the plaintiffs then gave notice that on the appeal they should contend that the judgment ought to be varied by extending the injunction so as to restrain the defendants from taking, using or diverting any of the water, and from using or maintaining any pipes or other communication with the river, and that damages should be awarded.

Russell, Q.C., *Ambrose, Q.C.*, and *R. H. Collins*, for the defendants.—All the land occupied by the premises of the defendants was originally part of one undivided riparian estate; and by the deed of grant of 1859, Schofield, the owner of the riparian estate, gave the defendants an easement; so that if the defendants are not riparian owners they yet are entitled, as grantees from a riparian owner, to the use of the water. *The Stockport Waterworks Company* v. *Potter* (2) is not an authority against the contention of the defendants, for it only decided that as the company was not a riparian owner it could not maintain an action in its own name. A licensee has all the rights of his licensor, so that he becomes substantially a riparian owner.

[BRETT, M.R.—The judgment of the majority of the Court in *The Stockport Waterworks Company* v. *Potter* (2) shews that there cannot be a grant of such rights in gross.]

That decision only affects the right to sue.

[BRETT, M.R.—To how many persons could a riparian owner make such a grant?]

To as many as he chooses, so long as he does not increase the sum total of the water taken, and does not create rights more extensive than his own original rights. *Nuttall* v. *Bracewell* (3) governs the case, for the defendants are riparian owners in respect of the goit; and further, the judgment of Bramwell, B., in that case, following the reasoning of his judgment in *The Stockport Waterworks Company* v. *Potter* (2), is in favour of the defendants. If one of the members of a partnership were a riparian owner, and he were to grant the rights of a riparian owner to a trustee for the purposes of the partnership, that would be a valid grant. There has been no unreasonable use of the water by the defendants; they have merely used it for the purposes of their business, within the doctrine laid down in *Embrey* v. *Owen* (6) and *The Earl of Sandwich* v. *The Great Northern Railway Company* (7).

Norbury v. *Kitchen* (8), *The Wilts and Berks Canal Company* v. *The Swindon Waterworks Company* (1), *Laing* v. *Whaley* (9) and *Holker* v. *Porritt* (4) were also cited.

Gully, Q.C. (with him *Aspland*), for the plaintiffs.—The contention on behalf of

(6) 6 Exch. Rep. 353; 20 Law J. Rep. Exch. 212.

(7) 49 Law J. Rep. Chanc. 225; Law Rep. 10 Ch. D. 707.

(8) 9 Jurist, N.S. 137; 7 Law Times, N.S. 685.

(9) 3 Hurl. & N. 675; 27 Law J. Rep. Exch. 422.

the defendants is that as they have access to the water of the river, they have the same rights as riparian proprietors, or that they have under the grant from Schofield the same rights as riparian proprietors.

[BRETT, M.R.—It may be assumed that the defendants do not own anything which touches the river; they own an easement, and the question is whether the judgment of Bramwell, B., in *The Stockport Waterworks Company* v. *Potter* (2), is an authority which this Court will follow.]

If the defendants are not riparian owners they cannot have the rights of riparian owners. Bramwell, B., held that such rights can be sold in gross, whereas they are appurtenant to land. In this case the defendants have caused sensible diminution of the water; but whether an upper riparian proprietor uses the water of the river for ordinary or extraordinary purposes, he cannot send the water down deteriorated in quality, and that is what the defendants have done in this case. Schofield did not intend to grant to the defendants his own riparian rights, and indeed he could not do so; the most that he has done is to grant to them a right to take water through a pipe. If the judgment of Bramwell, B., in *The Stockport Waterworks Company* v. *Potter* (2) is right, it follows that a riparian owner can keep all his own original riparian rights, and yet create and then sell an extra riparian right without any limitation as to the number of the grantees. *Nuttall* v. *Bracewell* (3) does not support the case of the defendants, and the *dicta* of Martin, B., refer to rights which may exist between several persons all of whom are riparian proprietors. *The Swindon Waterworks Company* v. *The Wilts and Berks Canal Company* (1) shews that water must not be conveyed away.

[He was stopped by the Court.]

Collins, in reply.

[BRETT, M.R.—There appear to be two points—in the first place the defendants are not made riparian owners by the deed of grant; and, secondly, even assuming they are riparian proprietors, do they use the water for ordinary non-artificial purposes? Is not this an extraordinary use within the definition given by Lord Kingsdown in *Miner* v. *Gilmour* (10), and then are not the defendants bound so to use it as not to diminish it in quantity or deteriorate it in quality?]

What are ordinary purposes cannot be precisely and permanently defined, the law with regard to this must be as flexible as the needs of man are changeable. In *The Swindon Waterworks Company* v. *The Wilts and Berks Canal Company* (11), James, L.J., said that any person living on the banks of a stream may use the water for himself, his family and his cattle, and for ordinary domestic purposes, such as brewing and washing. In a manufacturing district, such as that through which this river flows, the water could not be used for irrigation, drinking or brewing; and if it may not be used for manufacturing purposes in a manufacturing district, it cannot be used at all. No distinction can be made between different manufacturing processes, and in such a district as this the use of water for manufacturing purposes is an ordinary and not an extraordinary use. This view is supported by the judgment of Lord Cairns in *The Swindon Waterworks Company* v. *The Wilts and Berks Canal Company* (1). A riparian owner has a right both to the flow and to the use of the water, and the measure of this use is not the land which he occupies. *Norbury* v. *Kitchen* (8) shews that a riparian owner can take water for the use of another estate which is not riparian; and it would seem to follow that he can confer upon another person a right to use the water, and it may be that the two together may do more than either of them could separately have done. *Nuttall* v. *Bracewell* (3) is in point, for although the plaintiff happened to be a riparian owner, that was not material to the decision of the case.

[BRETT, M.R.—Does not the law as to flowing water apply as between riparian owners, and not as between other persons?]

The decision in *Holker* v. *Porritt* (4) is based upon the principle that a person who possesses water rights can assign them, and the judgment in the Exchequer Chamber seems to throw some doubt upon the

(10) 12 Moore P.C. 131.

(11) 43 Law J. Rep. Chanc. 395; Law Rep. 9 Chanc. 451.

authority of *The Stockport Waterworks Company* v. *Potter* (2).

BRETT, M.R.—I am of opinion that the judgment of Mr. Justice Cave should be affirmed, and substantially on two grounds. I think there is evidence, as the case comes before us, that the plaintiffs are riparian owners, and therefore that we must consider the case in that light. I also think that there is no evidence that the defendants are riparian owners, and therefore that we must consider the case upon that footing. Having regard to these facts, we have to consider how we ought to enter judgment on the findings of the jury, and what is in fact the meaning of those findings. There are certain questions and certain answers, and if any doubt arises on the words of those answers as to the true meaning to be placed upon the answers, I am of opinion that those who were present at the trial can judge better than we can, and that in this case the learned Judge has in his judgment placed a construction upon these answers, and I take the meaning of the jury to be that which the Judge who tried the case has considered to be their meaning. Now the learned Judge says that the jury found as follows:—"We are agreed that the water is affected, but the plaintiffs have failed to shew that for practical purposes they are sensibly damaged;" and he considers this to mean that the plaintiffs' right to have the water flow undiminished in quantity and undeteriorated in quality, without reference to any actual use they may make of it, was sensibly affected. The second question was whether, assuming the defendants to be riparian owners or entitled to the rights of riparian owners, the use made by them of the water was in all the circumstances of the case a reasonable use; and that question the jury answered in the affirmative.

We have now to apply those findings to an action in which the defendants are not riparian owners, and in which they have sensibly affected the right of the plaintiffs who are riparian owners. There is evidence that the plaintiffs still own part of a wall facing the stream which flows past land belonging to the plaintiffs, and that they own a piece of land six feet deep which abuts upon the river, and that water flows to their mill through a goit belonging to them.

The question has been raised whether, assuming the defendants to be riparian owners, the plaintiffs are entitled to recover. It is suggested that they are so entitled, even though the defendants are riparian owners, because the use of the water of this river for manufacturing purposes is an extraordinary use of the water within the definition given by Lord Kingsdown in *Miner* v. *Gilmour* (10), and therefore that it does not signify whether the use of the water was reasonable or not, because the defendants would in such a case be bound so to use the water as not to send it on to another riparian proprietor sensibly diminished in either quantity or quality. If I were clear that the use of the water by the defendants was an extraordinary use within the principle laid down by Lord Kingsdown, I might be able to deal with the case on that footing; but the argument for the defendants strikes me as forcible, and I agree that it is impossible to negative the proposition that a use which may at one time have been extraordinary, may by changes in the condition of things become ordinary, and that a use of water which might be extraordinary in an agricultural district, may not be extraordinary in a manufacturing district; and I am not prepared to hold that in such a district, where the use of water for the purposes of drinking or of irrigation has become obsolete, the use of water for manufacturing purposes may not be an ordinary use.

If the defendants were riparian owners, and if they used the water for ordinary purposes, I am not prepared to say that the finding of the jury might not be in their favour; but I think that that question does not arise, as I am of opinion that the defendants are not riparian owners. Whether they are riparian owners or not depends, I think, upon the cases of *Nuttall* v. *Bracewell* (3) and *Holker* v. *Porritt* (4), and not upon the case of *The Stockport Waterworks Company* v. *Potter* (2). In *Nuttall* v. *Bracewell* (3) and *Holker* v. *Porritt* (4) the grounds of the decisions were that both the plaintiffs and the defendants were riparian owners. It was

held in both those cases that the ordinary condition of the stream had been altered so that it had been made to form two channels, the second of which was a new channel; but the Court held that it was still a river, and that all the water which ran down either the new or the old channel formed part of the river—therefore, that any one who owned land on the new branch of the river was as much a riparian owner as any proprietor who owned land on the old channel. There was between the new channel and the riparian owner no other person who owned land abutting on the river; and if the Court held as a matter of fact that the new channel formed part of the river, then it appears to me that a person owning land on the bank of the new channel was of necessity a riparian owner. To say that the new channel was not in fact part of the river is to depart from the foundation of the judgments in those cases upon which the Judges based their reasoning and conclusions. It was urged on behalf of the defendants that what was there relied on was an easement; but it is clear that the Judges did not consider it to be an easement. It was then said that there may have been a pipe laid through the soil in *Holker* v. *Porritt* (4), as there is a pipe in this case. If that were so, I do not think it is likely that the Judges would have found the facts to be as they did find them; but even if that were the case, then it was not a fact which they found as an element in their judgments. Neither of those cases make the defendants in this case riparian owners.

In this case Schofield, who was a riparian owner, granted something by deed to the defendants. That deed does not in terms, nor need it in effect, give the defendants any right to take water. The deed appears to me to be purposely expressed with a good deal of mystery.

I am prepared to hold that as against Schofield the deed would give the defendants rights with regard to the water, and would give them a right to take the water across or through his land; but it seems to me to give to the defendants no ownership of any part of the bank of the river, and it gives them no property in anything which abuts on the river; it only gives an easement to lay a pipe and to take water, so that it does not make them riparian owners.

The question remains whether, although the defendants are not riparian owners, they can by a grant from the riparian owner acquire the rights of a riparian owner. That depends on whether the grounds of the judgment of the majority of the Court in *The Stockport Waterworks Company* v. *Potter* (2) are sound, and whether we can adopt them. I consider that case to have been decided on the grounds which the Judges gave in their judgments. Lord Chief Baron Pollock said, "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights or any of them," that is, those water rights, "and thus create a right in gross by assigning a portion of his rights appurtenant"—that is, his water rights appurtenant.

The Lord Chief Baron then proceeds:—"It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is, that he can have them against the grantor, but not so as to sue other persons in his own name for the infringement of them." I read that as meaning that he can have them against the grantor, not against other persons. Baron Bramwell objected to the principles expressed by Lord Chief Baron Pollock, and gave a judgment in which he expressed his view. That is, of course, a high authority; but we have now to determine which of the lines of reasoning we ought to adopt. The Lord Chief Baron appears to me to have foreseen, as it were, the case which afterwards arose in *Nuttall* v. *Bracewell* (3), for he says, "The case where a riparian proprietor takes two streams instead of one, and

grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river," and the Judges adopted that principle in the later cases, and decided that on the facts of the cases the defendants were in *Nuttall* v. *Bracewell* (3) and *Holker* v. *Porritt* (4) riparian owners.

In *Nuttall* v. *Bracewell* (3) Baron Channell considered himself bound by the decision in *The Stockport Waterworks Company* v. *Potter* (2), but he also agreed with it, and said, "It would go wellnigh to destroy his rights altogether"—that is, the rights of a riparian proprietor—"for that can scarcely be called a right which is subject to an indefinite restriction unascertained and practically unascertainable"—that is, if it were possible to multiply persons who, though not owners of land abutting on the river, yet could claim to have, and can exercise the rights of riparian owners. "If, therefore," says the learned Judge, "a riparian proprietor grants to some one not such a proprietor a right to abstract water from the stream, as in *The Stockport Waterworks Case* (2), I think the grantee can only sue the grantor for any interference with him." That shews that the grant gives no right against other persons. "If, however, two adjoining riparian proprietors agree to divert the stream, so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different."

I am prepared to say that my opinion agrees with that of Baron Channell, and that a riparian owner who gives to one who is not a riparian owner a right to take water from a river, only gives that right as far as he himself is concerned, and not with respect to other riparian owners. The law which regulates running water, and which regulates the rights of riparian owners, is part of the common law of England, and it applies, as it appears to me, only between riparian proprietors, and not between other persons, or between a riparian proprietor and another person not a riparian proprietor. Therefore, the judgment of Mr. Justice Cave is right, and must be affirmed. We do not at present decide the question of the injunction, but we will hear argument upon that to-morrow, and then give judgment upon it.

LINDLEY, L.J.—I also am of opinion that the appeal of the defendants cannot succeed. I assume that the plaintiffs are riparian owners; but the question is whether the defendants are riparian owners also; and I think that they do not own any part of the soil which abuts on the river, and that they are not riparian proprietors. Under the deed Schofield granted to them a right to insert a pipe. The deed says nothing more, and does not in terms give them any right to take any water, and I should suppose that this was done on purpose, and that it was done for the protection of the grantor. It appears to me to be material to remember that Schofield could, notwithstanding the deed, take water just as he could do before he made the grant to the defendants, his rights were not at all abridged; and if we were to hold that he could by this deed constitute the defendants riparian owners, we should, in fact, hold that he could create any number of riparian owners by a grant such as this, and I do not see what limit could be imposed upon him.

The deed does not pretend to give the defendants the rights of riparian owners, although they are not, in fact, riparian owners. Whether it could have that effect depends on the view which is to be taken of *The Stockport Waterworks Company* v. *Potter* (2) and *Nuttall* v. *Bracewell* (3). I am of opinion that the judgment of the majority of the Court in *The Stockport Waterworks Company* v. *Potter* (2) is right, and that the rights of riparian owners are incident to the possession of land, and are not rights in gross. That is my present impression. The defendants, therefore, are neither riparian proprietors, nor have they the rights of riparian proprietors; and that is sufficient to dispose of this case. The jury have found that the defendants sensibly diminished the quantity and deteriorated the quality of the water; and this being so, the rights of the plaintiffs have been infringed by them, and the judgment of Mr. Justice Cave, omitting for the present the con-

sideration of the injunction, was right, and must be affirmed.

BOWEN, L.J.—I am of the same opinion. This being an action for interference with a right, the first question is, who are the plaintiffs. The jury found that they were riparian proprietors; and it cannot be denied that there was evidence to go to the jury on that point, and we must assume that the finding on that point is correct. What, then, are the rights of these plaintiffs? Water is not *bonum vacans*, it is only *publici juris*, as Baron Parke established in *Embrey* v. *Owen* (6), where it was said that water "is public and common in this sense only, that all may reasonably use it who have a right of access to it; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only." But distinct from this right of water is the incorporeal right to have water flow, and from time immemorial the law has been that the owner of land on the bank of or beneath the channel of the stream, or of both, is a riparian owner, and that he has as such a right to enjoy the usufruct of the stream to a certain extent and for a certain time, and to have it flow in its accustomed course, not sensibly diminished in quantity and not sensibly deteriorated in quality. The learned Judge has put a construction on the answers of the jury, and I think he must be taken to have put the right construction on those answers, and therefore it must be taken that the defendants have sensibly affected the flow of the water, but that practically the plaintiffs have not suffered anything but nominal damage. It then becomes imperative to see who the defendants are—whether they are strangers, whether they are riparian owners, or whether they claim under riparian owners. If the law is rightly laid down in *Miner* v. *Gilmour* (10), then an upper riparian owner has more right to interfere with the flow of water to a lower riparian owner than a mere stranger has. Lord Kingsdown said in *Miner* v. *Gilmour* (12), "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle—and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts on them a sensible injury." I assume that the plaintiffs must submit to a certain amount of interference with the water from other riparian owners, and also that the use of water for manufacturing purposes is not an extraordinary purpose within the definition given by Lord Kingsdown in *Miner* v. *Gilmour* (10). This view is supported both by the judgment of Baron Parke in *Embrey* v. *Owen* (6), and by that of Lord Cairns in *The Swindon Waterworks Company* v. *The Wilts and Berks Canal Company* (1).

But assuming all that, the question still remains whether the defendants are riparian proprietors or strangers. They have no land which borders on the stream, they have no right of ownership in any of the soil; all that they acquired under the deed was, not a transfer of part of the land, but a right as against the person who gave it to them to go into his land, and to lay pipes through his land to the river—that is, they in fact acquired an easement as against Schofield. The grant may, perhaps, carry with it a licence as against the grantor to take water out of the river; but it does not carry with it Schofield's riparian rights as against other riparian proprietors. Assuming that the deed carries with it, on the principle *ut res magis valeat quam pereat*, a right as against Schofield to tap the river, it does not carry with it any transfer of his right as a riparian proprietor to take water from the river; it does not take his

(12) 12 Moore, P.C. at p. 156.

grantees out of the category of strangers as against other riparian proprietors; and I am of opinion that the deed stopped short of doing that of set purpose, because Schofield might well be willing to allow the defendants to use his land, and to do to the river, as far as he was concerned, what they might desire to do, without intending or wishing to confer upon them anything in the nature of a grant, even supposing that he could have made such a grant. I therefore base my judgment on the ground that the jury found that the plaintiffs were riparian proprietors; that their right to have the water flow in due quantity and good quality had been sensibly diminished, and that their right had been affected, although the damage caused was nominal only; and that the persons who have so affected the right of the plaintiffs are not riparian proprietors; and I therefore agree that this appeal must be dismissed.

Appeal dismissed (13).

Solicitors—Torr, Janeway & Gribble, agents for Eastwood, Todmorden, for plaintiffs; Pritchard, Englefield & Co., agents for Grundy, Kershaw & Co., Manchester, for defendants.

1883.
March 17.
April 23.

BRADLAUGH *v.* NEWDEGATE.

Maintenance — Champerty—Action for Penalty—Common Interest in Suit—Bond indemnifying a Plaintiff against all Costs —Measure of Damages.

The defendant caused a writ to be issued in the name of C. against the plaintiff, claiming the penalty (500*l.*) *imposed by* 29 *Vict. c.* 19. *s.* 5, *upon any person sitting or voting in the House of Commons without having made and subscribed the oath appointed by that Act.*

The defendant was a member of Parliament, and the action was in reality his action, C. being without any means of paying any costs. The defendant gave to C. a bond by which he indemnified C. against all costs and expenses which C. should incur or become liable to pay in the action or in any way relating thereto; but the defendant could claim no right to, nor interest in, the penalty, should it be recovered. It was proved that C. had consented to the use of his name, but he would not have authorised the action but for the bond:—

Held (*by* LORD COLERIDGE, C.J.), *on further consideration, that the defendant's conduct constituted maintenance, for which an action would lie at the suit of the plaintiff; and that the latter was entitled to recover as damages all the costs he had been put to in resisting C.'s action, amounting to a complete indemnity for every loss occasioned by the maintenance of the defendant.*

This was an action in which the plaintiff claimed damages against the defendant for maintaining the action of *Clarke* v. *Bradlaugh*, wherein Clarke, the nominal plaintiff, had sued for the penalty of 500*l.*, alleged to have been incurred by Bradlaugh for having sat and voted in the House of Commons without having taken the oath, under the Act of 1866 (29 Vict. c. 19), s. 5.

By the statement of claim it was alleged that the defendant had given Clarke a bond, conditioned for the repayment to him of all costs, charges and expenses which Clarke should pay or incur, or become liable to pay in the action.

By the defence it was denied that what the defendant had done amounted to maintenance, or that it was unlawful or malicious; and it was asserted that the defendant, as a subject of the realm and as a member of Parliament, had an interest in the action, and was entitled to test the liability of the plaintiff to the penalty, and to enforce against him the operation of the law.

The case came on to be tried before Lord Coleridge and a special jury on the 9th of March, when, after several witnesses had been called, the jury were discharged, and the case reserved for argument on further consideration before the Judge, which was had on March 17.

The evidence, uncontradicted, of Mr.

(13) The question as to the injunction was settled by an order made by consent that the defendants should pay 200*l.* in lieu of an injunction, and by way of purchase of the plaintiffs' rights.

Newdegate's own solicitor and of Mr. Clarke was that Mr. Newdegate had expressed his intention of proceeding against Mr. Bradlaugh should he sit or vote without taking the oath, and wished to find some one in whose name the action could be brought, thinking himself to be prevented by the forms of the House of Commons from suing in his own name; that Mr. Clarke gave his consent to the issuing of the writ in his name on the promise of being indemnified against the costs; that he should not have brought nor authorised the action but for the bond of indemnity; and that he had no means of paying the costs himself.

Crump and *W. A. Hunter* argued for the plaintiff.—The defendant had nothing to do with Clarke's action; he was not to receive the penalty if it were recovered, so he had no pecuniary interest in the result. But as he gave or promised money to Clarke wherewith to maintain the action, under such circumstances he has been guilty of maintenance as defined by Lord Coke (1). Then what other interest can be suggested? At the time that the action was tried all general interest had ceased, because the House had declared the seat vacant, and thus determined for itself its rights. There was nothing left, except the penalty, for which the action could proceed; so the action was unnecessary for the vindication of any right or privilege.

[LORD COLERIDGE, C.J.—There was the common interest in seeing that the law is observed.]

But the greatest penalty had already been exacted—*Girdlestone* v. *The Brighton Aquarium Company* (2). The Act provides that a member of the House of Commons vacates his seat as well as incurs the penalty. In a peer's case the only penalty is the action for 500*l.*

The plaintiff is therefore entitled to succeed here if the law as to maintenance is still existing, and that it is so is shewn by its recognition in various cases. *Wallis* v. *The Duke of Portland* (3) is an authority that the finding money by a peer to support an election petition amounts to maintenance. *Pechell* v. *Watson* (4), *Hutley* v. *Hutley* (5), *Sprye* v. *Porter* (6) and *Stanley* v. *Jones* (7) shew that agreements to maintain another person in a suit are void as within the law against champerty or maintenance.

Kydd, *Wilfred Baugh Allen* and *Woodfall* (*Sir H. Giffard, Q.C.*, with them), for the defendant).—The cases that have been cited only shew that there may be such a thing as maintenance, but they do not contradict the proposition that the action will not lie unless there is a total want of interest as well as a bad motive in the defendant, so that the action is in a legal sense immoral and against justice, as laid down in *Fischer* v. *Kamala Naicker* (8). Here the defendant's interest is a real one; as a member of the House he was interested in the composition of the House and in seeing the law observed. He could have brought the action himself, and could have been substituted as plaintiff under Order XVI. rule 1. He therefore could help another to bring it.

[LORD COLERIDGE, C.J.—What interest had he in the 500*l.*?]

No pecuniary interest, it must be admitted.

[LORD COLERIDGE, C.J.—And yet the 500*l.* was the subject-matter of the action!]

Even if his interest was only that of any subject or M.P., still his motive was good, and he acted *bona fide*. In *Hawkins' P. C.* it is laid down that motive is an important element. Nor is it correct to say that defendant's interest ceased so soon as the seat was vacated through the decision of the House. Indeed it was his duty to proceed. By 18 Eliz. c. 5, an informer is not permitted to discontinue an action begun, "but after answer made in Court," "nor after answer, but by the order or consent of the Court." [They cited also *Prosser* v. *Edmonds* (9) and *Story's Equity Jurisprudence*, § 1048*a*.]

(1) Co. Lit. 368*b*.
(2) 48 Law J. Rep. Exch. 373; Law Rep. 3 Ex. D. 137.
(3) 3 Ves. 494.
(4) 8 Mee. & W. 691; 11 Law J. Rep. Exch. 225.
(5) 42 Law J. Rep. Q.B. 52; Law Rep. 8 Q.B. 112.
(6) 7 E. & B. 58; 26 Law J. Rep. Q.B. 64.
(7) 7 Bing. 369; 9 Law J. Rep. (o.s.) 51.
(8) 8 Moore In. App. at p. 187.
(9) 1 You. & C. (Eq. Ex.) 481.

In *Wallis* v. *The Duke of Portland* (3) there is the distinction that the defendant was a peer, who could not interfere in an election; and by the paying costs of a petition he would be helping to seat a person in Parliament, and this was held to disclose an offence.

In *Findon* v. *Parker* (10) Lord Loughborough's view in the former case was not followed; and both Lord Abinger and Rolfe, B., say that the question is, whether the party had, or believed himself to have, an interest in the case. In the report in the *Law Journal*, at p. 446, it is expressly remarked by Rolfe, B., that Lord Loughborough's decision had been disapproved of.

[LORD COLERIDGE, C.J.—Perhaps he did not know that it had been affirmed in the House of Lords, reported in *Brown's Parliamentary Cases*, VIII. p. 161.]

In *Master* v. *Miller* (11) Buller, J., says: "If a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it."

In *Hunter* v. *Daniel* (12), Wigram, V.C., adopted the same view—namely, that to constitute maintenance the party must not have had, nor believed himself to have had, a *bona fide* interest.

In *Hutley* v. *Hutley* (5) Lord Blackburn agreed with Lords Abinger and Cranworth in *Findon* v. *Parker* (10); and Archibald, J., says the cases shew that a *bona fide* belief in the existence of a common interest will justify the maintenance of a suit.

First, then, it is submitted that the defendant has not been guilty of maintenance in fact within those cases; and secondly, if he were guilty, no action will lie against him unless the plaintiff can shew legal damage—*Cotterell* v. *Jones* (13).

The bond given here secured the plaintiff his costs. The defendant did everything that he could to make himself liable, being under the impression that he could not bring the action in his own name; so no damage could have accrued to the plaintiff.

[LORD COLERIDGE, C.J.—There *Findon* v. *Parker* (10) is against you, for it is said that the result is not to be looked at.]

The bond really supports both parties, as it provides for the plaintiff's costs expressly.

[LORD COLERIDGE, C.J.—Not for solicitor's costs, only for party costs.]

Williamson v. *Henley* (14).

Hunter, in reply, cited *Stone* v. *Yea* (15).

Cur. adv. vult.

The following judgment was (on April 23) delivered by:—

LORD COLERIDGE, C.J.—This action was heard before me on the 9th and the 17th of March in this year. The facts upon which the action was grounded, if the action would lie, were undisputed; the principle upon which the damages (if any) were to be calculated was in like manner agreed to. The jury were accordingly discharged. The facts and arguments in the case were proved and heard before me alone, and I am now to deliver judgment. My judgment, as I was informed, is to be appealed from; and I was, therefore, inclined to send the respondent, whoever he might be, to the Court of Appeal unweighted by any reasons of mine. But as the subject of the action is not common, and the authorities which deal with it are not familiar to every one, I have thought it best upon the whole to state not only my judgment but the grounds of it.

The plaintiff and defendant are both members of the House of Commons, and the plaintiff had voted in the House of Commons and sat there during a debate after the Speaker had been chosen, without having made and subscribed the oath appointed by 29 & 30 Vict. c. 19. s. 5. The defendant appears to have been anxious to sue the plaintiff for the penalty of 500*l.* which is imposed by the section I have already quoted, and to which, under the circumstances, the plaintiff had become subject. He went at once to his own solicitor's office in Gray's Inn Square, and

(10) 11 Mee. & W. 675; 12 Law J. Rep. Exch. 444.
(11) 4 Term Rep. 340.
(12) 4 Hare, 420.
(13) 11 Com. B. Rep. 713; 21 Law J. Rep. C.P. 2.
(14) 6 Bing. 299.
(15) Jacob, 426.

what took place I will state in the words of that gentleman who was examined as a witness before me.

"In June, 1880, I remember Mr. Newdegate coming to my office. It was late in the day. Before this day he had told me that he anticipated Mr. Bradlaugh would apply to take his oath and his seat; that if he voted without taking his oath he would be liable to the penalty; but that he was himself prevented by the forms of the House from bringing an action in his own name [a complete mistake, I may observe in passing], and therefore he must find some one who would bring it. On the day in June I speak of, Mr. Newdegate came in a great hurry; he said Bradlaugh had taken his seat and voted, and that the writ must be sealed and served at once."

So far is the evidence of Mr. Stuart, the solicitor. Mr. Clarke, who was the plaintiff in the action which was brought against Mr. Bradlaugh for the penalty, was also called; and his evidence, so far as it is material to the present question, was as follows:—

"I first heard of Mr. Bradlaugh having incurred the penalty some time in June, 1880. I happened to be at Mr. Stuart's on business, and I heard of it in conversation with him. I believe it was on that occasion that I gave my consent to the issue of the writ in my name. I don't know who asked me, but I don't deny that I was asked. I may have given my consent without being asked, but I do not say I did. I knew a writ entailed costs. I quite appreciated the consequences of this action. I never could have pretended to pay the costs in this action. I had no means whatever to pay the costs. I gave Mr. Stuart no undertaking to pay the costs; I gave him no written instructions. I think there was no discussion as to the payment of costs between me and Mr. Stuart. I said I must be indemnified against the payment of costs; I don't know whether I said this at the first interview or later in the day, but it must have been just after I had consented to let my name be used as plaintiff. I should not have brought the action without the indemnity. Mr. Stuart must have said he would get me one. He may have mentioned Mr. Newdegate's name. Very likely he did mention from whom he was going to get the indemnity. Mr. Stuart was then acting for Mr. Newdegate to my knowledge. In the result I got the bond which has been read in Court this morning. But for that bond I should certainly not have allowed the action to go on." So far Mr. Clarke.

The bond was before me, it was dated the 14th of July, 1880, and, so far as is material, was as follows:—It declared Mr. Newdegate to be held and firmly bound to the said Clarke in all sums of money, costs, charges and expenses which the said Clarke has already paid or incurred, or is become liable to pay, or shall hereafter pay, incur or become liable to pay, in and about the prosecution of the said action, or in anywise relating thereto, and which the sum or sums of money (if any) which may be recovered by, or ordered to be paid to, the said Clarke in the said action, either in respect of the penalty sued for in the said action or for costs, shall be insufficient to discharge; and whether such sum or sums of money, costs, charges and expenses which shall be so paid or incurred by the said Clarke, shall be paid or incurred by him or in his behalf in the prosecution of the said action, or shall be ordered to be paid by him to the defendant in the said action, or otherwise. Such in its material substance is the bond.'

A fact must now be added, which, when the case was heard before me, might perhaps have been anticipated, but had not happened—the reversal by the House of Lords of the judgment given against Mr. Bradlaugh by the Court of Appeal in the case of *Clarke* v. *Bradlaugh*. The House of Lords dismissed Mr. Clarke's action with costs, on the ground that he, according to the words of the Lord Chancellor, "has not any right to, or interest in, the penalty he sued for." If he had not, it seems to follow that neither had Mr. Newdegate.

The action now before me is brought by Mr. Bradlaugh against Mr. Newdegate, because he (I omit the vituperative adverbs) upheld and maintained the action on the part of Mr. Clarke against the now plaintiff, Mr. Bradlaugh. Two questions

arise—first, Will the action lie? secondly, If it will, what in the present state of things are the damages?

Mr. Newdegate was not called to deny or to qualify the statements made by his own solicitor and by the person to whom he gave his bond of indemnity. It is proved that the action was in truth Mr. Newdegate's action; that Mr. Clarke was a man of straw, quite unable to pay costs, which, in case of failure, must needs be heavy; that he never dreamed of paying costs, and that he never would have dreamed of bringing the action at all if Mr. Newdegate had not put him forward and indemnified him against all consequences of bringing it. Mr. Newdegate's bond is no doubt binding as between himself and Mr. Clarke; but it is only binding at Mr. Clarke's option, and if Mr. Clarke chooses to put it in suit. Mr. Bradlaugh's admission to the House of Commons, however, is a question in which a large number of persons have persuaded themselves that religion is involved. No one the least acquainted with human affairs but must have seen again and again the strange obliquities of which men absolutely honourable in all other matters will be guilty in what they think defence of what they think religion; and suppose Mr. Clarke, the man of straw, is content to become bankrupt and to be ruined himself, while he half ruins Mr. Bradlaugh, what redress has Mr. Bradlaugh? He cannot himself sue on a bond to which he is no party, he cannot sue in Mr. Clarke's name, nor compel Mr. Clarke to sue for his benefit in his own. It is probable, indeed, that, by the agency of the Court of Bankruptcy, the bond of Mr. Newdegate could be realised as an asset; and there are, I know, authorities which shew that, under certain circumstances, this could be done. But it would be a remedy troublesome and expensive, and after all not absolutely certain.

How the facts may turn out in result it is, I think, immaterial to enquire. The first question is, will the action lie? And that must be determined by the legal relations existing between and the legal liabilities *inter se* of the parties to it.

There are many definitions of maintenance all seeming to express the same idea. Blackstone calls it "an officious inter-meddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it" (16). "Maintenance," says Lord Coke, "signifieth in law a taking in hand, bearing up, or upholding of a quarrel or side, to the disturbance or hindrance of common right" (1). These two definitions are repeated in substance in *Bacon's Abridgments*, in *Viner* and in *Comyns* under the head of Maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the 2nd Institute, in his commentary on the Statute of Westminster the first, c. xxviii. There is, perhaps, the fullest and completest of all to be found in *Termes de la Ley*. "Maintenance is where any man gives or delivers to another that is plaintiff or defendant in any action, any sum of money or other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him, called a writ of Maintenance." Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is "a principle common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce"—part vi. lect. 67. I quote from the existent edition of *Kent's Commentaries*, published by Mr. O. W. Holmes, at Boston, in 1873, vol. iv. p. 447 note. To the same effect is another American authority, Mr. Story. "Maintenance is the officious assistance by money or otherwise proposed by a third person to either party to a suit in which he himself has no legal interest, to enable them to prosecute or defend it" (16).

Jacob's Law Dictionary is to the same effect as the other authorities I have quoted.

I have been thus full in my citation of authorities because I conceive it to be important to keep in view the original

(16) Black. Com. book iv. c. 10. s. 12.
(17) Story on Contracts, c. vii. s. 578.

idea conveyed by the word, in order to see whether modern authority has qualified or altered it, and to interpret the phraseology of modern decisions by principles which the Judges who pronounced those decisions would undoubtedly have recognised. And it seems to me that unless Maintenance is to be struck out of Digests and Law Dictionaries for the future, it is impossible to avoid the conclusion that Mr. Newdegate has been guilty of it. If this is done it must be done by some higher authority. I have not the power, and if I had I have not the wish, to abolish an action which may be in some cases the only way of redressing very cruel wrong. I do not in the least say that Mr. Newdegate deserves the stinging language in which Lord Justice Knight-Bruce describes what he calls "breed-bates and barretors," and which will be found by any one who desires to combine amusement with instruction, and to read good law in racy language, in the judgment in *Reynell* v. *Sprye* (18). But undoubtedly he drove on to sue Mr. Bradlaugh for a penalty, and he supported and maintained in involving Mr. Bradlaugh in protracted expensive litigation, a man who admitted he could never have brought the action but for Mr. Newdegate, who could never have gone on with it but for Mr. Newdegate's bond, and who could himself pay no costs if he failed in his action.

What is the state of the authorities on the subject? It is not useful to go very far back, because, no doubt, things were held to be maintenance some centuries ago which would not be held to be maintenance now. It may be that the danger of the oppression of poor men by rich men, through the means of legal proceedings, was great and pressing; and that the Judges of those days wisely, according to the facts of those days, took strict views on the subject of maintenance. I do not pretend to the historical knowledge which could enable me to say with certainty whether or no this was so, at least it is very possible. But the earliest case to which I think it useful to refer is that of *Wallis* v. *The Duke of Portland* (3). That was decided by Lord Loughborough in 1797. He refused discovery to the plaintiff on the express ground that, as it was sought to discover an agreement between the Duke of Portland and Mr. Tresney to join in the expenses of an election petition against the return of a Mr. Jackson, it was asking the Duke of Portland to discover what, if discovered, would be maintenance. The case was appealed to the House of Lords, and it is to be found in the supplemental volume of *Brown's Parliamentary Cases*, p. 161. Lord Loughborough's decree was affirmed, principally, as the head-note states (in *Brown* the judgments do not appear at length), "on the ground that the transaction amounted to maintenance at the common law." Lord Loughborough and Lord Kenyon appear from the journals of the House of Lords to have been present in the House on this occasion. Lord Walsingham was also present, but I was in error on the argument in stating that he had been Chief Justice of the Common Pleas. Lord Chief Justice De Grey, the first Lord Walsingham, did not survive to 1798. For me, sitting at Nisi Prius and hearing a case on further consideration, this decision of Lord Loughborough's, affirmed in the House of Lords, is a binding authority. In the *Law Journal Reports*, and in that only, of *Findon* v. *Parker* (10), to which I shall have presently to advert, Baron Rolfe (afterwards Lord Cranworth) is reported, and no doubt correctly reported, to have interjected the remark that the case of *Wallis* v. *The Duke of Portland* (3) had been disapproved of. He does not say where or by whom. If he means by himself, his authority, though not without weight, can hardly, I should suppose, be compared to Lord Loughborough's; and as he was speaking only of the case in *Vesey*, and seems to have been unaware of the subsequent affirmance of Lord Loughborough's decree by the House of Lords, it is possible that had he been aware of it he would not have treated Lord Loughborough with such curt contempt. The interjected remark, I may observe, is not to be found in the report of the case in *Meeson and Welsby* (10). The cases of *Sprye* v. *Porter* (6) and *Stanley* v. *Jones* (7) were both of them cases of that kind of maintenance

(18) 1 De Gex, M. & G. at p. 680; 21 Law J. Rep. Chanc. 633.

which is called champerty, and are important chiefly as shewing that neither the Court of Common Pleas in the time of Lord Chief Justice Tindal, nor the Queen's Bench in the time of Lord Campbell, considered maintenance to be obsolete or exploded.

The case of *Pechell* v. *Watson* (4) is more directly in point.

In that case a count which had been proved in fact, and which charged against the defendants conduct really indistinguishable from the conduct here charged and proved against Mr. Newdegate, was held a good count for maintenance by the Court of Exchequer, consisting of Barons Parke, Alderson, Gurney and Rolfe. *Pechell* v. *Watson* (4) came to be considered in *Flight* v. *Lemon* (19). Its authority was recognised; but the latter case was decided against the plaintiff, who sued for maintenance, on the ground —I own I should have thought the narrow ground—that to instigate a suit was not maintenance, though to support one already instituted was. But the case of *Flight* v. *Lemon* (19) is not in point, because the bond which is the gravamen of the present plaintiff's complaint was not given till nearly a month after the issuing of the writ and the commencement of the action. I notice in passing the cases of *Burke* v. *Greene* (20)—where Lord Manners held that for one first cousin to advance to another sums of money for the recovery of an estate was, to use his words, "a case of clear and distinct maintenance"—and of *Harrington* v. *Long* (21), in which Sir John Leach (Master of the Rolls) and Lord Brougham, upon appeal, held that while the mere assignment of the subject of a suit was not maintenance, yet that it was maintenance to agree to give another the benefit of a suit on condition that he prosecutes it, and that it was properly discouraged, because it promotes litigation and leads to oppression. These cases are both recognised in *Hutley* v. *Hutley* (5), which was indeed a case of champerty, but which is important, as shewing that in 1873 Lord Blackburn, Mr. Justice Lush and Mr. Justice Archibald conceived the law of maintenance to be an existing law, and one which in a proper case they would enforce.

It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie. It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintenance must have been actuated by a bad motive; next, that if he has or believes himself to have a common interest with the plaintiff in the result of the suit, his acts which would otherwise be maintenance cease to be so. For the first of these propositions a passage in the judgment of Sir John Coleridge, delivering the opinion of the Judicial Committee in *Fischer* v. *Kamala Naicker* (8), is cited, and for the second the judgments in *Findon* v. *Parker* (10) and the judgments (especially that of Mr. Justice Archibald) in *Hutley* v. *Hutley* (5). It is fit that I should consider these authorities with the respect which is due to them, and which I unfeignedly feel.

If the judgment of the Privy Council had the sense which has been contended for, I at least am not prepared to say that I should hold the conduct and the motives of Mr. Newdegate, as proved before me (and I know nothing but what is proved), to be such as, within the words of that judgment, taken in the sense contended for, to relieve him from the character of a maintainer. But I am not obliged to give a positive opinion on this point, because I do not think the words can fairly bear the sense ascribed to them. The words are remarkable: "It (that is, maintenance) must be something against good policy and justice; something tending to promote unnecessary litigation; something that *in a legal sense* is immoral, and to the constitution of which a bad motive *in the same sense* is necessary." The decision of the House of Lords shews, I think, that

(19) 4 Q.B. Rep. 883; 12 Law J. Rep. Q.B. 353.

(20) 2 Ball & B. 517.

(21) 2 Myl. & K. 590.

Mr. Newdegate's conduct was against good policy and justice, and tended to promote unnecessary litigation. But what is immoral *in a legal sense*, what *in a legal sense* is a bad motive, it is not perhaps quite easy to say; yet the language I am quoting is not the language only of the Privy Councillor who delivered judgment (and who by the course of the Judicial Committee is by no means certainly the centre of it), but of Lord Kingsdown, of Lords Justices Knight-Bruce and Turner, Sir Edward Ryan, Sir Lawrence Peel and Sir James Colvill, a collection of perhaps as great lawyers as in the year 1860 could have been brought together, and who must have intended something by a form of words not usual, and clearly intended to be definite and exact. At least, in any view, it must mean as much as this, that to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive. In this sense I do not hesitate to call Mr. Newdegate's conduct immoral, and his motive bad. The language, indeed, is *obiter* only, for the judgment is in an Indian case, holding that the Sudder Adawlut could not decide a case upon the ground of champerty which the pleadings did not raise, but that if they could, the champerty or maintenance which would invalidate a contract in India, must have the qualities attributed to champerty or maintenance by the English law, that is to say—and then follows the passage which I have quoted. *Obiter dictum*, however, or not, I entirely accept it, and intend to decide this case in accordance with its language. This language was not, I think, intended to turn the Court or the jury into doctors of casuistry, or to embark them in enquiries as to the true character, in a Court of morals, of the conduct or the motive. If the thing done is injurious and unlawful, and if none of those excuses exist which have been held in law to justify the injury or render the act lawful, then the act is and remains unlawful and actionable; and further, in the absence of evidence to the contrary, men are held to intend to do what they do in fact: if the act is one from which in the nature of things injury must follow, the doer will be considered to have intended the injury he has done, and the existence of the *mens rea* will be inferred—so far at least as that inference is necessary to the maintenance of the action.

It is said, however, that the defendant had, or believed that he had, a common interest with Mr. Clarke in the result of the suit, and that therefore his finding Mr. Clarke the whole money for the litigation was not maintenance. As a general rule, there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities—authorities which hold a multitude of things to be maintenance which would not be held so now—all lay down this qualification. Brooke, Fitzherbert, Rolle, Hawkins, Viner and Comyns (to cite no more) all concur in this. Mr. Justice Buller, in his celebrated judgment in *Master* v. *Miller* (11), strongly insists upon it. But then the instances they give shew the sort of interest which is intended: a master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow-commoner defending rights of common, a landlord defending his tenant in a suit for tithes, a rich man giving money to a poor man out of charity to maintain a right which he otherwise would lose. But in all these cases it is, and the interest spoken of is, an actual valuable interest in the result of the suit itself, either present or contingent or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties—*e.g.*, as master and servant—or that interest which charity and compassion give a man on behalf of a poor man, who but for this aid of his rich helper could not assert his rights, or would be oppressed and overcome in his endeavour to maintain them. All this is recognised in the judgment of Lord Loughborough already referred to; and it is insisted upon with great force in the case of *Findon* v. *Parker* (10), a case which it is fit, from the reliance which has been placed upon it, that I should carefully examine. It was an action brought by an attorney for his bill of costs; it was brought against the person who had em-

ployed him to defend proceedings brought against himself and a number of other landowners, by Jesus College, Oxford, to enforce payment of tithes for lands which it was asserted by the defendant and his co-defendants were covered by a *modus*. The defendant pleaded that he, the defendant, had been guilty of maintenance in agreeing with other landowners to resist the claim of the college at their joint expense; and he insisted on his own wrong to escape the payment of his attorney's bill. No wonder that Lord Abinger said, "If any ground can fairly be suggested for making his contract legal, we ought to adopt it in favour of the party who makes the defence, in order to acquit him of the imputation which he casts upon himself." No wonder that Baron Rolfe said, "The only hesitation I have had in the case has arisen from the fear lest the indignation I feel against so unrighteous a defence as the present might lead me into bending the law more than ought to be done." The Judges shew that there was abundant reason for the landowners to believe that they had a common ground for resisting, and a common interest in resisting, the claim of Jesus College, and they gave judgment for the plaintiff. In the course of Lord Abinger's judgment occurs the well-known passage on which so much stress was laid, and properly laid, in the argument. It has been read so often that I confine myself to referring to it at p. 682. It is full of the strong sense characteristic of Lord Abinger, and I venture to adopt the language of Lord Blackburn in *Hutley* v. *Hutley* (5), and I say that I incline to agree with and to adopt every word of it; but it has no application to the case before me. The interest in that case was an interest which the old law would have recognised, as Baron Rolfe expressly points out; and the case affords no ground for saying that the doctrine of maintenance in itself was either obsolete or exploded. Indeed, Lord Abinger had expressly upheld it in *Prosser* v. *Edmonds* (9) and in *Shackell* v. *Rosier* (22), a case in many respects not unlike the present. The Court of Common Pleas refused to enforce a contract of the same sort as that between Mr. Clarke and Mr. Newdegate, on the ground that it amounted to maintenance—see particularly the judgment of Lord Chief Justice Tindal and Mr. Justice Bosanquet.

What then is the common interest which existed here between Mr. Clarke and Mr. Newdegate? There is none: except the interest which all the Queen's subjects have in seeing that the law of the land is respected and the enactments of every Act of Parliament are obeyed; but maintenance is not confined to civil actions, and if this be legal it will be legal to agree to pay the expenses of any one who will indict another for the misdemeanour of non-compliance with any Act of Parliament.

The action here is brought for a penalty of 500*l.* imposed by an Act passed in 1866 upon every member of the House of Peers and every member of the House of Commons, without distinction, who votes and sits during debate in either House without having made and subscribed the oath thereby appointed. In the case of a member of the House of Commons "his seat shall be vacated as if he were dead." In the case of a peer, this consequence was, I presume, thought too severe, and it is omitted, and in this very Parliament certain peers who had not complied with the provisions of the statute were relieved from all danger of the penalties by Acts of indemnity. As to a member of the House of Commons however, his seat is vacated by the operation of the Act, and the result of any action for the penalty can have no effect therefore upon the constitution of the House itself. The person contravening the Act has ceased to be a member; the action is for a penalty; the result of the action is the recovery or failure to recover 500*l.* In that result it is not suggested that Mr. Newdegate had any interest, it was not argued that he was to share the penalty with the informer, and there is no other interest common to the informer and to him which is not common to him with every subject of the Queen. Indeed if there had been a bargain, which there certainly was not, to share the penalty if recovered, it would have made the matter more illegal still.

"Do you, a man of straw, sue another for a penalty; I will find all the money; and if you recover the penalty we will

(22) 2 Bing. N.C. 634; 5 Law J. Rep. C.P. 193.

share it." Such a transaction is not only maintenance but champerty, and though I need cite no authorities to shew that it would be absolutely illegal, I will mention only the great authority of Lord Eldon, who, in his judgment in *Wood* v. *Downes* (23), expressly so decides.

It is very true that this action is of the rarest, and very few examples of it in any modern books are to be found. As a rule, the doctrines and principles applicable to maintenance are discussed and laid down in judgments upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved from an obligation, on the ground that the contract was void or illegal, and the obligation not binding, because grounded upon what was or what savoured of maintenance. But I think it has been shewn, not only from abridgments and old digest and text writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which in a fit case the Courts of this day will support.

The action of *Pechell* v. *Watson* (4), to which reference has already been made, was such an action. It was an action brought expressly on the grounds of maintenance, and the plaintiff recovered large damages. It was tried in 1841, and, as might be expected from the date, many points of pure pleading were raised and decided in it which have not now the importance they had then. But it was not even contended that the action was misconceived, or that if properly stated, and stated by the proper parties, such an action would not lie. The case is an express authority in support of this kind of action. It is my fortune to have to support it in an action in which the defendant is a man whose character is entitled to great and true respect, and in favour of a plaintiff with whose opinions, openly enough avowed, I have no kind of sympathy. Yet I will not call it an ill-fortune, for many of the most precious judgments which these Courts have ever heard pronounced have been pronounced in favour of persons who, if English justice could ever be swayed by personal feeling, or could for a moment "hedge aside from the direct forthright," would assuredly have failed to command success. It is an ill-fortune perhaps that to many men, though not to me, the cause of true religion seems to be concerned with the legal success or the legal defeat of a particular person, whose legal success or legal defeat is really to the cause of true religion a matter of supreme indifference, yet in regard to whom (I speak only of what has been proved before me) recourse has been had to proceedings which with regard to any other accused person would have been sternly and universally condemned, and of which unhappily in the minds of many men the cause of true religion is burdened with the discredit.

My duty, however, is very simple—to decide the case according to the best opinion I can form of the law, which I am set here to dispense, a duty which the elements of Christian teaching make, if not pleasant, at least plain and clear.

Having decided therefore, as I do, that the action lies, what are the damages? On the argument it was rather assumed that the judgment in the House of Lords would affirm the judgment of the Court of Appeal, and on that assumption it was conceded that if there were any damages they must be the penalty, and all the costs which Mr. Bradlaugh had been put to in resisting its recovery. The House of Lords has relieved him of the penalty and of the party and party costs of the proceedings. But that leaves, I suppose, a considerable sum of money which the conduct of Mr. Newdegate has compelled him to pay, but which under the rules as to costs he cannot recover from Mr. Clarke. I assume that either Mr. Newdegate will pay without trouble, or that in the way I have pointed out he can be compelled to pay by the Court of Bankruptcy all that Mr. Clarke could be made to pay as costs. For the residue—the costs and expenses to which Mr. Bradlaugh has been put, his own costs as between solicitor and client, and any legal expenses which he has had to bear—for all this I think Mr. Newdegate is liable in damages. I think Mr. Bradlaugh is entitled to an indemnity at

(23) 18 Ves. at p. 125.

Mr. Newdegate's hands for everything which Mr. Newdegate's maintenance of Mr. Clarke has caused him. If this cannot, and probably it cannot, be agreed between the parties, it must go to an official referee to ascertain the amount, and on receipt of his report to me I will give judgment for the amount which he finds to be due, applying to his enquiry the principles I have laid down.

Judgment for plaintiff.

Solicitors—Lewis & Lewis, for plaintiff; Stuart & Tull, for defendant.

1883. March 17, 20. THE ATTORNEY-GENERAL *v.* HUBBUCK AND OTHERS.

Revenue—Probate Duty—Partnership Property—Land—Conversion.

Where land is held by partners jointly as partnership property, it is deemed to be personal and not real estate, and probate duty becomes payable on the share of a deceased partner in such land, independently of whether there has or has not been an actual conversion into personalty.

This was an information by the Attorney-General to recover probate duty in respect of a sum of 22,150*l.*, which was alleged to have formed part of the personal estate and effects of William Augustus Hubbuck deceased, and which, having been bequeathed by his will to his widow Eliza Matilda Hubbuck, since deceased, was also alleged to have formed part of the personal estate of the said Eliza Matilda Hubbuck.

The following are the material facts, as stated in the information and answers:—

By an indenture dated the 27th of April, 1849, and made between Thomas Hubbuck of the first part, the defendant Edward Martin Hubbuck of the second part, and William Augustus Hubbuck of the third part, it was agreed that Thomas Hubbuck, Edward Martin Hubbuck and William Augustus Hubbuck should enter into partnership as oil and colour merchants, upon certain terms therein contained, for the term of twenty-one years from January, 1847, Thomas Hubbuck being entitled to one moiety of the profits, and Edward Martin Hubbuck and William Augustus Hubbuck to one-fourth each. The partnership business was, at the date of the indenture, carried on upon premises in East Smithfield belonging to Thomas Hubbuck and another person not a partner, and the indenture provided for rent in respect of these premises. By the indenture it was, among other things, provided that in case either of the partners should die before the expiration of the partnership, then the surviving partners should, within six months after the decease of such partner, settle and adjust with his representatives the value of the share of the deceased partner in the partnership effects (to be ascertained by two indifferent persons), and should become the purchasers of the said share at such valuation; and it was also provided that, if either of the partners retired—which he was at liberty to do at the expiration of the first seven or fourteen years, upon giving six months' notice—the remaining partners should be at liberty to take his share at a valuation.

The term for which the partnership was originally entered into having expired on the 1st of January, 1868, no new agreement was made, but the partnership continued on the same terms as before.

Between 1855 and 1862 Thomas Hubbuck, on behalf of himself and his partners, and out of the partnership moneys, purchased certain freehold and copyhold premises, the whole of which were used for the purposes of the partnership business.

In 1872 Thomas Hubbuck retired from the partnership, and an agreement was made dissolving the partnership as regards Thomas Hubbuck, he receiving a certain sum for his share. No new partnership deed or agreement was entered into by Edward Martin Hubbuck and William Augustus Hubbuck, who were brothers, but they continued to carry on the business on the same terms between themselves as before.

After his retirement Thomas Hubbuck executed a deed conveying the premises,

purchased as aforesaid, to Edward Martin Hubbuck and William Augustus Hubbuck, who thereby declared that the premises should be and were then held by them as partnership property.

On the 2nd of January, 1878, William Augustus Hubbuck made his will, and thereby appointed his wife, Eliza Matilda Hubbuck, and the defendants, Edward Martin Hubbuck and Frederick Furze, executrix and executors thereof. The testator directed that his share of capital in such business at the time of his decease should, at the discretion of his executors, be allowed to remain in the business in the hands of his brother, at five per cent. per annum interest, payable half-yearly, for seven years next after his decease, or for such other period as his said brother and his other executors should mutually agree upon. The testator also declared that his share of the freehold premises in which the said business was carried on, instead of being taken at a valuation by his said brother as surviving partner or of being sold, should be leased to his brother or other firm at a yearly rent equal to five per cent. per annum on the value of such premises as the same should be stated in the stock-taking account last signed prior to his decease, and for such term or terms as his said executors and his said brother or other firm should agree upon. And he also authorised his executors to sell to his said brother, as surviving partner, his share of the capital stock and effects of the business at the time of his decease, and his share of the said freehold premises, or any or either of them, for his share of their value according to the valuation at the last stock-taking account prior to his decease; and, subject to the foregoing directions, the testator devised and bequeathed all his real estate and the residue of his personal estate unto his executors, their heirs, executors, administrators and assigns, upon trust either to continue the same or any part thereof in the existing investments, or to sell and convert the same into money, and, after payment of debts, funeral and testamentary expenses and legacies, to invest the clear surplus thereof upon certain securities, and out of the resulting income to pay an annuity of 1,000*l.* to his wife for life, for the use of herself and the maintenance, education and benefit of his child or children for the time being under twenty-one or (being daughters) unmarried; and, subject thereto, his said trustees were to hold his residuary estate upon trust for his wife absolutely.

William Augustus Hubbuck died on the 9th of March, 1878, without having revoked or altered his will, which was proved on the 15th of April, 1878. The estate was sworn under 60,000*l.*, but this sum did not include the value of the testator's interest in the real estate so purchased as aforesaid.

After the death of William Augustus Hubbuck, the defendant Edward Martin Hubbuck continued to carry on the said business, and he paid to the executors of William Augustus Hubbock, in respect of the share and interest lately belonging to the said William Augustus Hubbuck in the said premises, an annual sum calculated at five per cent. upon the amount of the valuation of the premises at the last stock-taking before the death of William Augustus Hubbuck; but the defendant Edward Martin Hubbuck did not take any lease thereof from the executors of the said William Augustus Hubbuck, nor was any other arrangement made between them as to the said premises.

Eliza Matilda Hubbuck died on the 5th of May, 1880, having duly made her will and thereby appointed the defendant Edward Martin Hubbuck, and her sons the defendants William Hubbuck and Augustus George Hubbuck, her executors, and she thereby confirmed and directed her executors to do all acts which might be necessary to confirm the options, powers and provisions given by or contained in the will of the said William Augustus Hubbuck, with respect to the freehold premises in which he was interested in partnership with his brother, and also with respect to his share of capital in the said partnership business, if any should be remaining at her decease. And, subject thereto, she gave the share of her late husband in the said freehold premises unto and equally between all her children as tenants in common, and, in case during her lifetime her interest or the interest of her late husband in any part of the said

freehold premises should be purchased by her said brother-in-law or any other person, then a sum equal to the purchase-money paid or payable to her or to her late husband's estate was to be divided equally amongst her children. And the testatrix gave the residue of her real and personal estate to the defendants William Hubbuck and Augustus George Hubbuck absolutely.

The will of Eliza Matilda Hubbuck was proved on the 21st of May, 1880, by all the executors, but no probate duty was paid upon the value of her interest in the proceeds of sale of the real estate purchased as before mentioned.

After the death of Eliza Matilda Hubbuck, the defendant Edward Martin Hubbuck purchased the share and interest of the said William Augustus Hubbuck in the real estate belonging to the late partnership from the executors and trustees of his will, and the said Edward Martin Hubbuck became and is entitled in fee simple to the entirety of the said premises.

The purchase-money paid for the beneficial share and interest of William Augustus Hubbuck in the aforesaid premises amounted to 22,150*l.*, but no probate duty has been paid in respect of the said sum or any part thereof.

The Commissioners of Inland Revenue claimed probate duty on the said sum of 22,150*l.* in the case of the wills both of William Augustus Hubbuck and Eliza Matilda Hubbuck, which the defendants refused to pay, on the ground that the real estate belonging to the partnership between William Augustus Hubbuck and the defendant Edward Martin Hubbuck was not personal assets for fiscal purposes.

The defendants, in their answer to the information, stated, among other things, that the agreement for the dissolution of the partnership referred to in the information was not merely as regarded Thomas Hubbuck, but was an agreement that the partnership then existing between the three, Thomas Hubbuck, Edward Martin Hubbuck and William Augustus Hubbuck, should in all matters be dissolved. After the said agreement of dissolution, the said Edward Martin Hubbuck and William Augustus Hubbuck did not continue to carry on their business on the same terms between themselves as before. No new terms were agreed upon, but the defendants alleged that the partnership was a new partnership. The stipulations of the original deed were in no way applied to the new partnership, and the new partnership was at will, and the only terms of such new partnership were that the partners were entitled to the profits of the partnership business in equal shares. They further stated that the money capital of the partners was not exactly equal, but the partners were always considered as entitled to the business premises of the partnership in equal shares. The defendants further alleged that until the said William Hubbuck made his will there had been no stipulation between him and his brother Edward Martin Hubbuck as to the right of the survivor in the partnership business; and the said Edward Martin Hubbuck and William Augustus Hubbuck were both of opinion that in the event of the death of the said William Augustus Hubbuck intestate, his share in the real property belonging to the partnership would pass to his eldest son as his heir-at-law, and, as the said William Augustus Hubbuck was at the time very ill, the matter was discussed between the said brothers, who were both desirous of avoiding such a result; and it was agreed between them that provisions to the contrary should be made by the will of the said William Augustus Hubbuck, and the provisions actually contained in the said will were so inserted according to an agreement in that behalf made by the said brothers. The defendants contended that probate duty was not properly payable, on the ground that the real estate belonging to the partnership was not personal assets (at all events for fiscal purposes), having regard to the express agreement between the brothers, that William Augustus Hubbuck should make such provisions with respect to his share in the freehold premises as were embodied in his will, which said agreement the defendants alleged was made between the said William Augustus Hubbuck and Edward Martin Hubbuck, shortly before the execution of the will, at the house where the testator

was residing. The defendants, however, admitted that, except as appearing by the will itself and certain drafts of the will, they were unable to state the words in which the said agreement was made. It appeared that the draft of the will was prepared by the solicitor of the testator in pursuance of general instructions given to him by Edward Martin Hubbuck, and, after undergoing certain alterations, was fair copied and sent to Edward Martin Hubbuck, who took the fair copy to the testator and read it over to him. The terms of the draft and also of the will as eventually executed were arranged between the testator and the said Edward Martin Hubbuck.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Vaughan Hawkins*, for the Crown.—This property, being originally, or at all events prior to the will and the supposed arrangement in relation to it, held by the partners jointly as partnership property, was personalty; on the death, therefore, of one of the partners, his interest in the partnership formed part of the personal estate. In order to establish that probate duty is not payable, it will be incumbent upon the defendants to shew that, in some way or other, that which was declared to be partnership property, and therefore personalty, became converted into realty. It is alleged that that was done by the will of William Augustus Hubbuck, or rather by the assent which was given to the disposition in his will by Edward Martin Hubbuck; for if, at the time of the testator's death, and apart from the effect of the will, it was personalty, it would not cease to be personalty by reason of a disposition contained in the will. The defendants must shew some agreement, of which there is no evidence, between the partners, in the lifetime of both, that the interest of each should be reconverted into real estate. Apart from any such reconversion the property was clearly personalty. How is such reconversion proved? It is submitted that the intention was not to reconvert it, but to leave it personalty. The case of *Custance* v. *Bradshaw* (1) will be relied upon by the other side. That case cannot be supported as laying down so extreme a proposition as is contained in the marginal note; the decision can only be supported on the peculiar circumstances of the case, as pointed out in a judgment of James, V.C., in *Forbes* v. *Steven* (2). In *Custance* v. *Bradshaw* (1) all the properties were not conveyed to the partners and declared to be partnership property, but they were conveyed to such uses as the partners should appoint, and, in default of appointment, as to one undivided third part, to the three brothers severally in fee. The decision, therefore, is capable of being supported on the ground that the property was never partnership property at all, nor intended to be so, but was always intended to be real estate. General language is no doubt used in the judgment of Wigram, V.C., which can only be supported upon the narrow facts of that case; beyond that, it is inconsistent with the subsequent cases of *Forbes* v. *Steven* (2) and *The Attorney-General* v. *Brunning* (3).

As regards Eliza Matilda Hubbuck's will, it is contended that her case is identical in point of law with that of her husband, and that she transmitted the property in the character in which she took it. If that be so, probate duty is payable under both the wills.

Grantham, Q.C., and *Maidlow*, for the defendants.—There is a misconception running through the whole of the arguments adduced on behalf of the Crown. In the case of a partnership property realty is only treated as personalty for certain purposes.

[POLLOCK, B.—It is realty in one sense, but the moment you shew that real estate is part of a partnership property, it cannot be dealt with except by taking an account between the partners, and then it must become personalty.]

In *Lindley on Partnership*, 4th edition, at page 667, the rule is thus stated:—"From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and

(1) 4 Hare, 315; 14 Law J. Rep. Chanc. 358.

(2) 39 Law J. Rep. Chanc. 485; Law Rep. 10 Eq. 178.

(3) 8 H.L. Cas. 243; 30 Law J. Rep. Exch. 379.

applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate, *unless, indeed, such conversion is inconsistent with the agreement between the parties.*" Again, at page 671, the same learned author says, "The general rule may nevertheless be excluded by an agreement, express or implied, to the effect that the land shall not be sold." In such a case the reason of the rule excludes its application; the reason being that, for the purpose of dividing partnership property, it was assumed that it has to be treated as personalty, in order that the partners might maintain their respective shares. All you have to do is to shew some agreement, express or implied, sufficient to indicate the intention of the parties, that, as between their representatives, the property should be treated as realty and not personalty; in that case the property remains, for fiscal purposes, what it has always been, namely, land. Here, the facts connected with the making of the will of William Augustus Hubbuck, as well as the provisions of the will itself, shew that there was an agreement that this property should remain realty and not be treated as converted. The liability to pay probate duty depends on the character of the land at the time; as Kelly, C.B., said in *The Attorney-General* v. *Lomas* (4), "If the land remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land, and devolves according to the rules governing the descent of real estate." The provision contained in the will of William Augustus Hubbuck, that, instead of the property being sold and converted, it should be leased for a certain time, is inconsistent with the idea that it was to be considered as converted into personalty at the date of the death. *Custance* v. *Bradshaw* (1) is a clear authority to shew that the mere fact of its being partnership property does not in any way stamp it necessarily, for fiscal purposes, with the character of personalty. In that case Wigram, V.C., in the course of his judgment, said: "The question which arises then is whether the circumstance that this is partnership property makes any difference. The argument which, at the moment, had some effect upon my mind, was that the interest in the estate of a deceased partner was an interest only in the balance to be recovered in respect of the partnership accounts; but that, in my opinion, does not alter the case. That, it is true, is the result as between the parties themselves, but it does not alter the real nature of the property. The state of the partnership account might render the sale of the property wholly unnecessary; and so also might the acts of the parties as between themselves." The *ratio decidendi* of *Custance* v. *Bradshaw* (1) is that, although the real estate was partnership property, yet still a sale might never be necessary for the purpose of the partnership; and until it is decided whether or not in fact a sale is necessary, however much the land may be in other respects referred to as personalty, yet for the purpose of probate duty there is no presumption that there must necessarily be a sale. The decision in *Custance* v. *Bradshaw* (1) is perfectly consistent with that of *The Attorney-General* v. *Brunning* (3), where there was a contract binding on the testator to sell. In that case probate duty was held to be payable, on the ground that the sale of land which the testator had actually contracted to sell was afterwards completed. It is the actual completion of the sale which makes probate duty payable—see the judgment of Lord Campbell in *The Attorney-General* v. *Brunning* (3). In *Forbes* v. *Steven* (2) there had been an actual sale and conversion of the property; moreover, that was a case as to whether legacy duty was or was not payable, and gave rise to considerations which do not apply here.

As regards the will of Eliza Matilda Hubbuck, it is submitted that, even if she took the property as personalty, she did not leave it as such. There can be no equity, such as it is said arises under the will of William Augustus Hubbuck, to convert that into personalty which is *ipso*

(4) 43 Law J. Rep. Exch. 32; Law Rep. 9 Exch. 29.

facto land. The testatrix took the land *qua* land. They also cited *Smith* v. *Claxton* (5), *Curteis* v. *Wormald* (6), *Ackroyd* v. *Smithson* (7), *Cogan* v. *Stephens* (8), *Rowley* v. *Adams* (9), *De Lancey* v. *The Commissioners of Inland Revenue* (10), *Matson* v. *Swift* (11), *Steward* v. *Blakeway* (12), *Taylor* v. *Haygarth* (13), *Lysaght* v. *Edwards* (14), *Mordaunt* v. *Benwell* (15) and *Walker* v. *Denne* (16).

POLLOCK, B.—This is an information filed by the Attorney-General to recover probate duty which is alleged to be payable in respect of a sum of 22,150*l.*, as part of the personal estate and effects of William Augustus Hubbuck; and it is claimed in respect of property acquired under his will, and also in respect of the same property acquired under the will of his widow, Eliza Matilda.

William Augustus Hubbuck made his will on the 2nd of January, 1878, and he died on the 9th of March in the same year. Eliza Matilda Hubbuck died on the 5th of May, 1880, having made her will upon the 18th of January, 1879, and appointing the defendant Edward Martin Hubbuck, and her sons, the other defendants, her executors,

Now, the main and substantial point in this case is, whether probate duty is payable in respect of this sum, it being alleged on the part of the Crown that it is to be treated as personal property; whilst on behalf of the defendants it is contended that it is to be treated as real estate, in respect of which no probate duty is payable.

Now, before I proceed to the particular facts of the case, which we must look at very closely, it may be well to observe that the contention on the part of the Crown is founded upon the ground of this being partnership property, and I state this at once because a great many cases have been cited which have a great bearing upon the general question which one sometimes has to consider, whether there has been a conversion or not, and which are cases in which no partnership has existed. In those cases the rule suggested by Mr. Maidlow may be the true rule, namely, that you must look upon the result as to whether any necessary conversion takes place before you can say that the property is deemed to have been converted. That is very well expressed in a judgment of the late Lord Chief Baron Kelly in *The Attorney-General* v. *Lomas* (4), where the rule is thus laid down: "If the land remains unconverted at the time when the heir who takes an undisposed-of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is to be taken as land, and devolves according to the rules governing the descent of real estate." The Chief Baron then goes on to say that where there is an absolute obligation to sell, it is otherwise. Now, that case, and a great many of the other cases which were cited, I do not think it necessary further to refer to, because they are cases in which it happens that the rule upon which the present case has been put and founded upon the part of the Crown in no way applies.

Now this is a case of a partnership, and it is also said that this is partnership property. If it be not partnership property, of course *cadit quæstio*. Several cases were cited on behalf of the defendants where it was shewn that real estate might be owned by partners, and upon the death of a partner, and the surviving partner dealing with that property, probate duty might not be payable because the Court had held that there was no conversion. When those cases are examined they will be found to be cases in which, although the partners were possessed of the property, the property was not partnership property. That is very often the case in other properties. Take the case of ships. It constantly happens that partners are co-owners of ships, and yet the ships are not

(5) 11 Madd. 484.
(6) Law Rep. 10 Ch. D. 173.
(7) 1 Bro. C.C. 503.
(8) 5 Law J. Rep. Chanc. 17.
(9) 7 Beav. 548.
(10) 39 Law J. Rep. Exch. 76; Law Rep. 5 Exch. 102.
(11) 8 Beav. 368; 14 Law J. Rep. Chanc. 354.
(12) Law Rep. 6 Eq. 479; on app. 4 Chanc. 603.
(13) 14 Sim. 8.
(14) 45 Law J. Rep. Chanc. 554; Law Rep. 2 Ch. D. 490.
(15) 51 Law J. Rep. Chanc. 247; Law Rep. 19 Ch. D. 302.
(16) 2 Ves. jun. 170.

part of the assets of the partnerships. The most prominent case to which we were referred upon that head was the recent case of *Steward* v. *Blakeway* (12). There the very statement of the case shews that the partners owned some land in which there was a quarry worked by them for the purposes of trade, but they were to use the quarry, not as partnership property, but as co-owners; therefore the rule which is insisted upon in the present case in no way applies.

Now, it being admitted that in this case there was a partnership, and that this was partnership property, let us see what is the law on the subject, to be gathered, not from one case, but from a great many cases. Amongst them is one to which I should like especially to refer, namely, *Darby* v. *Darby* (17), decided by Vice-Chancellor Kindersley and approved of by Lord Justice James in *Forbes* v. *Steven* (2). In *Darby* v. *Darby* (17) the rule is laid down generally in these terms:— "Now it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the partnership property personalty, and effects a conversion out and out. What is the clear principle of this Court as to the laws of partnership? It is that, on the dissolution of the partnership, all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie."

Now that is a rule which has been acted upon again and again—namely, that in the case of a partnership it is not necessary to look forward to see what may or may not occur under the particular devolution of the property. The question is, what is the status of the property so long as the partnership exists. Now in the present case one can scarcely have a more marked instance of the property being partnership property, and dealt with as partnership property, because what occurred was this. It appears that as far back as 1855, Thomas Hubbuck, one of the partners, on behalf of himself and his partners, and out of the moneys of the partnership, purchased certain freehold premises; he subsequently purchased some copyhold property on behalf and with the moneys of the partnership. So things remained until 1872, when Thomas Hubbuck retired from the partnership, and then it was agreed that he should receive from the remaining partners (there were two with him) a certain portion "for his share of the partnership effects, including his share of the freehold and other premises purchased or held by the partnership as on the 31st of December then last." That clearly would include all the real property which had been purchased in the first instance by Thomas Hubbuck. Subsequently changes from time to time took place in the partnership, and upon each of those changes you find it expressly declared that the premises in question should be and were then held by the partners as partnership property. Then when the deceased William Augustus Hubbuck made his will, after making certain provisions for his sons the testator's heirs, he declared that "his share of the freehold premises in which the said business was carried on, instead of being taken at a valuation by his said brother as surviving partner, or of being sold, should be leased to his brother or other firm at a yearly rent equal to five per cent. per annum." He also authorised his executors to sell to his brother, as surviving partner, his share of the capital, stock and effects of the business at the time of his decease, and also his share of the said freehold premises, for his share of the sum at which the same might have been valued in the last stocktaking account preceding his decease. Then after that the testator devised and bequeathed all his real estate and the residue of his personal

(17) 3 Drew. 495; 25 Law J. Rep. Chanc. 371.

estate to his executors upon trust, and after these trusts for the benefit of his wife absolutely. I can hardly imagine any circumstances which would more clearly shew that this was dealt with as partnership property.

It has been contended on behalf of the defendants that the view of the law I have endeavoured to point out is inconsistent with the decision of *Custance* v. *Bradshaw* (1). Now a good many remarks have been made upon that case, but it is unnecessary for me to express my opinion upon it, because the decision in *Custance* v. *Bradshaw* (1) in no way conflicts with my view of the law, so far as it dealt with the condition of the property in question. So far as it decided that a distinction is to be made when you are dealing with the Crown and when you are dealing with other parties in an enquiry as to whether there has been a conversion or not, that case has been distinctly overruled by *The Attorney-General* v. *Brunning* (3). The case is also referred to in several passages of my brother Lindley's Book on Partnership, where its peculiar circumstances are explained, as shewing the distinction which exists between that case and such a case as the present. It is said by Lord Justice James in *Forbes* v. *Steven* (2): "The case before Sir James Wigram" (which was the case of *Custance* v. *Bradshaw*) (1) "was shewn in the same way not to have been a case of conversion for everybody but the Crown, but a case of no conversion at all, and that the property was still legally and equitably the real estate of the deceased partner, and which would descend of course as such to the real representatives, subject to any equities the surviving partner would have. And that that was in fact so is clear, if reference be made to the conveyance in that case." It is clear that there is no reference to any document bringing it within the exception said to be created by *Custance* v. *Bradshaw* (1). But, accepting that view of the case, it is further argued upon the part of the defendants, that some agreement existed here which would bring the case within the limitations upon the general proposition recognised in the later editions of *Lindley on Partnership*, where it is stated that the rule I have referred to will prevail, unless indeed such conversion is inconsistent with some agreement which has been entered into between the parties, in which case such agreement between the parties will override any implied intention; and more than that, even an agreement may be implied from facts which are existing in a particular case which would override the general law. Accordingly, that being so, the defendants have sought to shew that there exist such circumstances in this case as will remove it from the operation of the general rule. They state, in their answer, that no duty is payable, "on the ground that the real estate belonging to the partnership between the said William Augustus Hubbuck and Edward Martin Hubbuck was not personal assets at all, having regard to the express agreement between the partners, and certainly not personal assets for fiscal purposes." And further on, they state the same proposition with more full particulars. They say that the agreement referred to "was an agreement that the said William Augustus Hubbuck should be at liberty to make, and should make, such provisions with respect to his share in the freehold premises in which the business was carried on as are embodied in his will." The defendants then state the house where the will was made, to shew that he made a will at his private house, and that it had no reference to the business of the firm; but they admit that, except as appearing by the will itself and the other documents referred to, they cannot state the words in which the agreement was made. That is a suggestion that there was some verbal agreement come to before the will was made, and does not rid us of the necessity of looking at the will itself for the purpose of seeing what the intention of the testator was. Now when we look at the will it is quite clear that the testator was dealing with partnership property. It seems to me unnecessary, therefore, to go with any great refinement into any of the cases cited before us to bring us to the conclusion that this is a case within the general rule of law laid down and acted upon for very many years with regard to partnership property, and does not come within any

exception which goes to shew that no duty is payable. I therefore come to the conclusion that under the will of William Augustus probate duty is payable.

The next question seems to me to be one of less difficulty. It is said that Eliza Matilda Hubbuck had the property left to her by that will, and, as she left it again, it must be taken in her hands to be, not personalty, but realty. But I think I can answer that again by a reference to the intention as expressed by the testator William Augustus Hubbuck in dealing with the property. What he leaves is this: he leaves this property in question as a share of his property in the business, and he leaves it to his widow as such. She, taking it as such, must take it subject to all the general rules under which he held it; and until the estate is disposed of, as part of the assets of the partnership, she holds it as such. She died, leaving a will; and, disposing of it as she did, her executor takes it as personal property. My brother North, in the course of the argument, asked a pertinent question of Mr. Maidlow—namely, under which of the words of the will the trustees would take the property. It seems to be impossible to treat this as realty when any person who claimed to take it under the will would certainly take it as personalty. It is useless, in my opinion, to go further into this matter, since for the reasons I have given I am of opinion that our judgment should be for the Crown for the two amounts claimed for probate duty, upon the devolution from the testator William Augustus Hubbuck, and also upon the devolution from the widow Eliza Matilda Hubbuck.

HUDDLESTON, B.—I am of the same opinion, and for the same reasons.

NORTH, J.—I agree. Upon the first point I wish just to refer to the case of *Waterer* v. *Waterer* (18), which seems to me to lay down the law applicable to a case of this kind. There the testator had carried on business with his three sons, and he gave his property to those three sons as tenants-in-common. After his death, they, like the three Hubbucks, carried on the business in partnership, and out of moneys belonging to the estate completed a contract for the purchase of more land, which was inchoate at the death, and employed such land in the business. Afterwards two of them purchased the share of the third in the land and business, which is exactly what happened here, and they paid for it partly out of the estate and partly out of moneys borrowed on the land. The two then continued the business on the land, and one of them died intestate; and it was held that both the devised and the purchased land employed in the business was converted. Lord Justice James puts very shortly in his judgment the reasons to which I would wish to refer. He says, "I am of opinion that this case is governed by that class of cases in which Lord Eldon said that where property became involved in partnership dealings it must be regarded as partnership property. It seems to me immaterial how it may have been acquired by the surviving partners, whether by descent or devise, if in fact it was substantially involved in the business. If, instead of Michael selling his undivided third part, there had been a partition beforehand, it would have been impossible to say that the freehold so bought to carry on the business was not within the authorities. They buy it not as an individual third only, but in one lump, for one lump sum including the goodwill; therefore it was in fact a purchase of land and business altogether, by the continuing partners jointly, for the purpose of the business. Under these circumstances I think that they must be deemed to have irrevocably appropriated each of them his share in the land to the partnership purposes." I pause there to say that that entirely answers the novel point suggested by Mr. Grantham, that land could be reconverted from personalty to realty by the election of one of the partners without the concurrence and against the will of the others. Then, after dealing with the facts of that case in a way which I need not refer to, Lord Justice James says at the end: "In my judgment, therefore, the land used in the trade is part of the partnership property, and therefore personal estate. The house and land not used for the partnership business, but let

(18) Law Rep. 15 Eq. 402.

to tenants, remain real estate. The mortgages must be paid exclusively out of personal estate." That decision seems to me to settle this case, unless the second point makes a difference. The second point was that there was some agreement between the parties to the contrary. As regards that, a passage was cited from the work of Lord Justice Lindley, which I confess I do not quite understand, for this reason. After stating the rule to be one which is applied to cases in which property has been acquired for partnership purposes, it says that it may be excluded by agreement, and a case is cited which is not really a case of partnership property at all, but co-ownership. But, passing that by, what agreement was there here? The agreement which the defendants state in their defence or answer shews that the intention was to treat the property as personalty, because it is stated that the partners were both of opinion that the property would descend to the heirs-at-law, which was what they did not want; but on behalf of the defendants it is said here that the partners made certain arrangements between them, and then this agreement was made. Now, though I have looked carefully for it, I cannot find any trace whatever of an agreement beyond this, an agreement that the will should be altered in a certain way, which was done for an obvious reason. The two brothers being in partnership together resolved what should be done with the business at the death of one, and it was considered desirable that he should alter the will by giving a power to the executors which they would not otherwise have had. To that extent there is an agreement, which is carried out by the will being altered, but there is not an agreement that the will should not be altered again the next day. There is no agreement that the other brother should be bound by it; he accepts the benefits which the will gave the executors the power of giving to him; and I cannot see anything which shews the faintest indication of any agreement upon the part of the surviving partner, or any reason whatever why he should not at his brother's death have required against the wish of the executors that the partnership should be wound up and the property sold.

There is, in my judgment, no agreement here, and there is nothing to prevent the rule laid down in *Waterer* v. *Waterer* (18) from applying in the present case.

Judgment for the Crown.

Solicitors—The Solicitor of Inland Revenue, for the Crown; Stones, Morris & Stone, for defendants.

1883. April 28. THE GREAT WESTERN RAILWAY COMPANY *v.* THE HALESOWEN RAILWAY COMPANY.

*Railway Commissioners—Jurisdiction—Agreement to refer—"Confirmed and made binding" by and scheduled to Act—Reference "required or authorised" by any Act—Completion of Works to Satisfaction of Engineers—Condition precedent—*36 *&* 37 *Vict. c.* 48. *s.* 8.

Before the H. railway company was formed, B., purporting to act on its behalf, entered into an agreement with two other companies for the working of the H. railway. When the H. company was formed and obtained its private Act, the following section was contained in it: "The heads of agreement, bearing date April 29, 1865, *between B. on behalf of the H. company; C. on behalf of the Midland Railway Company; and Y. on behalf of the Great Western Railway Company; which heads of agreement are set forth in schedule* 1 *to this Act, are hereby confirmed and made binding on the said companies respectively." By clause* 18 *of the agreement in the schedule, "All differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration under the Railway Companies Arbitration Act,* 1859." *By* 36 *&* 37 *Vict. c.* 48. *s.* 8, *it is provided that "Where any difference between railway companies . . . is, under the provisions of any general or special Act, . . . required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Rail-*

way Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration."

The H. Company applied to the Commissioners for an order enjoining the Great Western and Midland Railway Companies to work the H. line, and the Great Western Company objected that the H. Company had not constructed certain platforms :—

Held, *by* SMITH, J. (GROVE, J., *dubitante*), *that the provision of the agreement requiring all differences to be referred to arbitration was not, although made binding by the Act, a provision of any general or special Act, within* 36 *&* 37 *Vict. c.* 48. *s.* 8, *and that the Railway Commissioners had, therefore, no jurisdiction.*

By clause 1 *of the agreement, "The H. Company agree, at their own expense, to make and complete the railways, stations, buildings and works by this Act authorised, including a terminal station at H., with the necessary conveniences thereto, and proper sidings at the junction with the Midland Railway, for the convenient interchange of traffic in passengers and goods, to the satisfaction of the respective engineers of the three above-named companies; or, in case of their difference, to the satisfaction of an engineer, to be appointed by the Board of Trade." By clause* 2, *"From and after the time when the railways are so completed, the Midland Company and the Great Western Company at all times, at their own joint expense and risk, shall work the H. line" :—*

Held, *by the Court, that the question as to the necessity for the platforms was within clause* 1, *and that, as the application of the H. Company did not and could not allege that the works had been completed to the satisfaction of the engineers, clause* 18 *of the agreement did not apply; that, on that ground, the Railway Commissioners had no jurisdiction; and that the H. Company should be prohibited from proceeding further with the application.*

This was an application by the Great Western Railway Company for a writ of prohibition against the Halesowen Railway Company to restrain further proceedings in the matter of an application by them to the Railway Commissioners against the Great Western Railway Company and the Midland Railway Company, and in the matter of an order made thereon, on the ground that the Railway Commissioners had no jurisdiction.

Before the Halesowen and Bromsgrove Branch Railway Company had been incorporated, a working agreement was entered into by Mr. Blyth, purporting to act on behalf of that company, with the solicitors of the Great Western and Midland Railway Companies, acting on behalf of their respective companies. When the Halesowen Company was incorporated and obtained its private Act, a section was inserted in that Act (The Halesowen and Bromsgrove Branch Railways Act, 1865, s. 37) to make the agreement entered into by Mr. Blyth binding on the company. That section is as follows: "The heads of agreement, bearing date April 29, 1865, between Edmund Kell Blyth on behalf of the company of the first part; Samuel Carter on behalf of the Midland Railway Company of the second part; and John Young on behalf of the Great Western Railway Company of the third part; which heads of agreement are set forth in schedule 1 to this Act, are hereby confirmed and made binding on the said companies respectively." By clause 1 of the agreement so set out in schedule 1 of the Act, it is provided that, "The Halesowen Company agree, at their own expense, to make and complete the railways, stations, buildings and works by this Act authorised, including a terminal station at Halesowen, with the necessary conveniences thereto, and proper sidings at the junction with the Midland Railway, for the convenient interchange of traffic in passengers and goods, to the satisfaction of the respective engineers of the three above-named companies; or, in case of their difference, to the satisfaction of an engineer, to be, on the application of the three companies or any two of them, appointed by the Board of Trade; the works to be completed for a single line of rails, with land and overbridges for a double line." By clause 2: "From and after the time when the railways are so completed and authorised to be opened for public traffic, the Midland Company and the Great Western Company at all times, at their own joint

expense and risk, shall maintain, manage, man, stock, work and use the Halesowen lines and works."

By clause 18: "All differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration, under the Railway Companies Arbitration Act, 1859, by a single arbitrator, to be, if not agreed on, appointed by the Board of Trade, with ample powers."

By the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8: "Where any difference between railway companies . . . is, under the provisions of any general or special Act, . . . required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Railway Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration."

The Halesowen Railway Company applied to the Railway Commissioners for an order enjoining the Midland Railway Company and the Great Western Railway Company, at all times, at their own joint expense and risk, to maintain, manage, man, stock, work and use the Halesowen line and works.

The Great Western Company objected that the Halesowen Company had not constructed certain platforms and waiting-rooms at the junction with the Midland Railway, and raised a preliminary question of law that the Commissioners had no jurisdiction.

The Commissioners gave judgment (on January 31) against the Great Western Company on the preliminary question.

A rule *nisi* calling upon the Halesowen Railway Company to shew cause why a writ of prohibition should not issue against them having been obtained,

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Littler, Q.C.* (*Balfour Browne* and *Lush-Wilson* with them), now shewed cause.—The principal question in this case is whether an inchoate agreement to refer, "confirmed and made binding" by an Act of Parliament and set out in the schedule thereto, is a reference to arbitration "required or authorised" "under the provisions of any general or special Act," within 36 & 37 Vict. c. 48. s. 8. The Attorney-General, in moving for the rule *nisi*, relied strongly on the case of *The Great Western Railway Company* v. *The Waterford and Limerick Railway Company* (1). But it is submitted that there is a plain distinction between this case and that. In that case the companies were empowered by the special Act to enter into a working agreement. At the time the Act was passed no such agreement was in existence, and the Legislature could know nothing of what its provisions might be. It need not have contained any arbitration clause at all. That is widely different from the case of an agreement scheduled to and made binding by the special Act. In the case of *The Attorney-General* v. *Lamplough* (2), Brett, L.J., says in his judgment: "With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part." It is submitted that the words "required or authorised" in section 8 of 36 & 37 Vict. c. 48, would be meaningless if this case were not within them. As to the other point, this is clearly a difference between the companies within clause 18. One of the companies says that the other is bound to construct two platforms; the other says that they are not so bound. That is the only question between the companies, and that is a question as to the true construction of the agreement. It is not pretended that any part of the work that has been done has not been done to the satisfaction of the engineers. The engineers have nothing to do with the question whether certain platforms are to be constructed or not; and that is the view that they have themselves taken. As a matter of fact, no difference has arisen between the engineers.

The Attorney-General and *Webster, Q.C.* (*R. S. Wright* with them), in support of the rule.—The 8th section of the Regu-

(1) 50 Law J. Rep. Chanc. 513; Law Rep. 17 Ch. D. 493.

(2) 47 Law J. Rep. Exch. 555, at p. 562; Law Rep. 3 Ex. D. 214, at p. 229.

lation of Railways Act, 1873, relates only to those differences between railway companies which the Legislature, in the interests of the public, have required or authorised to be referred to arbitration. The object of section 37 of the Halesowen and Bromsgrove Branch Railways Act, 1865, is only to make that which was not an agreement before binding on the parties. There was no agreement of any kind binding between these parties until the Legislature made it so. The Legislature may, in the interests of the public, enforce an agreement between two companies to refer certain differences to arbitration, or it may of its own motion require differences to be referred. Here it has done neither of these things; the section is only inserted to give validity to certain heads of agreement, which were not before a binding contract. The distinction is between statutory obligation and statutory validity. That distinction was pointed out by Lord Cairns in *The Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (3). In that case an agreement had been entered into between the Caledonian Railway Company and the promoters of the Greenock and Wemyss Bay Railway Company. Lord Cairns, in delivering the judgment of the House of Lords, says: "The agreement would not, without more, have been binding on the Greenock and Wemyss Bay Railway Company, when incorporated; and therefore it was scheduled to the Act of Parliament which incorporated the Greenock and Wemyss Bay Railway Company, and a special clause was inserted, reciting that: 'An agreement had been entered into between the provisional directors of the Greenock and Wemyss Bay Railway Company and the Caledonian Railway Company, in relation to the construction and the maintenance of the railway and other works by this Act authorised, the working and management of the traffic thereon, the fixing and apportionment between the said companies of tolls, rates and charges, and other matters in connection therewith; and it is expedient that the said agreement should be sanctioned. The said agreement shall be, and the same is hereby, sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorised by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of the Act.' Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words: 'And it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.' Now, my Lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies who are coming for an Act of Parliament is scheduled to the Act of Parliament, and when an enactment is found in the body of the Act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections." With reference to the case of *The Great Western Railway Company* v. *The Waterford and Limerick Railway Company* (1), it must be admitted that the distinction exists which was pointed out on the other side. But the reasoning in the judgments of the Court of Appeal include this case. Lord Justice James says: "I really cannot come to the conclusion that a reference to arbitration in an agreement authorised by an Act of Parliament is a reference to arbitration by or under the provisions of any general or special Act of Parliament."

[SMITH, J.—The real point in this case is, what is the meaning of the words "made binding."]

It is submitted that in order to constitute a reference "required or authorised" by an Act of Parliament, much more is wanted than the words "made binding," used as to an inchoate agreement containing a reference clause.

Then as to the second point. The works

(3) Law Rep. 2 Sc. App. 347.

to be completed to the satisfaction of the engineers, are works proper "for the convenient interchange of passengers and goods." That includes a question as to what platforms are necessary. There were to be such platforms as were to the satisfaction of the engineers. This is not within clause 18 at all. A difference between the engineers is not a difference between the companies. Suppose there was a difference between the engineers as to what length the platform should be, could it be contended that that was within clause 18? This is like the case of a builder saying, I have not got the architect's certificate, but I have in fact finished. They are substituting the satisfaction of the Railway Commissioners for the satisfaction of the three engineers.

GROVE, J.—I am of opinion that this is not a difference within the meaning of clause 18 of the agreement scheduled to the Halesowen and Bromsgrove Branch Railways Act, 1865. I think that it is a question for the engineers, and not a question for the Railway Commissioners; not, in other words, an arbitration in which the Commissioners can be the arbitrators. I think so on this ground, that clause 1 of the agreement provides that "The Halesowen Company agree, at their own expense, to make and complete the railways, stations, buildings and works by this Act authorised . . . to the satisfaction of the respective engineers of the three above-named companies, or, in case of their difference, to the satisfaction of an engineer, to be, on the application of the three companies, or any two or one of them, appointed by the Board of Trade." Now the engineer is to be the judge, not in my judgment of what works are to be done, but whether the works are properly executed. That is entirely a question for the engineers of the companies; or, if they differ, for an engineer appointed by the Board of Trade. Reverting to clause 1, and reading the words I omitted, there are certain works specified which the Halesowen Company are to make, "including a terminal station at Halesowen, with the necessary conveniences thereto." Whether there should be a terminal station is not a question that the engineers could determine; nor do I quite go the length of the Attorney-General, that if the Halesowen Company had put up some thatched building which would be a merely nominal station, that could be a compliance with the clause. I think that there must be a substantial compliance with the agreement before the function of the engineers begins. Then they are to look to the manner in which the things required to be done have been done. "The necessary conveniences" to a station consist of skilled work, and questions as to their fitness are only proper to be determined by an engineer. Then, as to what is to be constructed, the clause further specifies—"and proper sidings at the junction with the Midland Railway, for the convenient interchange of traffic in passengers and goods." What are "proper sidings"? Who is to say what are "proper sidings"? I think that the engineers are the only persons who can decide what is essential to the traffic in that respect. I certainly think that the Railway Commissioners would not be a good tribunal to decide that question. They would have to visit every station-house and see if all the appliances were satisfactory for the purposes of passenger traffic. They are to be proper sidings, "for the convenient interchange of traffic in passengers and goods"; that is, I suppose, with a proper platform for passengers protected from the weather, and with a proper place, also protected from the weather, where goods can be deposited and stored. It is a matter entirely for the decision of the engineers, as it seems to me. They are to say whether there is proper accommodation both for passengers and goods. Does that question arise in this case? I think it does. This is an application to the Commissioners to settle that point, to settle whether there are proper sidings for the convenient interchange of traffic or not. The applicants say: "The company are advised and believe that they have made and completed all the railways, stations, buildings and works, including proper sidings, at the said junction, for the convenient interchange of traffic in passengers and goods." They do not say that they have made proper sidings to the satisfaction of the engineers under the first clause of the

scheduled agreement; they say only that they have made proper sidings. Then the answer of the Great Western Company is, "The Great Western Company say that 'proper sidings at the junction with the Midland Railway for the convenient interchange of passengers and goods, to the satisfaction of the engineers or engineer,' as required by the first article of the agreement, have not been made, completed or provided as therein mentioned or at all. Until such sidings and conveniences, including proper platform and other accommodation have been provided, it is impossible for the Great Western Company to work the traffic as proposed." Supposing that to be proved, the Commissioners must say at once that the case must go back to the engineers; that the question whether the Halesowen Company have made proper sidings is not a question for them; and that their jurisdiction does not arise until proper sidings have been made to the satisfaction of the engineers. The 18th clause of the scheduled agreement says:—"All differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration, under 'the Railway Companies Arbitration Act, 1859,' by a single arbitrator, to be, if not agreed on, appointed by the Board of Trade, with ample powers." It seems to me that this question does not come within that clause, as a preliminary objection has not been complied with, namely, that the works are to be completed to the satisfaction of the engineers. Therefore, either the application is bad for not stating that the works have been completed to the satisfaction of the engineers; or, at all events, at the hearing, it would be dismissed upon the applicants failing to prove that the works have been so completed.

Upon the first point I have very grave doubts, and I should have desired to take time to consider the question before delivering judgment upon it. But it is unnecessary to do that, as our decision on the second point is sufficient to dispose of the case.

SMITH, J.—I am of the same opinion on the second point; but, as I entertain a clear opinion on the first point, I think I ought to express it. The question in this case for us is, have the Railway Commissioners jurisdiction to entertain this complaint? That depends upon section 8 of the Regulation of Railways Act, 1873, which is as follows: "Where any difference between railway companies . . . is, under the provisions of any general or special Act, . . . required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration." The first question, therefore, is, Is the present difference one that, by the Halesowen Railway Act, is "required or authorised to be referred to arbitration"? It has been argued that this section applies to no case where the provision for reference is contained in an agreement which is scheduled to an Act of Parliament and is not in the Act itself. I am not prepared to go that length; and the distinction between this case and *The Great Western Railway Company* v. *The Waterford and Limerick Railway Company* (1) has been pointed out. But, by reading section 37 of the Halesowen Railway Act, one can see pretty plainly what the intention of the Legislature was as to the agreement contained in the schedule. Before that Act was passed or the Halesowen Company formed, the agreement had been signed by Mr. Blyth, purporting to act for the company. When the company was incorporated, a section was put into their private Act to make that inchoate agreement, which was not before binding upon the company, a valid agreement binding upon them. That is done by section 37, which says, "The heads of agreement, bearing date the 29th day of April, 1865, between E. K. Blyth on behalf of the company of the first part, S. Carter on behalf of the Midland Railway Company of the second part, and J. Young on behalf of the Great Western Railway Company of the third part, which heads of agreement are set forth in the first schedule to this Act, are hereby confirmed and made binding on the said companies respectively." The question thus arises whether, when a reference clause in an agreement

is "made binding" on the parties by an Act of Parliament, the reference to arbitration is or is not authorised under the provisions of such Act. I think that section 37 was intended simply to confer statutory validity upon the agreement, and nothing more. I think if every term of this working agreement was intended to have the authority and become a section of an Act of Parliament, we should have words saying so expressly. It seems to me that the best mode of putting shortly the intention of making an invalid and unauthorised agreement as binding upon the company as though they had been in existence and had authorised it at the time it was drawn up, is to say that it is hereby confirmed and made binding upon them. In the case of *The Caledonian Railway Company* v. *The Greenock and Wemyss Bay Railway Company* (3), the section in the private Act was as follows: "An agreement had been entered into between the provisional directors of the Greenock and Wemyss Bay Railway Company and the Caledonian Railway Company, in relation to the construction and the maintenance of the railway . . .; and it is expedient that the said agreement should be sanctioned. The said agreement shall be, and the same is hereby, sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorised by this Act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this Act." It seems to me that it is only to put that shortly to say that the agreement shall be binding upon the companies. Lord Cairns, after reading the section so far, says: "Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words: 'And it shall be lawful for the company and the Caledonian Railway Company respectively, and they are hereby required to implement and fulfil all the provisions and stipulations in the said agreement contained.'" There are no such words as those in the present case. I should therefore be prepared to hold that this is not a difference between railway companies which is, under the provisions of any general or special Act, required or authorised to be referred to arbitration.

Then there is the other point, and I think that that is very clear. This is an application by the Halesowen Railway Company to the Railway Commissioners, for the purpose of compelling the Midland and the Great Western Railway Companies to work the line which they allege they have completed. They give the go-by, and advisedly, to the question whether the engineers had been called in to decide as to the works being properly completed to their satisfaction. Any question as to the convenience of the station or of the sidings is to be decided by the engineers of the companies, or by an engineer appointed by the Board of Trade; that is the tribunal, and the only tribunal, to decide it. Then the Great Western Company say, You have not *so* completed the line as to be entitled to call upon us to work it. The second clause of the agreement says, not from and after the time when the railways are completed, but from and after the time when the railways are *so* completed. The Halesowen Company give the go-by entirely to the word "so," which means to the satisfaction of the engineers. I think this is a matter which comes within the first clause of the agreement. It was not disputed by the Solicitor-General or by Mr. Littler that, if it was within the 1st clause, the Railway Commissioners had no jurisdiction. I am of opinion that it is within the first clause, and that the Commissioners have no jurisdiction.

Rule absolute for prohibition, with costs.

Solicitors—R. R. Nelson, for the Great Western Railway Company; Newman, Stretton & Co., for the Halesowen Company.

1883. March 20.

DOUGHTY v. FIRBANK.

Employers' Liability Act (43 & 44 *Vict.* c. 42), *s.* 1, *sub-s.* 5—"*Train upon a Railway*"—*Meaning of a* "*Railway.*"

By 43 & 44 *Vict. c.* 42. *s.* 1. *sub-s.* 5, *employers are made liable to compensate workmen in their service for injuries caused to them* "*by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine or train upon a railway*":—Held, *that the term* "*railway*" *in sub-section* 5 *was used in a popular sense, and included a temporary tramway used by a contractor for the passage of engines and trucks during the construction of certain works.*

This was an action brought in the County Court at Croydon to recover compensation under the provisions of the Employers' Liability Act (43 & 44 Vict. c. 42), for personal injuries occasioned to a workman by reason of the negligence of a person in the service of the employer, who, it was alleged, had the charge or control of a train on a railway within the meaning of section 1, sub-section 5 (1).

It appeared that the plaintiff was employed by the defendant as an engine-driver upon a temporary tramway used for the passage of engines and trucks during the construction of a line of railway for the South Eastern Railway Company, which the defendant had contracted to make. The injuries in question were sustained through a collision, occasioned by the negligence of another engine-driver in the service of the defendant who had the control of an engine and trucks.

The County Court Judge gave judgment for the plaintiff.

Douglas Kingsford now moved for a rule by way of appeal to set aside the judgment.—The defendant is not liable under the provisions of the Employers' Liability Act. The term "railway," as used in 43 & 44 Vict. c. 42. s. 1. sub-s. 5, means some "railway" opened under the provisions of an Act of Parliament as distinguished from a mere temporary tramway. He cited *Matson* v. *Baird* (2) and *The Queen* v. *Bradford* (3).

POLLOCK, B.—I am of opinion that this rule must be refused. I do not think that the Legislature intended to restrict the meaning of the word "railway," as used in 43 & 44 Vict. c. 42. s. 1. sub-s. 5, to a railway worked under statutory provisions. In my judgment the word "railway" in sub-section 5 was used in a popular sense, and includes the way in question.

HUDDLESTON, B.—I am of the same opinion. The word "railway" was intended to signify any way upon which trains pass by means of rails.

Rule refused.

Solicitors—Saunders, Hawksford, Bennet & Co., for plaintiff; G. H. K. & G. A. Fisher, for defendant.

(1) By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 5, "Where after the commencement of this Act personal injury is caused to a workman . . . . by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine or train upon a railway, the workman, or in case the injury results in death, the personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

(2) Law Rep. 3 App. Cas. 1082

(3) Bell C.C. 268; 29 Law J. Rep. M.C. 171.

[IN THE COURT OF APPEAL.]

1883. April 5, 6, 28. } SANDERS BROTHERS *v.* MACLEAN AND COMPANY.*

Bills of Lading—Execution in Triplicate—Validity of Tender of Two of Three Sets—Contract—Sale.

The plaintiffs contracted in London with the defendants for the sale of goods to be delivered at Philadelphia, payment to be made in net cash in London in exchange for bills of lading of each cargo or shipment. The goods having been shipped in Russia, the plaintiffs tendered in London to the defendants two duly indorsed copies of a tripartite bill of lading, the other copy not having been dealt with. The defendants refused to accept these two copies. The plaintiffs then procured the third copy from Russia, and six days after the first tender they tendered all three copies to the defendants, who refused to accept them, on the ground that it was too late then to forward them in time to deliver them in America before the arrival of the ship with the goods. In an action for non-acceptance of the goods,—Held, *that the tender of the two copies of the bill of lading was a valid tender, that the defendants were bound to accept the goods, and to make payment in accordance with the contract.*

Appeal by the plaintiffs from the judgment of Pollock, B., after trial with a jury.

Action for damages for non-acceptance of a cargo of iron rails.

The statement of defence alleged that neither the rails nor the documents of title were ever duly tendered, and by way of counter-claim claimed damages on the ground that the plaintiffs failed to make due delivery of part of the rails, and that those which they did deliver were of inferior quality.

The contract was for the sale by the plaintiffs to the defendants of 2,000 tons of iron rails at the price of 82 shillings per ton, "including the cost, freight and insurance to Philadelphia, U.S. Shipment to be made during months of July {and / or} August next. Payment to be made in net cash in London in exchange for bills of lading and policy of insurance of each cargo or shipment."

Eleven hundred and thirty-six tons of iron were shipped under this contract from Sebastopol to Philadelphia. On the 3rd of August the plaintiffs tendered to the defendants in London two copies of the bill of lading, the third copy not having been dealt with, and having been detained in Russia; the defendants declined to accept two copies, the third being outstanding; whereupon the plaintiffs procured the third copy from Russia, and tendered all three copies to the defendants on the 9th of August, but the defendants declined to accept them, on the ground that they could not then forward them to Philadelphia so as to ensure their delivery before the arrival of the ship.

It was admitted that the first mail after the tender on the 9th of August arrived in New York on the 21st of August, that the ship with the cargo of rails came to anchor on the 18th of August, arrived at the discharging berth and began to discharge on the 19th of August, and finished discharging on the 26th of August.

Pollock, B., at the trial, asked the jury two questions—

1. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and the defendants the vendee is bound to pay cash for the goods where only two bills are tendered?

Answer—The custom has not been proved by the evidence, but it is the unanimous opinion of the jury that it is the usual practice in the city of London to do so.

2. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and the defendants the vendee is bound to accept bills against shipping documents, although they are tendered at a date when the cargo having gone forward to America it will arrive before the bills of lading can arrive?

Answer—Such a custom has not been proved by the evidence, but it is the unanimous opinion of the jury that where

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

due diligence has been employed, and in this instance they believe that the plaintiffs did exercise such diligence, the vendee is bound to accept such bills of lading.

Pollock, B., gave judgment for the defendants on the claim, and also on their counter-claim.

The plaintiffs appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *Shiress Will*, for the plaintiffs.—The tender of the two copies of the bill of lading on the 3rd of August was a good tender, for when one copy of a bill of lading is tendered duly indorsed the rest of the copies become inoperative; therefore, as part of the set was tendered duly indorsed, the other part not having been previously indorsed, the plaintiffs could pass the title to the property in the goods, and the tender was a valid tender—*Barber* v. *Meyerstein* (1); and if the defendants had accepted the two copies tendered they would have been the owners of the goods, so that they were bound to give on the 3rd of August their acceptances against the two copies tendered, and this quite apart from any custom.

But even if the tender of the 3rd of August was not a valid tender, still that of the 9th of August was valid. It is objected that if the bills of lading had been accepted on the 9th of August they could not have been forwarded so as to arrive at the port of destination before the arrival of the ship, or before the goods were landed, and therefore that the defendants were not bound to accept them; but this is to import a condition into the contract, and to enable the defendants to succeed they must establish that there was an absolute undertaking that the bills of lading should be delivered at such a time that they could be forwarded so as to arrive before the ship. No usage has been found by the jury in favour of the defendants on this point, and there is no warrant for inserting such an undertaking into this contract; there is no such express term, nor is it necessarily involved or implied in this contract. The port of shipment was in Russia, the bills of lading were to be delivered in London, and if the plaintiffs have used due diligence in presenting the symbols of the property they are entitled to be paid.

Even if there were an implied undertaking that the plaintiffs would deliver the bills of lading so as to enable them to be forwarded to America within a reasonable time, still the failure to comply with that undertaking would not go to the whole consideration. The condition would only be a collateral agreement, for the breach of which damages would be sufficient compensation, and it would not entitle the defendants to reject the cargo, to refuse payment, and to decline to accept bills of lading complying in every other respect with the contract.

Webster, *Q.C.*, and *J. F. Moulton*, for the defendants.—There never was a valid tender under this contract, for the defendants might not have been able to get delivery of this cargo without the payment of further charges. The vendors were bound to offer documents which would entitle the purchasers to have the goods free of all charges.

The ship arrived at Philadelphia on the 19th of August; the plaintiffs rely on two tenders, that on the 3rd of August and that on the 9th of August; but neither tender was a valid tender; that on the 3rd of August was not, because the bills of lading shewed that three copies had been signed, whereas but two were tendered. The cargo was from a foreign port; it was possible it had not been paid for; and if that had been the case, the defendants would have been considered to have notice that there was a third copy which might have been dealt with, and they would have been without remedy if it turned out that such was the case. With the three copies the defendants would have been safe, with but two they were commercially in an inferior position, unless the plaintiffs proved to their satisfaction that the third copy had been destroyed—*Glyn, Mills, Currie and Company* v. *The East and West India Docks Company* (2) and *Gabarrow* v. *Kreeft* (3).

The tender on the 9th of August was also

(1) 39 Law J. Rep. C.P. 187; Law Rep. 4 E. & Ir. App. 317.

(2) *Ante*, p. 146; Law Rep. 7 App. Cas. 591.

(3) 44 Law J. Rep. Exch. 238; Law Rep. 10 Exch. 274.

invalid, because it is not enough to tender bills of lading when the cargo is at sea; they must be delivered at a time when there is no possibility of the purchaser being become liable to fresh burdens. It is not enough to tender them within reasonable time of shipment, for even though the vendors may have done all that they were reasonably bound to do, still there must be such a tender as will not change the nature of the contract, and such as will render the purchasers undisputed masters of the goods at the moment of the arrival of the ship at the port of destination.

The Solicitor-General, in reply.—There was no evidence that charges had been incurred, and to insert a stipulation such as the defendants contend for would be to vary the contract, and make that a condition precedent which is not part of the contract at all—*Tarrabochia* v. *Hickie* (4).

Cur. adv. vult.

BRETT, M.R. (on April 28).—This was an action for the non-acceptance of a cargo of iron. The contract was a contract for the sale of railway iron, for forward delivery, and for shipments to be made within certain months. The iron was to be shipped for Philadelphia, and payment was to be made against bills of lading delivered in London. A shipment was duly made, and the vessel arrived in due course at Philadelphia; but before the arrival of the vessel the defendants refused to accept the cargo. The question is whether they were justified in so refusing. There is no issue between the parties as to the contract. The plaintiffs offered on the 3rd of August to the defendants or their agents in London, two copies of the bill of lading duly indorsed, or ready to be duly indorsed; but the defendants or their agents refused to accept them because only two copies were tendered, and because they claimed to be entitled to reject the bill of lading, to refuse payment, and to reject the cargo unless or until all three copies of the bill of lading were tendered.

In fact two copies were tendered on the 3rd of August, the third being then in the hands of the shipper of the iron at St. Petersburg. The plaintiffs wrote to the shipper, obtained the third copy, and tendered it on the 9th of August. So that on that day they in fact tendered all the three copies; but the defendants refused to accept them, inasmuch as the ship was on that day so far on her voyage to Philadelphia that she would in all probability arrive there before the bills of lading could be forwarded so as to reach the agents of the defendants at Philadelphia. If therefore the cargo were landed immediately, it would have, as is alleged by the defendants, to be warehoused, and expenses incurred, and if the ship were detained the captain would be entitled to demurrage.

Whether these were the true grounds of the refusal of the defendants it is not necessary to enquire; if they are good legal grounds for refusal the defendants are entitled to rely upon them.

Baron Pollock left a question to the jury, which was, in effect, whether after the objection was taken by the defendants to the tender of the two copies of the bill of lading, the plaintiffs did all that was reasonable to get the third copy of the bill of lading, and whether they did all that was reasonable to effect delivery of the cargo, and this question the jury answered in the affirmative; but the learned Judge gave judgment for the defendants for the reason that it is a good legal objection under this contract for the defendants to decline acceptance of the bills of lading, to refuse the cargo, and to decline to pay for it, unless all the copies of the bill of lading were tendered, and he also held that the tender made on the 9th of August was a bad tender.

I am unable to agree with this view, and I am of opinion that both tenders were good. With regard to the first tender, the question is whether under an ordinary contract for goods to be shipped, or shipped on the terms that payment is to be made against bills of lading to be presented before the arrival of the cargo, it is part of the contract that all the copies of the bill of lading must be presented to entitle the person presenting them to payment.

It is known law that if one copy of the bill of lading is offered, and one copy only

(4) 1 Hurl. & N. 183; 26 Law J. Rep. Exch. 26.

is indorsed, the delivery of that copy with the intention of passing the property in the goods does pass the property, and that the delivery of that copy to the person to whom it is indorsed enables that person to demand possession of the goods; so also if that person re-indorses in similar manner that copy of the bill of lading he thereby passes on the property, for if that first copy is the first indorsed it passes the property in the goods. It is said, however, that a difficulty arises in the commercial world, because it is unsafe for a vendee to accept the first copy of the bill of lading indorsed to him, as, if there has been fraud, and if a subsequent copy of the bill of lading has been indorsed and is presented first to the captain of the ship, the shipowner is absolved from liability if he has in good faith delivered the goods under the copy so presented. That is the effect of the judgment of the House of Lords in *Glyn* v. *The East and West India Docks Company* (2). This difficulty was sure to arise in consequence of that decision; but it is the law, and we must loyally follow it. The House of Lords said that that decision did not alter the old law, which is, that the due indorsement of the first copy of a bill of lading with the intention to pass the property does pass the property in the goods comprised in it, and that the other copies have no other effect than this, that in case of fraud the true owner of the goods can sue the person who has so obtained possession of them under another copy of the bill of lading, but that he cannot sue the captain or shipowner.

If that be so, does this contract mean that although the bill of lading is offered according to the ordinary practice of merchants so as to pass the property, and being so offered would pass the property, and would enable the vendee to pass the property in the goods, nevertheless the contract in this case means that the vendee is entitled to reject the cargo because all the copies of the bill of lading are not tendered? I do not think that the case of *Glyn* v. *The East and West India Docks Company* (2) produces such a result, and I think it would be opposed to all the business practice of merchants. The learned Judge held that he was bound by *Glyn* v. *The East and West India Docks Company* (2) to give judgment for the defendants; but I cannot agree that it does so lay down the law. This is sufficient to decide this case, as I hold that the first tender was a good tender. But a question has been raised as to the tender of the 9th of August, and, speaking for myself, I think it desirable to state why I think it was a good tender, even supposing the first tender to be bad.

It has been objected that the delivery of the three copies of the bill of lading was not made in time to enable them to be forwarded so as to arrive at Philadelphia before or at the time when the ship carrying the cargo would arrive there. It is said that there is in this contract an implied condition to that effect which binds the vendor, and that if it is not fulfilled the vendee is entitled to reject the goods; and it is said that at all events the bill of lading must be delivered to the vendee at such a time as to enable him to forward it to the port of delivery before any charges can have been incurred; and further, it is said that the vendee is entitled to reject the cargo if this, which is alleged to be a condition precedent, is not fulfilled. The contention is that these are conditions implied in this contract; they certainly are not expressed; and I am of opinion that the Court has no right to imply in a contract anything which it is not clear was in the minds and intention of both parties when the contract was made.

It is urged that the bill of lading must arrive at the place of destination at or before the time when the ship carrying the goods arrives. If, then, the bill of lading were to arrive a day after the arrival of a cargo worth 20,000*l.*, the vendee would be entitled to reject the cargo, although he had sustained no damage; surely that is an outrageous conclusion. Again, if the contention be that the bill of lading must arrive before any charges have been incurred in respect of the cargo, a cargo worth 20,000*l.* may be shipped to a place where it may be beneficial to the vendee to have it, but where it may be ruin to the vendor to have it on his hands if it is rejected; and yet it is said that the vendee may so reject it if 10*l.* worth of charges have been incurred.

Here, as it seems to me, the rule as to express conditions will help us. Assume that there is an express provision in a contract that the bill of lading is to arrive before the ship arrives, still that provision would never be construed to be a condition as distinguished from a stipulation, unless it is expressly said that it is so, or unless the breach of it goes to the whole value of the contract. If this stipulation were an express stipulation it would not go to the whole value of the contract, and I do not think it is to be implied, for there is nothing on which the Court can say that there is such a stipulation, or that all reasonable men of business would imply such a stipulation in this contract. A stipulation to be inferred in a mercantile contract is that the parties will do what is reasonable in a mercantile sense; the reasonable thing is to make every reasonable exertion to send on the bills of lading after the cargo is shipped to the place of destination. Whether this has been done is a question of fact in each case. In the case of a perishable cargo it is reasonable to make greater exertions than in the case of other cargoes; that is one circumstance. Another circumstance to be considered is the place whence the ship sails and how near the consignor is to that place. In this case, therefore, if the bills of lading had been in London the vendors would be bound to tender them sooner than if they were in Russia; and in any case they were bound to use all reasonable exertions to tender the bill of lading in good time in London. The jury found that they had done all that was reasonable; and I am of opinion that the second tender was therefore a good tender, even supposing the first to have been bad. The appeal must therefore be allowed.

COTTON, L.J.—The facts of this case have been stated, and the question is, whether the plaintiffs have done what under this contract they were bound to do. The material words of the contract are: "Payment to be made in net cash in London in exchange for bills of lading and policy of insurance of each cargo or shipment."

The plaintiffs tendered on the 3rd of August two copies of the bill of lading, the third part being then in Russia; and those two copies so tendered were in fact effectual to pass the property in the goods shipped to Philadelphia. But it is said that the defendants were not secure, for the third copy was still outstanding, and that the third copy would enable a fraud to be committed, and enable a holder of the third copy or part of the bill of lading to obtain the cargo. Without doubt the vendee was thereby exposed to some risk; but the question here is whether the contract was complied with. There is in it no other stipulation than that contained in the words I have quoted, and they mean, as it seems to me, that "when you, the vendors, hand us, the vendees, effectual bills of lading, then payment shall be made." That is all that the contract says, and I think that if a purchaser desires to be free from all risk, he must insert some stipulation to that effect. If the purchasers declined to accept this cargo because they did not know whether the other part of the bill of lading had been dealt with, they, in fact, refused because there was a risk; and if, in fact, the bill of lading tendered to them was an effectual bill of lading, they have broken their contract by not accepting the cargo. The decision in *Glyn* v. *The East and West India Docks Company* (2) shews there may be such a risk as is suggested; but if a purchaser refuses to accept he does so at his own risk, if the vendor is in the right, and if the latter has tendered an effectual bill of lading, that is, the one which passes the property.

I am therefore of opinion that the tender of the 3rd of August was a valid tender; and as that decides this case I think it unnecessary to give an opinion on the other point, as it does not arise. But I would say that I in no way look favourably on the suggestion that a condition should be implied in this contract that the bill of lading must be sent out before the cargo could arrive at the port of destination.

BOWEN, L.J.—On the 3rd of August the plaintiffs tendered to the defendants two of the set of bills of lading which the plaintiffs had received from St. Petersburg from the shipper of the goods. The third of the set had been retained in St.

Petersburg by the shipper, and it is an admitted fact in the case that it never was in any way dealt with or attempted to be dealt with.

The defendants refused to accept the tender so made on the 3rd of August, and the first question is, whether they were entitled to refuse it as not in accordance with the contract. It was contended before us that under the present contract a tender of the bills of lading was imperfect, unless it included not merely those bills of lading which had been effectually dealt with and were sufficient to pass the property, but also a third bill of lading which was not in England and which had still remained in the Russian shipper's hands. This is a question of construction of the contract; although the contract is in common form, and our decision, therefore, may possibly affect other cases than that immediately before us.

The cargo had been shipped upon the 17th of July, at Sebastopol. The captain of the vessel had retained one copy of the bill of lading for himself, and had delivered a set in triplicate to the shipper. The set of three had been sent to St. Petersburg for the purpose of obtaining a consular certificate. The shipper had thence forwarded two out of the set of three to the plaintiffs, his correspondents and vendees, keeping one of the set in his own hands, of which, however, no sort of use was ever made. The point for our decision is, whether in tendering the two bills of lading received by them, without the third so retained in St. Petersburg, the plaintiffs were entitled to payment of the price of the goods under the contract. I am of opinion that the first tender of the 3rd of August was perfectly good.

The law as to the indorsement of bills of lading is as clear as, in my opinion, the practice of all European merchants is thoroughly understood. A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading is by the law merchant universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title of the indorsee so created, the other originals of the set are, as against it, perfectly ineffectual, and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit.

By inveterate practice among most of the commercial nations of Europe, bills of lading have long been drawn by the shipowner in sets of three or more. Sometimes one of the set is retained by the captain, the others being transferred by the captain to the shipper. Sometimes the whole of the set are handed, upon shipment, to the merchant, the captain retaining a copy only. This practice of drawing bills of lading in triplicate may be at the present day and under the altered conditions of communication between one part of the world and another less valuable than it was when originally introduced. But it certainly had its distinct uses in the early stages of European commerce, and it still survives. If it survives it is probable that the commercial world still finds it more convenient or less troublesome to preserve it than to change it; and it is plain that the purpose and idea of drawing bills of lading in sets—whatever the present advantage or disadvantage of the plan—is that the whole set should not remain always in the same hands. The possi

bility of its separation is intentionally devised for the purpose, not of fraud, but of furthering honest dealing. The separation may conceivably afford opportunities of fraud, if the holders choose to be dishonest; but, on the whole, the commercial world is satisfied to run the risk of this contingency for the sake of the compensating advantages and convenience which merchants, rightly or wrongly, have, till lately at all events, believed to be afforded by the system of triplicates or quadruplicates. The shipper or his vendees may prefer to retain one of the originals for their own protection against loss, or to transfer it to their correspondents. In such cases they are in the habit of treating the remainder of the set as the effective documents, and as sufficient for all purposes of negotiating the goods comprised in the bill of lading. The question we have to decide is, whether the tender to the vendee of the only effective originals of the set is a sufficient tender under their contract, notwithstanding the absence of a third original which is outstanding in the hands of the shipper, but which it is admitted in the present case has been in no way dealt with by him, and which has always remained in his hands as an ineffective and innocent triplicate.

If we were to hold that such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets, and one of a set is habitually dealt with as representing the cargo independently of the rest. If the set for purposes of contracts like the present must always be kept together, the whole object, be it wise or unwise, of drawing bills of lading in triplicate is frustrated; for if one of the set were lost, or had been forwarded by the shipper or by the subsequent owner of the cargo to his correspondent by way of precaution, the cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods. But the practice of merchants—it is never superfluous to remark—is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant, will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal; and commercial intercourse and communication are no more based on the supposition of fraud than on the supposition of forgery.

It appears to me, accordingly, that a tender is, at all events, in compliance with the present contract by which all the effective bills of lading in existence are tendered. If, indeed, the absent original had been misused so as to defeat the title of the indorsees of the tendered residue of the set, the tender would have been bad. But the vendees were not entitled to reject the tender of the only effective documents on the bare chance that a third effective bill of lading might possibly have been dealt with, when, in fact, it had not. The person who rejects effective documents of title on the ground that another may possibly be outstanding does so at his own risk. If his surmise turns out to be well-founded, his rejection of the tender would be justified. But if it is a mere surmise and has no foundation in fact, he has chosen, by excess of caution, to place himself in the wrong. The bill of lading, I have said, may be regarded as a key of the warehouse where the goods are. Can a person who has contracted to pay on delivery of the keys of the warehouse refuse to accept the keys tendered to him on the ground that there is still a third key in the hands of the vendor, which, if fraudulently used, might defeat the vendee's power of taking possession? I think business could not be, and is not, carried on upon any such principle.

The argument has been pressed upon us that, in the absence of the St. Petersburg original, there might be a difficulty in negotiating the two bills of lading out of

the set of three. People who lend money upon, or who purchase bills of lading, can make their own terms. Whether they will trust to the current bills of lading produced in any case is a matter for themselves, and one upon which they probably would be guided by their faith in, or distrust of, their customer. But I do not believe that such suspicion, when it exists, is the natural or necessary consequence of the presentation of the two bills of lading without the third. We have had also pressed upon us in argument the decision in the House of Lords in the case of *Glyn* v. *The East and West India Docks Company* (2). But that decision did not profess to alter the established usage of European merchants. It only shewed that it was attended, in the case of fraud, with a risk which had not been hitherto sufficiently understood. If the mercantile world, having its attention called to this risk, chooses to alter its mode of doing business, that is a matter for its own decision. It may not think the disadvantage of the risk, even when explained, sufficient to justify a departure from the known and recognised modes of transacting commercial business. But until and unless it alters its method of dealing and the forms of the well-known contracts by which it is done, I can only interpret its usages and its contracts as I find them, and as I am satisfied they are understood by the commercial world. I entertain no doubt that in the present instance the tender of the only effective bills of lading in existence was a sufficient tender, and that it would be so considered by any jury of merchants.

As, in my judgment, the tender of the 3rd of August was sufficient, it becomes unnecessary to discuss the validity of the later tender of the 9th of August. I in no way dissent from what the Master of the Rolls has said, but I do not think it necessary to decide it or to express a final opinion about it.

Appeal allowed.

Solicitors—G. M. Clements, for plaintiffs; Maples, Teesdale & Co., for defendants.

[IN THE COURT OF APPEAL.]

1883. April 17, 18. THE QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY *v.* EYRE.*

Action — Company — Maliciously presenting Petition to wind up Company — Want of Reasonable and Probable Cause — Action Maintainable without Proof of Special Damage.

An action will lie for falsely, maliciously, and without reasonable and probable cause presenting a petition to wind up a company, without proof that special damage has been sustained.

The mere bringing a civil action, even if the action is brought falsely, maliciously and without reasonable and probable cause, is not actionable.

Argument of rule *nisi* for new trial granted by the Court of Appeal.

Action for damages for falsely and maliciously and without reasonable and probable cause presenting and advertising, under rule 2 of the General Order, November, 1862, made under the Companies Act, 1862, a petition to wind up the plaintiff company.

It appeared that the company was brought out in 1881, and that Eyre was an original allottee of 100 shares. In November, 1881, he contracted through his brokers to sell these shares at a small premium, and executed a transfer on the 23rd of December. On the 29th of December there was a very heavy fall in these shares on the Stock Exchange, when the defendant's brokers wrote to him to say that the purchaser had failed and they must return the shares to him. The transfer was in fact registered on the 12th of January, 1882. On the 31st of January the defendant presented a petition for the winding-up of the company, believing at the time that he was still a shareholder. As soon as he discovered that he was no longer a shareholder he gave notice to the company that he should not proceed with the petition. Some other person, however, appeared in support of it, and the case came on for hearing, when, at the request of the defendant,

* *Coram* Brett, M.R., and Bowen, L.J.

the petition was dismissed, but without costs.

At the trial, Stephen, J., nonsuited the plaintiffs, upon the ground that the action would not lie, that there was no proof of legal damage, no evidence of malice, and no evidence of want of reasonable and probable cause.

The plaintiffs moved in the Queen's Bench Division for a rule *nisi* for a new trial, which was refused, and afterwards obtained a rule *nisi* in the Court of Appeal.

Moorsom (with him *E. Clarke, Q.C.*), for the defendant, now shewed cause.—No action will lie against a person who prosecutes a civil action—*Purton* v. *Honnor* (1) and *Savile* v. *Roberts* (2).

[BRETT, M.R.—Does not the latter case seem to shew that injury to the fame of a person will support an action?]

That only applies to criminal proceedings. An action will lie against a person who maliciously and without reasonable and probable cause swears to a deposition false in fact for the purpose of presenting a petition—*Farley* v. *Danks* (3). That was a case under the old bankruptcy law; *Johnson* v. *Emerson* (4) appears to be the only case under the present bankruptcy statute, but there the Court was equally divided as to the legal effect of the facts in the case. Martin, B., was of opinion that the law was not the same under the statute of 1869, and expressly states that "no action is maintainable for the mere bringing a civil suit, however groundless and malicious."

[BRETT, M.R.—Does that judgment consider that class of cases in which commercial reputation is in danger?]

Further, there is no special damage: neither the credit nor the money of the company was in danger, the petition did not allege insolvency, it was dismissed without costs, and yet the plaintiffs ask for those costs from a jury which the Vice-Chancellor refused; the matter is, therefore, *res judicata*. If the petition had been dismissed with costs, still extra costs could not be recovered—*Sinclair* v. *Eldred* (5) and *Grace* v. *Morgan* (6); and as extra costs are not recoverable, the plaintiff company cannot shew that any damage has been suffered. In an action for malicious prosecution of civil proceedings, in the name of a third party, special damage must be charged and proved in order to sustain the action—*Cotterell* v. *Jones* (7). To make this action maintainable, malice must be proved; and there is no evidence of malice in this case. There is also no evidence of want of reasonable and probable cause, for if the defendant made a mistake in law he is not liable—*Johnson* v. *Emerson* (4), *per* Bramwell, B.—nor even if he made a mistake in fact owing to defective memory—*Hicks* v. *Faulkner* (8).

Murphy, Q.C., and *Lane*, for the plaintiffs, in support of the rule.

[BRETT, M.R.—Suppose the damage is proved, still does this action lie?—and if evidence of damage is required, what damage is shewn in this case?]

It would seem to be too late to discuss the question whether the action would lie, for it is well settled that maliciously to take proceedings in bankruptcy is actionable—*Cotton* v. *James* (9), *Gilding* v. *Eyre* (10) and *Farley* v. *Danks* (3).

It is by no means established that extra costs may not be legal damage. The company were compelled, owing to the nature of the proceedings of this sort, to go into Court. These costs have never in fact been disallowed; and, moreover, there was evidence that the company were in fact damaged by the presentation of this petition. *Chapman* v. *Pickersgill* (11) and *Churchill* v. *Siggers* (12) were also cited.

(1) 1 Bos. & P. 205.
(2) 1 Salk, 13; 1 Lord Raymond, 374, 378.
(3) 4 E. & B. 493, 499; 24 Law J. Rep. Q.B. 244.
(4) 40 Law J. Rep. Exch. 201; Law Rep. 6 Exch. 329.
(5) 4 Taunt. 7.
(6) 2 Bing. N.C. 534; 5 Law J. Rep. C.P. 180.
(7) 11 Com. B. Rep. 713; 21 Law J. Rep. C.P. 2.
(8) 51 Law J. Rep. Q.B. 268; Law Rep. 8 Q.B. D. 167.
(9) 1 B. & Ad. 128.
(10) 10 Com. B. Rep. N.S. 592; 31 Law J. Rep. C.P. 174.
(11) 2 Wils. 145.
(12) 3 E. & B. 929, 937; 23 Law J. Rep. Q.B. 308.

Quartz Hill Gold Mining Co. v. *Eyre, App.*

BRETT, M.R.—The allegation in this action is that the defendant falsely, maliciously, and without reasonable and probable cause entered a petition to wind up the plaintiff company. The only evidence of money damage given in the cause was evidence that the company, upon that petition, was put to extra costs. Thereupon Mr. Justice Stephen, without giving any opinion as to the other points raised, nonsuited the plaintiffs, upon the ground that in order to maintain this action special damage must be proved, and the fact of the company being obliged to pay these extra costs was not special damage of which the law could take notice, and that therefore the action would not lie. To that ruling objection was taken, and the Divisional Court, agreeing with the learned Judge that the case was governed by that of *Cotterell* v. *Jones* (7), refused to grant a rule *nisi* for a new trial. A rule *nisi*, however, was granted in this Court. It was said on behalf of the defendant that the judgment, even if this Court should disagree with the grounds upon which it was based, could be supported if it was shewn that there was no evidence of want of reasonable and probable cause, and that there was no malice. There has been an interesting discussion as to the rule which ought to govern cases where an action has been brought upon the ground that some former legal proceeding has been taken falsely, maliciously and without reasonable and probable cause. I was for some time doubtful whether there might not be some civil actions in which there was no money damage, and whether the mere fact of bringing an action might not give a cause of action; but upon reflection, although it is not necessary to decide it in this case, I am convinced that an action cannot be maintained for the mere bringing a civil action, whatever may be the allegation contained in it, and even although it was brought falsely, maliciously, and without reasonable and probable cause. That is my present view. Assuming that to be true, the question remains whether, if a proceeding, such as presenting a petition to wind up this company, be taken without reasonable and probable cause, and although there has been no money damage beyond the extra costs sustained by the plaintiffs, an action will lie. I entirely agree that, even though the proceedings be malicious and without reasonable and probable cause, yet if they did not and certainly could not produce any damage of which the law will take notice, an action will not lie. The action would be an action of *tort* after all; and therefore there must be damage of which the law will take notice. I agree with Mr. Moorsom that if the only damage which can be suggested is the obligation to pay the extra costs as between solicitor and client, that is not a damage of which the law will take notice. The theory as to the payment of extra costs is, that they are costs which are not necessary for the purposes of the party who has incurred them. When costs are taxed as between party and party, the losing party is bound to pay the costs as between party and party, leaving the other party to pay the remaining costs. The costs, therefore, which a losing party is bound to pay are all the costs necessarily incurred by the other party in the litigation. It is only just that the losing party should pay the costs necessary to support the litigation, but not the extra costs caused by the litigation of the other party. Such extra costs are not costs necessary to the litigation, although it may be reasonable that they should be paid by the client to his solicitor. If that be taken to be the reasoning of the matter, it is obvious that where the litigation is false and malicious and without reasonable and probable cause, it is immaterial whether extra costs were incurred or not; for those costs were not caused by the litigation, and there would not, therefore, be any damage for which an action will lie. If we look back for guidance to the older authorities, we find it laid down in *Savile* v. *Roberts* (2) that there are three kinds of damage—damage to a man's fair fame and credit; damage to his person, as where he is arrested on mesne or final process, or on a criminal charge, for to take away a man's liberty is a cause of damage to him; and, lastly, damage to a man's property, as where he is put to expense to defend himself, for that is damage to his property of which the law will take notice.

It was held under the old law of bankruptcy that where a person falsely, maliciously and without reasonable and probable cause, caused a man to be made a bankrupt, he injured him in two ways. There were two kinds of legal injury to the man's property, for he was obliged under that system to do away with his bankruptcy, and he was put to expense in so doing. The Judges who held that to be the law, also put it as another ground, that to charge a trader with insolvency was an injury to his fair fame and credit, of which the law will take notice. Under the old system, therefore, and on either of those two grounds, to make a man a bankrupt falsely, maliciously and without reasonable and probable cause, was a good cause of action. It was alleged, however, that that is not so under the present law of bankruptcy, because it is the Court which is petitioned to make a man a bankrupt; and it was therefore argued that he is not made a bankrupt by the petition, and that he cannot be unless the Court adjudicate him to be a bankrupt. It was also said that the Court will not make a man a bankrupt if it is rightly advised, if the petition is false, malicious and without reasonable and probable cause. It is obvious that a party cannot be made liable for a wrong decision of the Court, but it is another matter if a decision is obtained by deceiving the Court; and although that may be a ground for punishment, yet it may not be actionable. It seems to me that the Court of Exchequer, in the case of *Johnson* v. *Emerson* (4), rightly overruled this argument, the fault of which is that it is too large. The proposition is, that such a proceeding cannot be a cause of action and of damage, because all that is done is to ask for an adjudication, and that it must be assumed that the Court acted rightly. That would be an answer to an action for false and malicious prosecution, because the Court is there asked to adjudicate. In a charge of that kind a man's fair fame must suffer, and he is put to expense in defending himself. It is not, therefore, a good answer to say that all that is asked for is an adjudication between the parties. The reason why an action can be maintained under the present system of bankruptcy is because an injury is done, by the original process, to a man's fame, even though he does not suffer any money loss, before he can prove the accusation to be false. That is the reasoning upon which Baron Cleasby in *Johnson* v. *Emerson* (4) supported the action under the present law of bankruptcy. It seems to me that the ground of the decision was, that a man is injured in respect of his fair fame just as much under the new as under the old system of bankruptcy, because he is openly charged with insolvency before he can clear himself. Such a proceeding, therefore, is not like an action which charges a man with fraud and in which the evil is remedied at the trial—that is, at the same time when the evil is published. That will reduce this case to the question whether the proceedings upon a petition to wind up a company resemble civil proceedings in an action charging fraud rather than proceedings in bankruptcy. I am of opinion that they are more like the latter proceedings. The point taken seems to me to be a very pertinent one—namely, that in the case of a petition to wind up a company, notice of the proceedings and the steps taken are published by the law itself, and by the act and deed of the party, before the company can defend themselves. The proceedings, therefore, are more like bankruptcy proceedings.

I therefore venture to differ from the decision of the Divisional Court that this case must be governed by the cases of civil actions, and that although a petition be entered falsely, maliciously and without reasonable and probable cause, an action will not lie. Under these circumstances I think that it will lie.

Then we have to consider the points taken on behalf of the defendant that the judgment can be supported upon other grounds than those which were given. I think that the learned Judge ought to have held that there was want of reasonable and probable cause on the part of the defendant in entering the petition to wind up the plaintiff company. It was also necessary for the plaintiffs to prove that the defendant had acted maliciously. The moment that a Judge holds there is want of reasonable and probable cause, there is evidence

of malice to go to the jury; and if there is no other evidence of malice except that which the Judge has stated is in his opinion evidence of want of reasonable and probable cause, I am inclined to agree with the opinion of Mr. Justice Hawkins, in the case of *Hicks* v. *Faulkner* (8), that upon a question of malice so left, the jury are not bound by the holding of the Judge, but may consider whether in their view of the case there was want of reasonable and probable cause. In this case the learned Judge was wrong in nonsuiting the plaintiffs, and there must therefore be a new trial, as we cannot venture to say whether there are any materials upon which to give judgment.

BOWEN, L.J. — I am of the same opinion. The plaintiffs complain that the defendant falsely, maliciously and without reasonable and probable cause, presented a winding-up petition against the company. At the trial, Mr. Justice Stephen nonsuited the plaintiffs, upon the ground that this action, even if it would lie, at all events would not lie without further proof of special damage than had been given. He did not actually decide that the plaintiffs had failed to make out malice or want of reasonable and probable cause; but he thought that the defendant at all events had pointed out a fatal blot in the action by reason of the failure of the plaintiffs to prove such special damage as alone would enable the action to be brought. The first question is, whether this action will lie at all—that is, whether an action will lie for falsely, maliciously and without reasonable and probable cause, presenting a petition against a joint stock company; and secondly, whether such an action will lie without further evidence of special damage than was given here. I think that both these questions can be answered at once, because it seems to me that the answer to the one exhausts in discussion the materials which are an answer to the other. I start then with this—in which I agree with the Master of the Rolls—that at the present day, the mere bringing a civil action under our rules of procedure, and with the consequences which in the present day attach, even if the action is brought falsely, maliciously and without reasonable and probable cause, is not actionable. Speaking broadly, when a man complains in a Court of justice of a false and malicious proceeding, he must, in order to support his action, shew that the proceeding of which he complains was accompanied by damage. The reason why the malicious bringing of a civil action under our present rules of procedure gives rise to no such complaint is to be easily seen, if one starts with the propositions laid down by Lord Holt in the case of *Savile* v. *Roberts* (2), where, with reference to an action for malicious prosecution, he said, "that there are three sorts of damage, any of which would be sufficient ground to support this action. 1. The damage to a man's fame, as if the matter whereof he is accused be scandalous . . . . 2. The second sort of damages which would support such an action are such as are done to the person, as where a man is put in danger to lose his life or limb, or liberty, which has been always allowed a good foundation of such an action, as appears by the statute *de conspiratoribus* . . . . 3. The third sort of damages which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused." Applying this classification of damage as a test to any civil action which can be conceived under our present system of law, it seems to me to follow that the bringing of any civil action, even without reasonable and probable cause, will not give rise to a further action for malicious proceeding. In no civil action, not even in cases which are based upon fraud, is damage to a man's fame the necessary and natural consequence of bringing the action. Incidentally, many proceedings in an action may involve damage, but the mere bringing of the action will not. If the action is tried, the plaintiff's fame will be cleared; but if it is not tried, his fame is not assailed.

With regard to the second sort of malicious proceeding, where damage has been done to the person, no civil action, under the existing law of procedure, involves as a necessary and natural consequence such damage or injury to the person. The same

observation is applicable to the third sort of damage, for bringing a civil action does not involve as a necessary and natural consequence damage or injury to property. The reason is, that the only costs which the law recognises are the costs which have been properly incurred in the action itself; for these costs a successful defendant will have been compensated, and if the Judge refuses to give them, it will be by reason of some act of the party himself by which he has ceased to deserve them.

It seems to me that the broad canon laid down by the Master of the Rolls is the correct one, and that at the present day, and according to the present law and procedure, the bringing of an ordinary civil action, however malicious and without reasonable and probable cause, will not support a subsequent action. I will not say that there are not scattered here and there in some of the cases observations which seem to shew that under other systems of procedure there were not some kinds of civil proceeding, the unreasonable bringing of which might possibly give rise to such an action. But it is not necessary to decide whether in the past such an action could not have been imagined, or whether it might not arise in the future in a different state of the law.

There is this strong fact, however, against the plaintiffs' contention, that no single instance can be pointed to in which an ordinary civil action similar to those of the present day has been considered to justify a subsequent action for malicious proceeding.

Although a civil action is not a proceeding which gives rise to such an action for malicious proceeding, upon the ground that it does not necessarily or as a natural consequence involve damage, yet there are proceedings which do; and to those kinds of proceedings, if taken falsely and maliciously, the reasoning of Lord Holt applies. A remedy is required by reason of the injury which has been done. Such cases are criminal charges, which involve either slander to reputation, or possible loss of liberty. In their very nature, the presentation, prosecution or inception of criminal proceedings involve damage to the fair fame of the accused which cannot afterwards be remedied by the mere failure or reversal of the proceedings. For that reason the law considers that the presentation of that kind of indictment, or the inception of that sort of prosecution, falsely, maliciously and without reasonable and probable cause, is the foundation of a civil action.

Then there are other proceedings which necessarily involve damage, such as the presentation of a bankruptcy petition against a trader in the past when his property was actually attached, because there the property itself was directly assailed. But a trader's credit is as valuable as property itself; and proceedings under the existing bankruptcy law, although unlike proceedings under the last in some respects, resemble them in this, that they strike home to a man's credit. The case of *Johnson* v. *Emerson* (4) rightly decided, I think, that such a proceeding will give rise to an action. I should like to suggest an analogy which may be found in the law of libel and slander, not with the view to lay down any positive law, but in order to throw some light upon what I have said. The very essence of a slander is that the words are spoken falsely, maliciously and without reasonable and probable cause. With regard to written words no proof of special damage is necessary; but with regard to slander it is, as a rule, different. It never has been satisfactorily settled why this difference does exist; but it is remarkable that the cases in which words spoken are actionable are either those in which actual damage is proved to have been sustained, or in which damage is the necessary and natural consequence of the words spoken, as, for example, a slander that a man is guilty of an indictable offence, a conviction of which involves loss of liberty or fair fame; so also a slander which attributes to a man a disease which renders him unfit for society; or, lastly, one which affects him in his trade or profession.

In the present case we have to consider whether a petition to wind up a company resembles a civil action, which does not necessarily involve damage and therefore will not justify an action, or resembles proceedings in bankruptcy. It seems to me that it is more like the latter

proceedings. I do not see how such a petition can be presented and advertised in a newspaper without striking a blow at the credit of the company. A great increase in our times in three kinds of abuse for the purpose of extorting payment of civil debts may be noticed—namely, proceedings in police courts to extort money which may be due; proceedings under the bankruptcy law; and petitions to wind up companies. There is a wrecking of credit in all these three forms of abuse. I should be sorry if the law did not place in the hands of a person who has been so injured the means to right himself, so far as can be done, if he has been unjustly attacked. In answer to the first question, I think, therefore, that an action will lie by reason of the special damage which is involved, *ex hypothesi*, in the very institution of winding-up proceedings which are unjust.

The only question which remains to be considered is, whether at the close of the plaintiffs' case the learned Judge should have interfered and said that, upon the plaintiffs' own shewing, there was no evidence of want of reasonable and probable cause, or that there was no special damage. It seems to me that the learned Judge at this stage could not have done so, at all events without a finding of the jury. Two possible views might be taken of the defendant's action with regard to this company. He was not the holder of any shares, and yet he presented a petition as if he were. Then it was said that there was a correspondence between him and his brokers which justified him in thinking that he was a shareholder. But the transfer was left for ten days in the hands of the brokers, and the defendant never wrote again, and, without any enquiry or notice, assumed that they had not sold the shares. That would raise a question for the jury.

Lastly, as to the insolvency. Can it be said that upon these materials alone the petition might reasonably have been presented by the defendant? I think not; and that at all events, without any finding of the jury on such facts as were in dispute, the learned Judge had no right in law to hold that there was a failure to prove absence of reasonable and probable cause. Then as to the malice; it seems to me that if the learned Judge ought to have left some question to the jury before deciding upon the absence of reasonable and probable cause, he must have left the question of malice to them.

It was also urged on behalf of the defendant that no one could suppose that he did not act *bona fide* in the view which he took. That may be the view of the jury so far as regards his *bona fide* belief that he was the holder of the shares, but it would not preclude the question of malice, for he may have taken the proceedings with a view, not to wind up, but to wreck the company. Upon the whole facts of the case, and for the reasons given by the Master of the Rolls, I think that there must be a new trial.

Rule absolute.

Solicitors—Snell, Son & Greenip, for plaintiffs; Bolton, Robbins, Busk & Co., for defendant.

[IN THE HOUSE OF LORDS.]

1882. Dec. 5, 6. 1883. March 19.

WAKE *v.* HALL.

*Mines—Customary Right of Mining—Right to Erect and Remove Buildings on Surface—*14 *&* 15 *Vict. c. xciv.*

Miners in the High Peak district have, by customs recognised and embodied in an Act of Parliament, the right as against the landowner to enter upon lands in the district for the purpose of working for ore, and to erect on the surface mining machinery, and buildings to cover such machinery:—Held, *that the maxim "Quicquid plantatur solo, solo cedit," does not apply as between them and the landowner, and that they are entitled to remove buildings so erected at any time while their interest in the mine continues.*

This was an appeal from a judgment of the Court of Appeal, which affirmed one of Lord Coleridge, C.J. The proceedings in

the Court below are reported 50 Law J. Rep. Q.B. 545; Law Rep. 7 Q.B. D. 295.

The action was one of trespass, brought by the appellants, surface owners of land in the High Peak of Derbyshire, against the respondents, owners of mines under the same land. The trespasses alleged comprised, among other things, the erection of buildings on the surface to hold mining machinery, and pulling down the buildings so erected. Lord Coleridge, who tried the case without a jury, found that there was a valid custom for mine owners in the district to erect buildings on the surface to hold machinery, and to remove the same during the continuance of the working. He accordingly, in giving judgment that the plaintiffs should recover damages, excepted from his judgment damages in respect of buildings covering machinery and removed prior to the 31st of December, 1874, the date at which the working was finally abandoned.

The plaintiffs and defendants both appealed from the judgment, but it was affirmed by the Court of Appeal.

Mellor, Q.C., and *C. Gould*, for the appellants.—The statute 14 & 15 Vict. c. xciv. s. 16, put an end to all customs except those set out in the schedule. The fifth custom is the only one under which the right to erect buildings could be claimed; but there is no express authority given, and the words "any other mining purposes" ought not to be construed to include such an user. Even if there were the right to erect the buildings, there is no custom giving the right to remove them. The custom ought to be strictly construed—*Wake* v. *Redfearn* (1). The Courts will not presume that the custom authorises interference with the rights of the surface owner—*Davis* v. *Treharne* (2). The custom, if it exists, is bad—*Rogers* v. *Brenton* (3) and *Blewitt* v. *Tregonning* (4). The maxim "*Quicquid plantatur solo, solo cedit*," applies—*Bain* v. *Brand* (5), *Justinian's Institutes* (6), *Broom's Legal Maxims* (7) and *Allaway* v. *Wagstaff* (8).

Davey, Q.C. (*W. Graham* and *E. R. Moon* with him), for the respondents, was directed to confine himself to the question as to the right of removal.

The maxim "*Quicquid plantatur solo, solo cedit*," is not of universal application. The buildings and machinery would, as between landlord and tenant, be tenant's fixtures—*Elwes* v. *Maw* (9), and cases there cited from Year-book Hen. 7, *Lawton* v. *Lawton* (10) and *Lord Dudley* v. *Lord Warde* (11). Here there are independent rights of property in the land, and there can be no reason for extending the maxim so as to benefit the appellants against the respondents—*The Duke of Hamilton* v. *Graham* (12).

Mellor, in reply.

Cur. adv. vult.

LORD BLACKBURN (on March 19, 1883). —The question to be decided in this case is, whether the respondents (defendants below), who were miners working a lead mine in the King's Field, part of the possessions of the Duchy of Lancaster, and who had erected some buildings on land the property of the appellants (plaintiffs below), were justified as against the plaintiffs in pulling down those buildings and removing the materials at the time and in the manner in which they did remove them. I think it convenient first to say what the question really raised is, and what appear to me to be the facts.

There were ancient mining customs in this district; but by the 14 & 15 Vict. c. xciv., after reciting that the "mineral laws and customs of the King's Field are uncertain and undefined, and are in many respects inapplicable to the present mining operations within the King's Field," and that it was advisable "that the said mineral laws and customs should be revised, altered and amended, so as to be made applicable

(1) 43 Law Times, N.S. 123, 125.
(2) 50 Law J. Rep. Q.B. 665; Law Rep. 6 App. Cas. 460.
(3) 10 Q.B. Rep. 26; 17 Law J. Rep. Q.B. 34.
(4) 3 Ad. & E. 554.
(5) Law Rep. 1 App. Cas. sc. 762.
(6) Lib. 2, tit. 1, ss. 29, 30.
(7) 4th ed. 387.
(8) 29 Law J. Rep. Exch. 51.
(9) 3 East, 38; 2 Sm. L.C. 8th ed. pp. 169, 193.
(10) 3 Atk. 13.
(11) 1 Amb. 113.
(12) Law Rep. 2 H.L. Sc. 166.

to the present state of mining operations within the said hundred," it is enacted by the 16th section that the mineral laws and customs of a part of the hundred of High Peak, including the King's Field, "shall be such as are mentioned and comprised in this Act, and no other alleged custom or practice shall be valid."

Power is given by the 56th section to make new and additional customs, but that does not appear to have been yet exercised. The articles and customs by this Act established are contained in the first schedule to it; and whether the customs there mentioned were really ancient or not, and whether they were such as would before the passing of this Act have been held reasonable or not, I think that, since the passing of that Act, August, 1851, they have the force of statute law.

The first custom allows any one to search for veins of lead ore upon any lands, except those occupied for certain specified purposes, and if a vein is found to follow it under such excepted places. No compensation is given to the owner of the land in which the vein is found and worked, though compensation is given to the owner of the excepted places for any damage to the excepted places by following it under them.

The 4th, 5th and 19th customs set out in the schedule seem to me material, and I will now read them: "4. The barmaster, together with two of the grand jury, shall provide the miners a way, either for foot passengers or carts, as may be required, from the nearest highway to the mine, and also from the mine to the nearest running stream, spring or natural pond of water, such ways to be set out in as short a course as may be practicable and reasonable. No compensation is to be claimed by the occupier or landowner for such ways, but such ways are not to be considered public, and the use thereof is to be limited to persons and purposes connected with the mine, and all rights of way are to cease when the mine shall be no longer worked. The parties entitled to use the way may make sufficient ways for use, and keep the same in repair, and may also use for mining purposes the water from the nearest running stream, spring or natural pond. 5. Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury, and be set out by them, for the purpose of laying rubbish, dressing his ore, briddling, making meers or ponds and conveying water thereto, and any other mining purposes. The miner shall in all cases, before he commences any search or uses any land, make fences sufficient for the protection of cattle from any injury which might arise from his operations, and keep such fences in sufficient repair. 19. The barmaster, if he finds any mine or vein neglected and not wrought, and not hindered by water or for want of air, shall, if required so to do by any person or persons, send to the owner or reputed owner where known to him, and if not known to him then put up in some conspicuous place within the liberty in which the mine or vein is situate, a notice that such mine or vein will, at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them, be forfeited, and if at the expiration of the said three weeks the mine or vein is not so worked, the barmaster, in the presence of two of the grand jury, may give such mine or vein to any person or persons willing to work the same: provided that nothing herein contained shall authorise the barmaster to give away such mine or vein if the owner thereof be unable to work the same by reason of such mine or vein being under water or for want of air, so long as the owner thereof is using efficient and diligent means to the satisfaction of the barmaster and the grand jury to relieve such mine or vein."

I do not think any others of the customs material. Admissions between the parties were made, of which some are material as shewing what is the question which is now to be decided. I will read those which I think material: "1. Admit that the land in question is within the King's Field. 2. Admit that the defendants have got the mining rights given by the statute and scheduled customs, and new and additional customs, articles, rules and orders (if binding on the landowners). 3. Admit that up to June, 1872, all buildings on the

land in question were erected and used for mining purposes. 4. Admit that in June, 1872, the defendants suspended working the mine (except the working of the hillocks in 1878, as hereinafter mentioned), and that the mine in question has remained in the possession of the defendants, and registered in their or some of their names in the barmaster's books. 5. Admit that the defendants in 1873 and 1874 pulled down the engine-house, boiler-house and some other of the buildings in the particulars mentioned, and that they sold the building materials, and fixed and unfixed machinery. . . . 12 and 13. Admit that part of the hereinbefore-mentioned buildings were built on some part of the hillocks above described, there being some feet of these mineral substances between the foundations and the natural surface of the land, but that part of the said buildings (the chimney and pumping engine-house and bed) were on foundations which were below the natural surface. 14. Admit that the mine in question has been worked for 200 years and upwards, during all which period the defendants or their predecessors in title have been in possession as miners. 15. Admit that the materials of which the hillocks were composed have been raised partly by the defendants and partly by their predecessors. 16. Admit that the before-mentioned buildings, other than the buildings now converted into stables, were erected in and before 1854. 18. Admit that the land in question was allotted to the plaintiffs or their predecessors in title under the award, dated 1807, made under the Great Hucklow Inclosure Act of 1803 (Act and award to be put in). . . . 19. Admit that it has been the practice in the district for miners to erect buildings and fix machinery similar to the buildings and machinery of the defendants for mining purposes, and from time to time to alter and vary the description and character of the buildings and machinery as improvements have been discovered and introduced, and to remove and sell removable machinery without objection by the owners of the soil. 20. Admit that it has been a common practice in the district for work in the mines to be suspended for many years (during which the mine remains the property of the miner and registered in his name in the barmaster's books until dispossessed under the miners' customs), and for the miners afterwards to resume the working of the mine. 21. Admit that the mines and hillocks in question have not been exhausted and are still a valuable property. 22. Admit that the working of the mine was suspended by the defendants in consequence of its being unremunerative, and that it would cost a considerable sum to put up machinery equivalent to what was removed by the defendants in 1873 and 1874."

There can, I think, be no doubt that the buildings mentioned in the 12th and 13th admissions, at least the chimney, pumping-engine house and bed, were so attached to the soil which belonged to the plaintiffs as to be, whilst they so continued attached, part of that soil; and if the defendants can make out that, notwithstanding this annexation, they retained such a property, or at least an interest in the materials of which these buildings were formed, as to be entitled to remove them when they did, the plaintiffs cannot make any case as to anything else. If the defendants fail as to these, there might come to be a question whether they necessarily failed as to other things. But I think, therein agreeing with the Court below, that the defendants have succeeded in shewing that they had such a property, or at least interest, in these materials.

The plaintiffs' counsel contended at your Lordships' bar (though the Lord Chancellor seems to have understood them not to dispute it below) that the defendants were not justified in erecting buildings of such a nature. And this, if it could have been made out, would have been of great importance to them. For there is a great difference between the position of a person who wrongfully annexes his materials to the soil of another, and that of a person who does so rightfully. But I think the plaintiffs' counsel failed in establishing this contention. I do not doubt that no such buildings were used for mining purposes in the reign of Henry 2, when the ancient custom originated; and before the Act of 1851, it might have admitted of an argument whether the custom which, *tempore* Henry 2, applied to the erections then necessary or proper, applied now to those which became after-

wards necessary or proper. But I do not think it admits of doubt that the Act of 1851 makes the custom apply to the present state of mining operations in the King's Field; and, after the 19th admission, it is impossible to doubt that, in the present state of mining, such buildings are necessary, or at least proper, for mining operations.

It was also contended that, whether the miner could or could not remove the materials whilst his interest continued, that interest terminated in 1872. But that I think fails in fact; for I think, as was indeed decided in the cross appeal which has not been brought before this House, that the miner's interest did not cease merely by the suspension of working in 1872 (though that might have justified the barmaster, under the 19th custom, in declaring the miner's interest forfeited), and that the miner's interest in the portion of the surface of which he had exclusive possession continued till, by the pulling down of the buildings in 1874, he unequivocally shewed that he had abandoned the mine. There is, therefore, no occasion to decide whether or not the right to remove materials, when a person has that right during his interest, continues a reasonable time after the termination of his interest or not.

The question, therefore, which has to be decided is, whether when the defendants erected buildings so, no doubt, as to annex them to the soil of the plaintiffs, but, in the language of the third admission, "for mining purposes," and that at a time when the defendants had a right to erect such buildings on the plaintiffs' soil, they, whatever their intention might be, made the materials the property of the owners of the soil in such a sense that the defendants could not at any time remove them. No case, it is admitted, has ever been decided on this particular kind of interest. The plaintiffs' counsel relied on what is said in a work no doubt of very high authority, the notes to *Elwes* v. *Maw* (9), that the general rule is, "that whatever is annexed to the realty becomes part of it," which I think is perfectly accurate, "and the person who was the owner of it when a chattel loses his property in it, which immediately vests in the owner of the soil. '*Quicquid plantatur solo, solo cedit*'"—which I venture to think is much too broadly stated even as the general rule. The maxim cited is to be found in the works of Gaius, and probably he was quoting an older maxim. And the passage in which he uses it is incorporated in the *Digest*, book 41, title 1, "*De acquirendo rerum dominio.*" In the 7th section of that title there is a great deal of very able reasoning as to what should be the law as to property where one person has changed the nature of the thing belonging to another by bestowing his labour on it—as, for instance, where one has turned the silver of another into a vase, his block of marble into a statue, or his grapes into wine. That question is not material here. And then in the 10th law of that 7th section it is said (I translate the Latin), "If one on his own land has erected a building with materials belonging to another, he is the owner (*dominus*) of the building, for all that is built into the soil becomes part of it ('quia omne quod insedificatur solo cedit'). But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless, he (the owner of the materials) cannot bring an action to recover them in specie, nor take them away himself ('nec vindicare eam potest neque ad exhibendum de ea agere'), because of that law of the twelve tables, which provides 'ne quis tignum alienum sædibus suis junctum eximere cogatur sed duplum pro eo præstet.' Therefore if by any cause the building is cast down, the owner of the materials can 'nunc eam vindicare et ad exhibendum agere.'" So far from meaning by the maxim that the property which had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gaius, and the framers of the *Digest* who adopted his opinion, thought that the property in the materials remained in the person who was owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the twelve tables he was obliged to leave the building untouched on being paid double the value of his materials. And I do not think that

the general rule of English law goes so far as is stated in the passage just read from *Smith's Leading Cases*, or that the authorities cited bear it out. Even where a person himself the owner of the fee has annexed any chattels of his own to his own land, he does not always cause the property in the chattels to cease to be personalty; he generally intends to make them part of the inheritance, and when he does so intend there can be no question that on his death before severance the heir takes, and not the executor.

Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir. Lord Ellenborough, in *Elwes* v. *Maw* (9), says that those cases "may be considered as decided mainly on the ground that where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, it should be itself considered as personalty." Even in such a case the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and as Lord Hardwicke said in *Lawton* v. *Lawton* (10), "You shall not destroy the principal thing by taking away the accessory to it;" and therefore, as I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it may be so great as to prevent the removal. But in the case now before the House there can be no doubt on the admissions that the machinery and the buildings were from the first intended to be accessory to the mining, and that there was not at any time an intention to make them accessory to the soil; and though the foundations being, as is stated in the 12th and 13th admissions, below the natural surface, they cannot be removed without some disturbance to the soil, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to shew that the property in the materials must have been intended to be irrevocably annexed to the soil.

For these reasons I think that the decision below was right. I therefore move that the judgment below be affirmed, and the appeal dismissed, with costs.

LORD WATSON.—I also have come to the conclusion that the judgment of the Court of Appeal ought not to be disturbed.

I am of opinion that, in sinking into the soil the foundations of a house, chimney and boiler seat connected with an engine for pumping water from the mine, the respondents were acting within the limits of their customary right. The practice set forth in the 19th article of the admissions made by the parties on the trial of the cause before Lord Coleridge, must be taken as explanatory of the custom, and is good evidence to shew that the use of the "surface land" for such erections as those in question has, ever since steam power has been employed in pumping, been regarded as a use "for mining purposes," within the meaning of the fifth custom scheduled to the Act of 1851. That is confirmed by the terms of the 26th custom, which obliges the owner of a mine, the working of which is impeded by water, to remunerate any stranger who relieves the mine by means of the old-fashioned steam-engine.

I am also of opinion that at the time when the erections in dispute were taken down and removed, the interest of the respondents in the mine had not come to an end.

It is therefore unnecessary to consider what the relative rights of the parties would have been if the erection of these buildings had been in excess of the powers conferred on the respondents by the mineral customs, and if the interest of the respondents in the mine itself had terminated before their removal.

Wake v. *Hall, H.L.*

In the Act of 1851, and in the scheduled customs which are therewith incorporated, and are therefore of statutory authority, the interest of the miner is expressly described and recognised as that of ownership. He has not an absolute right in perpetuity, but his right remains that of an owner until he gives up possession of the mine, or is dispossessed by competent authority. In other words, his is a proprietary right derived from the mineral customs of the district, and subject to the limitations imposed by these customs.

Accordingly, the position of these parties at the time when the erections in question were made, and also at the time when they were removed, was this—the appellants were owners of the surface land to which the buildings were affixed, the respondents were the owners of the mine under an independent customary title, having as an incident of that title the right to erect the buildings for the purposes of their mine. I do not think that between persons so situated the maxim "*Quod solo inædificatur solo cedit*" has any application.

According to my understanding of the Roman law, from which it is derived, the maxim applied exclusively to two classes of persons, either to those who built *in alieno solo* with their own materials, but without title and in *mala fide*, or to those who so built in *bona fide* under some misconception as to their right to do so. The *mala fide* builder forfeited his structure to the owner of the soil; but, on the other hand, the *bona fide* builder had a right to remove his materials, unless the owner of the soil gave him full compensation. I can find nothing in the law of Rome to suggest that the maxim contemplated a case like the present, which involves no question of *bona* or *mala fides*, and relates to persons building *in alieno solo* by virtue of a proprietary right superior to and independent of the title of the landowner.

There is, so far as I am aware, no English authority tending to establish that the maxim has ever been regarded in this country as of universal application. The authorities merely shew that the doctrine which it is understood to embody, which is not the same as the doctrine of the Roman jurists, has been given effect to, with certain differences, in the three classes of cases specified by Lord Ellenborough in his judgment in the case of *Elwes* v. *Maw* (9). I assume that the doctrine would receive a similar application in cases analogous to these; but I can perceive no analogy between the case of independent owners like the appellants and respondents and the cases of a tenant who has no title except a lease from his landlord, or of the division of the estate of a deceased into heritable and movable for the purposes of succession, or of the division of settled estate between the personal representatives of tenants-for-life or in tail, and the remainderman or reversioner. For these reasons I am of opinion that the appellants must fail; but, apart from them, I am disposed to think that the terms of the statute and customs are conclusive against their claim.

In my opinion all erections made upon or affixed to the *solum* of the surface land, in virtue of the powers conferred upon the miner by the fifth custom, constitute "mineral property" as defined in the 2nd section of the Act, and, as such, may be taken in execution and sold, in order to pay debts recovered or penalties awarded against the miner under a judgment of the Barmote Court. These, and other provisions of the statute, in my opinion, plainly recognise the fact that works such as those the appellants claim are, after their erection, owned by the miner—are, in other words, his property, subject to his disposal, and liable to be taken in execution for his debts. That fact is, I venture to think, of itself sufficient to prevent the application of the maxim to the present case. It appears to me that in all cases arising between the owner of the land in fee and a third party making the erection, the maxim "*Quod solo inædificatur solo cedit*," if applicable at all, must come into operation at once. An agricultural tenant who builds a barn, with its foundations sunk in the soil, ceases the moment the structure is completed to be owner of the materials composing it, and his sole interest is thenceforth to occupy as tenant, the building itself having become the property of his landlord.

I have only, in conclusion, to say that

even on the assumption that the appellants had a right to buildings annexed to and accessory to the soil as in a question with the respondents, I agree with the reasoning by which the noble and learned Lord on the Woolsack has demonstrated that the buildings in dispute must be regarded as personalty.

LORD BRAMWELL.—In this case the plaintiffs complain that the defendants have taken down buildings fixed to the soil and freehold of the plaintiffs, and have removed the materials. The defendants admit that the buildings were so fixed that they would have been part of the freehold, and would have gone with it, if, for example, they had been for dwelling purposes and had been erected by a tenant-for-life. They admit that they pulled down the buildings and removed the materials, contending that they had a right to do so, as the buildings were erected by them, or their predecessors in title, with their own materials, the property in which, say the defendants, has never passed from them. In answer to this the plaintiffs rely on the rule, "*Quicquid plantatur solo, solo cedit.*" The defendants deny that it applies. It undoubtedly applies where such buildings have been erected by a trespasser, a wrongdoer, whether innocently or knowingly so—why, it is not necessary to determine. The defendants say they were not wrongdoers. Mr. Mellor faintly contended that they were. This does not seem to have been argued in the Court below, and, I think, reasonably. For it is impossible to say that the miners might not sink a shaft as they had done, might not have an engine to work the mine, and might not have a building to cover the engine. It seems to me clear that this action cannot be maintained on the ground that the buildings were wrongful.

But the rule "*Quicquid plantatur solo, solo cedit,*" prevails in another class of cases, namely, that where the builder is not a trespasser; and where the tenant for life or years builds a building permanently fixed to the soil, he cannot lawfully pull it down as against the reversioner or remainderman. Here again it is not necessary to consider why the law is so, nor whether it is reasonable. If it is because the building is a wrong and waste, as has been held, it does not apply to the present case. But further, the relation between such a tenant and the reversioner or remainderman is altogether different to that between the plaintiffs and defendants—if, indeed, there can be said to be any relation between them. The defendants are tenants or workers of the mine, with an easement on the plaintiffs' land. The mine owner, the Duchy of Lancaster, is more in the same relation to the defendants as a reversioner to a tenant than are the plaintiffs. There is no privity between the plaintiffs and the defendants. That the maxim applies where there is, does not shew that it applies where there is not. I know of no other case where it does apply. Without saying that there is no other case, I cannot see why the maxim applies in this. The defendants are not wrongdoers like the trespasser I have supposed. They are not persons who had any estate or term in the land of which the plaintiffs are seised. No doubt the maxim is expressed in general terms and without qualification; but it must be taken with reference to what one would have said were the only cases in which there could be a fixing to the freehold, namely, by a trespasser or by a tenant.

But if no reason can be given why the maxim should apply to this case, plenty of reasons can be given why it should not. The defendants are lawfully in possession of the premises. They or their predecessors lawfully built these buildings, which are essential to the working of the mine, being accessorial to the engine and works; and it would be most unreasonable that they should have to leave them on the premises—as unreasonable as that they should leave the engine. On this ground alone I should advise your Lordships to affirm the judgment.

It is perhaps dangerous, as leading to litigation, to add what I am about to say, but it appears to me that the defendants' case may be made out in another way. I think, if the plaintiffs chose to insist on it, that the defendants were bound to remove these buildings. They have a right to use

the surface of the land for mining purposes; but when those purposes are fulfilled, I think the miners must restore the surface in a natural state; and it cannot be that the plaintiffs have an option either to have these buildings removed, or left, at their pleasure.

Further, I am of opinion, if it were necessary to decide it, that the principle on which a tenant may remove trade fixtures, would, if the defendants were tenants, justify the removal of these buildings; and that the defendants cannot be in a worse position than such tenants. The claim, if made by any one, should in reason be made by the mine owner, not by the plaintiffs. Suppose the mine is again worked, are new engines and a new house to be put up?

Lastly, it was contended that if the defendants might remove these buildings it must be during the mining. But I am clear that they had a reasonable time afterwards in which to do it; and, as I read Lord Coleridge's judgment, he has found that it was done within such reasonable time.

I agree, therefore, that this judgment should be affirmed.

Lord Fitzgerald.—This case was most carefully considered in the primary Court, and again in the Court of Appeal, and was fully and ably argued at the bar of your Lordships' House. Your Lordships probably reserved judgment, not by reason of any inherent difficulty which the case presented, but on account of its novelty. On mature consideration I had arrived at the same conclusion as that which has been announced by the noble and learned Lord (Lord Blackburn).

The case is one unaffected by authority, and is completely *sui generis*. I assume that the hard maxim of our law—"*Quicquid plantatur solo, solo cedit*"—represents a rigid rule of general application to all cases coming within its ambit; but it seems to me to be obvious that the parties to this litigation, both plaintiffs and defendants, stand outside its limits, and that their rights are not to be determined by its application. They do not come within any of the classes defined by the Lord Chief Justice in *Elwes* v. *Maw* (9), or deduced by the learned editors of the leading cases from the numerous authorities referred to in the notes to that case.

I do not know that much advantage can be derived from a minute examination of those authorities, or any further endeavour to trace the origin of the maxim to its foundation in the Roman law, or its adoption into the law of England in a more stringent form at a time when little heed was paid to rights other than those of the owners of land. Like all other rules, it has received from time to time judicial modifications to suit the exigencies of modern life and modern progress, and numerous exceptions and qualifications have been grafted on it in favour of trade, manufacture and agriculture, and in furtherance of the rights of creditors. It seems to me that what we have first to do is to ascertain as nearly and as accurately as we can the true relation of the plaintiffs and of the defendants to each other.

The interest which the plaintiffs or their predecessors took in the land allotted to them under the Inclosure Act of 1803 and the award of 1807 was subject to the rights of the Crown as lord of the manor of High Peak, within which the liberty of Great Hucklow is situate, and to the seigniories and royalties incident to such manor, and was also subservient to the customary rights of miners existing from time immemorial, and subsequently defined expressly by "The High Peak Mining Customs and Mineral Courts Act, 1851." These customs had probably their origin at a period when the whole ownership of the soil was in the Crown, and were established for the public interests in order to encourage the extraction by mining operations of the greatest quantity of lead from an otherwise unproductive soil, and to add to the revenue of the duchy by increasing the royalties.

Whatever their original foundation may have been, their intrinsic validity cannot now be questioned. It is observable that the waste lands to be divided under the Inclosure Act of 1803 are to be allotted to the parties interested in proportion to their respective properties, rights of common, and other interests in the same, but saving to the Crown and all other persons "all such rights, titles

and interests as they or any of them had in their lands to be allotted before the passing of the Act, or could or might have had in case the same had not been made."

The mine of the defendants in the place in question had been in possession of and worked by the defendants and their predecessors in title for 200 years prior to and down to 1872, and the plaintiffs took their allotment under the Inclosure Act, subject to the rights and interests of the predecessors of the defendants, whatever those rights and interests were.

It does not appear when the buildings in question were erected, save that they had been erected prior to 1854. The erection may have been, and probably was, at a much earlier period, and in substitution for some previously existing buildings; but all were erected for mining purposes, and were similar to those which it has been the practice of the district for miners to erect, and from time to time to vary and alter "as improvements were discovered and introduced."

I cannot doubt for a moment but that the custom would authorise the miner to use all modern appliances, and that he was not confined to the use of such as existed at the time of the presumed grant of these mining rights.

I now turn to the Act of 1851; but before criticising its provisions I desire to observe that, in the course of the arguments on the part of the plaintiffs, too narrow a character was given to that Act, as one providing only for the interests of miners *inter se*. The Act goes much further. It declares in its preamble that the Queen, in right of her Duchy of Lancaster, is seised of the hundred of High Peak, within which there is a district "called the King's Field, otherwise the King's Fee," within which "all the subjects of the realm have from time immemorial had or claimed to have a right to search for, sink and dig mines or veins of lead ore, subject to certain ancient mineral laws and customs, and upon paying certain duties to Her Majesty, &c." It recites that the mineral laws and customs of the King's Field are uncertain and undefined, and in many respects "inapplicable to the present mining operations within the King's Field," and that "it is advisable that the said mineral laws and customs should be revised, altered and amended, so as to be made applicable to the present state of mining operations within the said hundred, and that the jurisdiction of the Great and Small Barmote Courts should be more clearly defined and settled."

The statute then proceeds to provide for the constitution, jurisdiction and procedure of the High Peak Barmote Courts, and for the appointment of a steward and other Judges of these Courts, and fixes their duties. The Courts are to be Courts of Record, and have jurisdiction (amongst others) in trial of actions of title, trespass and debt, and the mineral laws and customs of that part of the hundred over which these Courts have jurisdiction are those mentioned in the Act.

The noble Lord (Lord Blackburn) has referred to many of the articles and customs contained in the schedule of the Act, and I will confine myself to additional observations on them.

The second custom, which authorises "the landowner to sell and remove from his land the calk, feagh, spar and other minerals (except lead ore)," limits that right by adding, "when not required for the use of the mine, but not so as to destroy or injure any mineral property."

The sixth scheduled custom provides for the transfer of the miner's interest in his mine by an entry in the barmaster's book. Custom 10 settles the right of the first finder of a vein, and the ascertainment of its limits; and from that to the 19th various provisions are made for the settlement of rights, and enforcement of them if disputed.

Returning again for a moment to the statute, it will be found that in its definitions, section 2, the words "mineral property" shall include mines and veins of lead, "and the works, rights and appurtenances connected therewith, and also lead ore, and all tools, materials, goods, chattels and effects used in searching for, getting, cleansing or preparing lead ore, whether such tools, &c., be found in or upon any mine or works or elsewhere;" and by section 32, when the amount of any judgment recovered in the Barmote Court or any penalty imposed by the

steward shall be unpaid, the steward shall issue his warrant, and, thereunder, the barmaster is required to take possession of any "mineral property" belonging to the debtor, and shall sell the same by ticket or by public auction, to raise the sum mentioned in the warrant.

It will be observed thus that the mineral property liable to be taken in execution for the miner's debt, includes not only tools, materials, goods, chattels and effects, but also the mine itself, with its works, rights and appurtenances. The whole is thus treated as in the nature of personal estate liable to be sold for the miner's debts, and it would not require any strained interpretation to come to the conclusion that under the term "works" would be included machinery and buildings erected for mining purposes, and necessary for the working of the mines, and which, according to admission No. 19, it has been the practice in the district for miners to erect, and from time to time to alter and vary as improvements were discovered and introduced.

In endeavouring to trace the relations of the parties to each other, it will be observed that the title of the landowner seems to be largely ignored, and as if subordinated to that of the miner. The landowner is but twice mentioned in the schedule of customs—namely, in the 1st, in giving him a right to the expenses of levelling the land after an unsuccessful search for minerals, and in the 2nd giving him a limited right to remove from his land stuff brought up in the course of mining operation. But, on the other hand, the miner's title seems to be dealt with as superior and predominating; he is entitled to search for, sink and dig mines in or under all manner of lands of whose inheritance soever they may be; if a mine is found, he is at liberty to work, and makes no manner of compensation or payment to the landowner. So long as his mine shall be worked he shall be entitled without any payment "to the exclusive use of so much surface land as shall be thought necessary," &c., for, amongst other purposes, "dressing his ore, making meers or ponds and conveying water thereto, and any other mining purposes." The "exclusive use of the surface land" seems larger than a mere easement over the surface of the land.

The concluding words of custom 5 are very comprehensive, and it seems difficult to hold that the erection of suitable machinery for working the mines, and the necessary buildings for the protection and due use of such machinery, would not come within these words. When once the mine has been found, and so long as it continues to be worked, the title of the miner, not only to the mine, but also to the necessary "surface land," with rights of way and water, seems to be complete and independent of the landowner's. He has full power of sale and transfer, or other disposition, as he may think fit, and until the miner shall cease to work his mine, the landowner's interest in the mine, and in the surface land necessary for its working, is in abeyance.

On a review of the position of the parties to each other, it will thus be perceived that the defendants did not derive from or under the plaintiffs; and, on the contrary, the plaintiffs took subject to all the customary rights of the defendants, and, amongst others, to the possession and use of the "surface land" for the purposes defined by the statute, and to which the 19th admission is applicable.

The defendants were not tenants or trespassers, and the plaintiffs were not landlords or lessors. There was no manner of contract between them. The defendants had rights, not derived from the plaintiffs' ownership of the surface, but in superiority to it, and to which that ownership was servient, and amongst others the right to erect buildings for mining purposes, and to alter or take them down as might be expedient, and, in my opinion, also to remove the materials.

This is not the case of a novel claim arising out of a new state of circumstances, but is the assertion of an alleged ancient right, springing from unquestioned immemorial customs, declared and established by a modern statute. It does not appear to have ever, before the present occasion, been the subject of controversy or litigation; and when it now comes before us, we apply to it the principles of common right and of common justice.

The right of the defendants to remove

the fixed machinery, though questioned in argument, has not been raised before us by appeal, and I can see no ground whatever on which, so far, to doubt or question the decision in the Courts below. Mr. Mellor, however, argued for the plaintiffs, that even in that case, and treating the machinery as personalty, and therefore removable, yet the same rule did not apply to the "building," which being fixed into the land, became, by an inexorable rule of law, a part of the land. If the rule was applicable to the present case, there would probably arise the question of intention, whether the erections in question were made for the purpose of benefiting the inheritance in the land, or for the more complete use and protection of the machinery as chattels. If such a question could arise in the present case, the ordinary presumption would be clearly rebutted. The buildings in question, if not by the statute and customs personalty, were but accessory to the machinery, and built to cover and protect it, and the one was as much removable as the other.

In my humble opinion, the machinery and buildings never ceased to be the property of the miners and removable by them; both are treated together as forming mineral property—property of the miners in the nature of personalty—and there seems no pretence for the contention that the right to remove them had been abandoned.

For these reasons, I adopt the decision of the Court below, and concur in the opinion that this appeal should be dismissed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors—Geare, Son & Pease, agents for B. Wake & Co., Sheffield, for appellants; W. & J. Flower & Nussey, agents for E. Hall, Castleton, Sheffield, for respondents.

[IN THE HOUSE OF LORDS.]

1883. March 5, 6. April 9.

BRADLAUGH *v.* CLARKE.

Penalty—By whom to be Recovered—Common Informer—Parliament—Parliamentary Oaths Act, 1866 (29 & 30 *Vict. c.* 19), *s.* 5.

Where a statute imposes a penalty, it goes to the Crown, unless an intention appears to give it to any one else. But it is not necessary that such intention should be expressly declared; it may be shewn by implication.

By the Parliamentary Oaths Act, 1866 (29 & 30 *Vict. c.* 19), *s.* 5, *a penalty of* 500*l. is inflicted on a member of either House of Parliament sitting or voting without having previously taken the oath prescribed by that statute. The penalty is "to be recovered by action in one of Her Majesty's Courts at Westminster," by whom, is not said. The Act repealed all earlier enactments in force as to Parliamentary Oaths, and in the provisions which it substituted made some material alterations in the law. Under the repealed statutes like penalties had been inflicted which had been expressly made recoverable by a common informer.*

On an action by a common informer under the Act of 1866 *the defendant demurred upon the ground that the Crown alone could sue:—*

Held, *first, that "action" is a general term which would properly include informations and other proceedings by the Crown.*

Held, *secondly* (*dissentiente* LORD BLACKBURN), *that no sufficient intention appeared by the Act to give the penalty to a common informer, and that it could be recovered only by the Crown.*

Per LORD BLACKBURN—*that, the Act being merely silent as to the persons to sue, the presumption was that no alteration was intended in the previous law by which a common informer was entitled to sue.*

This was an appeal from a decision of the Court of Appeal, which affirmed one of Mathew, J.

Bradlaugh v. *Clarke, H.L.*

The case is reported in the Courts below 50 Law J. Rep. Q.B. 342; Law Rep. 7 Q.B. D. 38.

The action was brought to recover a penalty of 500*l.* from the appellant, under the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5, for sitting and voting in the House of Commons without having taken the oath required by law. Several questions had been raised upon a demurrer to the statement of claim, all of which had been decided in the Courts below in favour of the respondent. As to the main point argued below, whether an affirmation made by the appellant in lieu of an oath was valid, no question was raised on this appeal.

The appellant in person.—The point to be determined is whether a common informer has the right to sue for a penalty under the Parliamentary Oaths Act, 1866, s. 5. Where a statute imposes a penalty, the right to sue for it vests immediately in the Crown by its prerogative, and cannot, except by express words, be taken away or limited as it would be by allowing any one else to sue—*Tomline's Law Dictionary*, "Penalty," *Jacob's Law Dictionary*, "Penal Laws," *Viner's Abridgment*, vol. 16, p. 566, "Prerogative of the King," T, 2, s. 61. The statute says that the penalty is "to be recovered by action in one of Her Majesty's Superior Courts at Westminster." It is said that these words exclude the Crown, and therefore give the right to sue to the common informer, because—first, the Crown does not sue by action but by information; and, secondly, it sues in the Court of Exchequer alone.

But the Crown may bring an action in the ordinary way, though, as it has more efficacious remedies, it is very unusual for it to do so—*Chitty on the Prerogative of the Crown*, c. 12, pp. 244-46, and cases there cited. Besides, the word "action" is a general term, and may well include informations. It is used in other statutes of proceedings by the Crown—31 Eliz. c. 5. s. 5. The Nullum Tempus Act (9 Geo. 3. c. 16), s. 1, speaks of "any action . . . . in any of His Majesty's Courts at Westminster for or in the name of the King's Majesty." In 18 & 19 Vict. c. 90. s. 1, "actions . . . . by or on behalf of the Crown" are mentioned.

A note to *Comyns's Digest*, Forfeiture C, is cited for the proposition that the Crown can only sue in the Exchequer for a penalty unless the statute gives power to sue elsewhere; but it is not warranted by the case there cited—*The King* v. *Malland* (1)—which merely decides that the proceeding must be civil, not criminal. There are many authorities that the Crown by virtue of its prerogative alone may sue in any Court—*Comyns's Digest*, Prerogative D, 85; *Viner's Abridgment*, vol. 16, Prerogative T, 2, ss. 28 and 33, Z, s. 4, citing 9 *Rep.* 74*b*, 75*a*; *Bacon's Abridgment*, vol. 6, Prerogative E, ss. 5 and 7; *Chitty on the Prerogative of the Crown*, c. 12, p. 244. *The King* v. *Hymen* (2) and *The King* v. *Clark* (3) were suits by the Crown for penalties in the King's Bench. The right was expressly conferred by the statute in those cases; but so it is here—*Comyns's Digest*, Information A, 1, and cases there cited.

The Court of Appeal held that the common informer could sue, because they thought the Crown was excluded, and that some one must be able to sue. If it has been shewn that the Crown can sue, the common informer's right has nothing to support it. The omission from the statute of the words found in the previous Act, 1 Geo. 1. st. 2. c. 13. s. 17, expressly authorising the common informer to recover, is evidence that Parliament intended to give the right to the Crown alone. The same inference may be drawn from the abolition of the right of suing in Scotland. The policy of recent legislation has been against actions by common informers. Even if the first portion of the section does give the common informer the right in the case of peers, it is submitted that the words "like penalty," in the latter part relating to the House of Commons, do not imply "to be recovered in the like manner" (the Act being to be construed strictly), but only indicate the amount. [He proceeded to argue that the Court had no power to give costs to a common informer; but the Lord Chancellor referred

(1) 2 Str. 828.
(2) 7 Term Rep. 536.
(3) 2 Cowp. 610.

to *Garnett* v. *Bradley* (4) and *Myers* v. *Defries* (5) as shewing that the Court has now in all cases a discretion as to costs from which there is no appeal.

Sir H. Giffard (*Kydd* with him), for the respondent.—Before the passing of the Parliamentary Oaths Act a common informer could sue. It is assumed by the appellant that Parliament intended to change the law in that respect, yet no express words are used to do so. The term "action" primarily and ordinarily applies to proceedings between subjects, not to those to which the Crown is a party. If the Crown alone can sue, it would be able to dispense with the statute altogether.

Cur. adv. vult.

THE LORD CHANCELLOR (THE EARL OF SELBORNE).—The single question to be decided upon this appeal is, whether a common informer can sue for the penalties imposed by the statute 29 & 30 Vict. c. 19, upon a member of the House of Commons sitting and voting in that House without having taken the oath prescribed by that Act. The words of the material clause (section 5) are these:—"If any member of the House of Peers votes, by himself or his proxy, in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of 500*l.*, to be recovered by action in one of Her Majesty's Superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence; and, in addition to such penalty, his seat shall be vacated in the same manner as if he were dead."

It was argued that the words "a like penalty" meant only a penalty of like amount, and not a penalty of like amount to be recovered in like manner. With that view I cannot agree; and in all that I say I shall assume that there is no difference as to the right of action for the recovery of the penalty between the case of a member of the House of Peers and that of a member of the House of Commons.

All previous enactments relating to the oaths to be taken by peers and members of the House of Commons (beginning with 30 Car. 2. st. 2. c. 1, and ending with 23 & 24 Vict. c. 63) were repealed by this statute, which is therefore the only law now in force on that subject. The question was considered and determined in the Court of Appeal (where alone it was raised and argued), without reference to any of the repealed statutes, in the same way as if there had been no prior legislation on the subject. It will be convenient first to examine from the same point of view the reasons assigned by the Court of Appeal for their judgment in the respondent's favour.

It was acknowledged as an incontestable proposition of law, that "where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it." Lord Justice Bramwell referred to *Comyns's Digest*, Forfeiture C, as correctly laying down that doctrine. If it were necessary many other authorities to the same effect might be mentioned. It rests on a very plain and clear principle. No man can sue for that in which he has no interest; and a common informer can have no interest in a penalty of this nature unless it is expressly, or by some sufficient implication, given to him by statute. The Crown, and the Crown alone, is charged generally with the execution and enforcement of penal laws enacted by public statutes for the public good, and is interested, *jure publico*, in all penalties imposed by such statutes; and therefore may sue for them in due course of law, where no provision is made to the contrary. The onus is upon a common informer to shew that the statute has conferred upon him a right of action to recover the particular penalty which he claims.

(4) 48 Law J. Rep. C.P. 186; Law Rep. 3 App. Cas. 944.

(5) 48 Law J. Rep. Exch. 446; Law Rep. 5 Ex. D. 180.

Bradlaugh v. *Clarke*, *H.L.*

I do not agree with the argument of the appellant that for such a purpose express words are necessary. If an intention to confer such a right ought to be implied from what the Legislature has said, upon any sound principle of construction, such an implication cannot, in my opinion, be excluded by reasons derived from the special prerogatives of the Crown.

Express words giving a right of action to any one who may sue for the penalty are certainly not found in this statute. Nor is there anything from which, upon ordinary principles of construction, such a right of action can be implied, unless the words "to be recovered by action in one of Her Majesty's Superior Courts at Westminster," are wholly, or in part, inapplicable to the Crown.

It appears by the report of the opinions of the learned Judges in the Court of Appeal that they were disposed to think (though they did not decide the point, and Lord Justice Bramwell expressed himself more doubtfully upon it than Lord Justice Lush) that if the words had simply been "by action," the penalty would have belonged to the Crown alone: "because the word 'action' is a generic term, and may be used as a general term." But they thought it proved by the context, "in one of Her Majesty's Superior Courts at Westminster," that the word "action" was here used "in the popular sense of a proceeding by writ," because the option of suing in any one of those Courts was given; and they assented to the contention of the plaintiff's counsel that the sovereign could only sue by information in the Court of Exchequer, and could not sue in the Court of Queen's Bench or in the Court of Common Pleas for such a penalty. Lord Justice Bramwell referred to a note by Mr. Hammond, the editor of the fifth edition of *Comyns's Digest* (published in 1822), to the passage Forfeiture C, which speaks of the right of the Crown to recover unappropriated penalties. That note rests upon the case of *The King* v. *Malland* (1), and is in these words: "Where the statute does not express how it shall be recovered, it must be sued for in the Exchequer." The learned Judge quoted the terms of the report of *The King* v. *Malland* (1), and of the reporter's marginal note to that case (in which, however, it is not said that the Crown could not sue for an unappropriated penalty elsewhere than in the Exchequer, but only that such a penalty "was suable for in a Court of Revenue and not by indictment"), and he added, "On the principle established by these authorities it is argued that as this penalty may 'be recovered by action in any one of Her Majesty's Superior Courts at Westminster,' it is not the Crown who is to sue for the penalty, but the common informer, including the plaintiff. By that reasoning I own that I am convinced; and therefore I think this action maintainable by the plaintiff." In the sequel of his judgment the same very learned Judge made it plain that his conclusion was, not that either the Crown or a common informer might sue, but that the Crown could not sue for this penalty; and that therefore, unless the common informer could sue, the Legislature would have "created a penalty not recoverable by anybody." Lord Justice Lush expressed himself very much to the same effect, and Lord Justice Baggallay concurred.

The argument at your Lordships' bar has satisfied me that the ground on which the judgment appealed from was thus rested cannot be maintained, and that (unless the word "action" is inappropriate with respect to a suit by the Crown) there would have been in 1866 no legal impediment to a suit for this penalty by the Crown in the Court of Queen's Bench or the Court of Common Pleas; and that Mr. Hammond's note to *Comyns's Digest*, Forfeiture C, if its meaning really is that the Crown could not sue for a penalty elsewhere than in the Court of Exchequer, is incorrect. It has been repeatedly laid down by high authority, as a rule of the common law, that the king by his prerogative may sue in what Court he pleases—*Magdalen College Case* (6), *Brownlow* v. *Mitchell* (7), *Fitzherbert's Natura Brevium*, 7 B and 32 E, *Burgess* v. *Wheate* (8), and see *Bacon's Abridgment*, Prerogative, ed. 1832, vol. 6, p. 472, and *Chitty on Prerogative*, p. 244. *Fitzherbert*, 32 E, when speaking of *quare impedit*, says, "The king may sue this writ, and every writ, in

(6) 11 Rep. 75*a*.
(7) 1 Rolle, 290.
(8) 1 W. Black. 131.

what Court he will." In *Burgess* v. *Wheate* (8), Sir Thomas Clarke, M.R., meeting the objection that the Court of Chancery was "not the proper Court for the Crown to institute a suit in (for an escheat), but it should have been a Court of Revenue," said, "though the Crown may insist on being sued in its own proper Court, yet it may sue in what Court it pleases," citing *Finch*, 84. In *The King* v. *Clark* (3) and *The King* v. *Hymen* (2) the Crown did sue for and recover in the Court of King's Bench penalties incurred under two Revenue Acts, 8 Geo. 1. c. 18. ss. 23 and 25, and 24 Geo. 3. st. 2. c. 47. ss. 32 and 38, both which expressly enabled a common informer to sue, and only mentioned the Crown as entitled to a moiety of the penalties and forfeitures incurred. As to the manner of suit, the earlier of those Acts provided that such penalties and forfeitures should and might "be prosecuted and determined by bill, plaint or information in any of His Majesty's Courts of Record at Westminster, or in the Court of Exchequer at Edinburgh, respectively;" the later that "all the same penalties and forfeitures shall and may be prosecuted and sued for, and the causes and controversies arising thereupon tried, heard and determined in any of His Majesty's Courts of Record at Westminster, or in the Court of Exchequer at Edinburgh, respectively." In the latter of those cases—*The King* v. *Hymen* (2)—after conviction, "a doubt arose whether the king could sue for the whole penalty, and, if he could, whether it should not be by a prosecution in the Exchequer." The counsel for the prosecution on a later day referred to *The King* v. *Clark* (3), and "stated that there were many precedents in the Crown Office of similar proceedings." The Court was satisfied with those authorities, and ordered the defendant (for whom Mr. Erskine was counsel) to pay the whole penalty.

These authorities appear to me to prove that a suit to recover such a penalty as that incurred by the appellant might, in and after 1866, have been brought by the Crown in any one of the Superior Courts at Westminster, and consequently that the option given to sue in any one of those Courts cannot be a sufficient reason for letting in a common informer under a statute by which a right of action is not otherwise given to him. I am also satisfied after full consideration that the word "action" is (as Lord Justice Lush said) a generic term, inclusive, in its proper legal sense, of suits by the Crown, and therefore not furnishing any sufficient ground for implying a right of action in a common informer. That it is used as *nomen generalissimum* in this particular statute seems probable, from the fact that it stands there alone without having superadded to it a number of other technical terms which are usually found associated with it in earlier statutes. Lord Coke (*Co. Lit.* 284*b*, 285*a*, and 8 *Rep.* 151*a*) adopts Bracton's definition of an "action": "Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur;" also giving (in *Co. Lit.*) its equivalent in Norman French: "Action n'est auter chose que loyall demande de son droit." In the third Institute he says: "The king may have an action for such wrong as is done to himself, and whereof none other can have any action but the king without being apprised by indictment, presentment or other matter of record, as a *quare impedit*, *quare incumbravit*, a writ of attaint, of debt, detinue of ward, escheat, *scire facias pur repealer patent*, &c. So also Fitzherbert (*Natura Brevium*, p. 206*I*): "The king shall have an action of trespass." In *Comyns's Digest*, Action B, the term is applied to various rights of suit by the Crown, writ of right, writ of escheat and other civil remedies, including debt and trespass; and in Action D it is extended even to the *placita coronæ* or criminal proceedings; as it is also in *Bacon's Abridgment*, Actions in General, A. In the same *Abridgment*, Prerogative E, 7, it is said, "The king, though the chief and head of his kingdom, may redress any injuries he may receive from subjects by such usual common law actions as are consistent with the royal prerogative and dignity"; and in *Chitty*, Prerogative, p. 245: "The general rule is, that the king may waive his prerogative remedies, and adopt such as are assigned to his subjects; he may maintain the usual common law actions, as trespass *quare clausum fregit*, or for taking his goods." These statements of the law are in accordance with the

language of the statute 31 Eliz. c. 5, "concerning informers" (section 5), which speaks of "Actions, suits, bills, indictments or informations," with express reference to "any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the Queen, her heirs or successors only." Considering the nature of the subject with which that statute deals, I am not surprised at the reference which the appellant made to it at your Lordships' bar.

The conclusion to which I have been brought is, that there is no difficulty in applying any part of the language of the clause in the Act of 1866, which creates the penalty sued for in the present action, to a suit by the Crown; and therefore that no part of that language affords any sufficient ground for implying an intention on the part of the Legislature to give a common informer as well as the Crown a right of action for that penalty.

One of my noble and learned friends is, however, as I understand, of opinion that, although the words of the Act of 1866 might not by themselves afford any sufficient ground for such an implication, it may, nevertheless, be derived (according to those principles applicable to the construction of statutes which are stated in *Heydon's Case* (9) and in *Hawkins* v. *Gathercole* (10)) from a comparison of the policy and provisions of that Act with those of the former enactments *in pari materia* which were thereby repealed.

In the application of those principles of construction it is essentially needful to remember that the office of a Court of justice is to interpret the law, and not to make it. In ancient times the provinces of the Judge and of the legislator were not unfrequently confounded under colour of those principles. They afford useful aids for the resolution of doubts, when (as in *Hawkins* v. *Gathercole* (10)), the question is how far, if at all, an earlier statute has been indirectly repealed or overridden by a later which does not expressly mention or refer to it; or when difficulties arise out of the apparently conflicting language of several laws concurrently in operation; or when the words of a statute are susceptible of divers constructions, one of which may be recommended and another repelled by considerations derived from the known policy of the law or from general reason and justice. In the present case there is no question as to the total and absolute repeal of the former enactments; and if the word "action" has really that sense which I suppose it to have, there appears to be no uncertainty or room for doubt as to the proper meaning of the words which the Legislature has used. They mean that the penalty is to be recovered by proceeding in due course of law in one of the Superior Courts at Westminster—that and nothing else. Their silence as to the person who is to recover the penalty creates no more difficulty or uncertainty than if the statute had simply imposed the penalty and had said nothing at all about the manner of recovering it. It must be recovered by him to whom it is due; and it is due to the Crown, and not to the informer, unless there is enough in the statute to shew affirmatively, by words pointing to the informer, or negatively by words exclusive of the Crown, that the informer was meant to have it. I think it would be legislation, and not interpretation, to import into this Act, by any inference from the repealed enactments, provisions in favour of a common informer which the Act does not itself contain.

The intention of the repealed statutes in this respect did not depend upon any uncertain implication. Of the two earliest, one (30 Car. 2. st. 2. c. 1), which imposed the oath against transubstantiation, applied to members of the two Houses of Parliament only; the other (13 Will. 3. c. 6), which imposes the first oath of abjuration, was applicable also (as was the third, 1 Geo. 3. st. 2. c. 13, imposing a like oath and also an oath against the deposing power of the Pope) to all holders of public offices of every kind, and members of the universities and learned professions, &c., &c., throughout the kingdom. All these Acts placed the person who omitted to take the oaths prescribed by them under heavy disabilities; and the two earlier provided especially that every peer or member of the House of Commons offend-

(9) 3 Rep. 7*b*.

(10) 6 De Gex, M. & G. 1; 24 Law J. Rep. Chanc. 332.

ing against them should be "deemed and adjudged a popish recusant convict," and should be disabled from sitting in either House of Parliament, and in other respects practically outlawed. By the Act of Charles 2, the seat of an offending member of the House of Commons was also declared void. The pecuniary penalty of 500*l.* imposed by the two earlier of those Acts on members of either House was "for every wilful offence" against the Act; and was to be recovered and received by him or them that should sue for the same, and to be prosecuted by any action of debt, suit, bill, plaint or information in any of His Majesty's Courts at Westminster. The severity of those Acts was mitigated by 1 Geo. 1. st. 2. c. 13. s. 17, to this extent only, that offenders against that statute were no longer made "Popish recusants convict," and (singularly enough) the incapacity to sit or vote in Parliament was omitted. The pecuniary penalty of 500*l.* was no longer imposed "for every wilful offence against the Act," but (apparently, though the point may admit of doubt) only once. The other disabilities and incapacities were substantially the same as under the Act of Will. 3, and the 500*l.* was recoverable "by him or them that should sue for the same, to be prosecuted by action of debt, bill, plaint or information in any of His Majesty's Courts at Westminster, and by way of summary complaint before the Court of Session, or prosecution before the Court of Justiciary in Scotland."

By all these three Acts, members of either House of Parliament were prohibited, not only from voting, but also from sitting in Parliament during any debate (in the House of Lords generally, in the House of Commons after the choice of a Speaker), and by the Act of Charles 2 the disabilities and the penalty were made co-extensive with the prohibition. But in the Acts of Will. 3 and Geo. 1 (for whatever reason), the only offence for which the disabilities and the pecuniary penalty were imposed was that of voting without having taken the prescribed oath. It may be that, under these two Acts, a member of Parliament who had not taken the oath, if he sat in either House during debate (though he did not vote), might have been prosecuted for a misdemeanour; but he certainly did not incur the 500*l.* penalty, and he could not have been sued for that offence by a common informer.

All the later enactments mentioned in the schedule to the Act of 1866 had for their object to change either the matter or the form of the prescribed oaths, sometimes generally, sometimes as to particular classes of persons; and they are all repealed so far (and so far only) as they relate to oaths required to be taken by members of the two Houses of Parliament. Most of them extend also to other holders of offices, &c., for the time being required by law to take the prescribed oaths, as to whom the Act of 1866 did not repeal them. In those later Acts there was nothing new as to penalties; the provisions on that subject of 1 Geo. 1. st. 2. c. 13, were applied by them to any neglect to take the altered oaths, in terms of reference which it is sufficient to quote from 21 & 22 Vict. c. 48. That Act substituted for the oaths of allegiance, supremacy and abjuration, in all cases in which they were by law required, a new oath, to the following effect—namely, (1) that the person taking it would bear true allegiance to the Queen; (2) that he would do his utmost to disclose all conspiracies, &c.; (3) that he would maintain to the utmost of his power the succession to the Crown as settled by law; (4) that he disowned all obedience or allegiance to all pretenders; and (5) that he rejected all claims to jurisdiction, &c., by foreign princes or others within this realm. The neglect to take that oath was to be "attended with the like disabilities, incapacities, penalties, liabilities and consequences as now" (that is—in 1858) "by law provided in the case of refusal, neglect or omission, to take, or take and subscribe respectively the oaths of allegiance, supremacy and abjuration, and all provisions now in force" were "to be construed and take effect accordingly." This is the latest of the repealed enactments in which penalties are mentioned.

If it were proper on this occasion for your Lordships to enter into considerations of policy not apparent upon the face of the Act of 1866, which might possibly be collected or inferred from the prior enact-

ments thereby repealed, I should, for my own part, be unable to found upon the provisions of those prior enactments any safe or satisfactory conclusion that the reasons which may have led the Legislature in 1677, 1701 and 1714 to make the pecuniary penalties then imposed recoverable by popular actions (that is, by a common informer) were also applicable to the legislation of 1866. It is obvious that the provisions (in this and some other respects) of the Acts of Charles 2, Will. 3 and Geo. 1, may have been, and probably were, influenced by considerations some of which have now lost their force; in the first of those reigns by the want of confidence then felt in the Crown upon the particular subject to which the oath then imposed related; and in the two latter by the serious danger to the peace of the realm from the claims and designs of pretenders. What was done under such influences might remain after those particular considerations had ceased to operate till the whole law on the subject was deliberately reviewed by the Legislature; but on such a review it might, not improbably, be changed. It is also, to say the least, reasonably probable that motives might exist for giving a right of action to a common informer, when the object was to secure the taking of the prescribed oaths, not only by members of the two Houses of Parliament, but by many official and other persons dispersed throughout the whole community, which might not have the same force when the oaths to be taken by the members of the two Houses of Parliament were (as they were in the Act of 1866) alone in view. I also believe it to be true, as was stated at the bar, that it was much more generally the policy of the Legislature in former than in recent times to give penalties imposed by public statutes to common informers.

When the particular provisions of the Act of 1866 are examined, the danger of importing into them for this purpose a policy supposed to be gathered from the provisions *in pari materia* of the repealed Acts becomes, to my mind, still more apparent. In the first place, the test imposed on members of the two Houses of Parliament was then, for the first time, reduced to the simple oath of allegiance and a promise to maintain the succession to the Crown as settled by law. In the next place, the penal clause (section 5) of the Act of 1866 itself affords conclusive proof of at least some intentional change of policy. It differs from the corresponding clauses of the former Acts, not only by omitting the words which in those Acts gave a common informer the right to sue, but also in other most material respects, which cannot be accounted for upon any theory of inadvertence or oversight. The civil disabilities and incapacities of 13 Will. 3. c. 6, and 1 Geo. 1. st. 2. c. 13, are not reenacted; the forfeiture of 500*l.* is now the sole penalty, with a provision (which was found in the Act of 1677, but not in that of 1701 or 1714) for vacating the seat of an offending member of the House of Commons. The 500*l.* penalty is under this Act still made recoverable in any one of the Superior Courts at Westminster; but not (as under the Act of Geo. 1) in any Scottish Court. And this penalty is imposed by the Act of 1866 *toties quoties* for every act of sitting or voting in Parliament without having taken the oaths, which was not done at all as to sitting, and was at least not clearly done *toties quoties* as to voting by that Act.

The words of 1 Geo. 1. st. 2. c. 13, are—"If any . . . . member of the House of Peers or member of the House of Commons, in this or any succeeding Parliament, presume to vote or make his proxy, not having taken the said oath and subscribed the same, ... every such peer or member so offending . . . . shall forfeit the sum of 500*l.*," &c. The words of the Act of 1866 are, "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a Peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall, for every such offence, be subject to a penalty of 500*l.*, &c.; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without, &c., he shall be subject to a like penalty for every such offence." The difference between a single penalty (assuming that to have been the proper construction of

the Act of Geo. 1) for neglecting to take the oath before voting, and a penalty *toties quoties* for every act of voting, or sitting without having taken the oath, is enormous; and it may be illustrated by the facts which were before the Courts in the present case. The present appellant claimed to be by law entitled to sit and vote after making an affirmation; and on the 2nd of July, 1880, he was permitted by the House of Commons to do so "subject to any liability by statute." The judgment of the Queen's Bench Division, holding that he was bound to swear and was not entitled to affirm, was not pronounced till the 11th of March, 1881. It is, therefore, conceivable (whether the fact be so or not) that the appellant might have sat (voting or not voting) in the House of Commons on every day when that House met during the whole interval between the 2nd of July, 1880, and the 11th of March, 1881, which would be about ninety days, making the cumulative penalties incurred by him not less than 45,000*l.* The Legislature might well have hesitated to place it in the power of every common informer to enforce fines of such enormous amounts as might be incurred under the Act of 1866, either through some such controversy as occurred in the present case, or when (as happened to certain peers who obtained Acts of indemnity) the necessity for a repetition of the oath by a peer in every new Parliament was not understood.

The Legislature, when making these material and important changes in the provisions and terms of the penal section of the Act of 1866, must, I think, be taken to have had under its eyes the provisions and terms of the penal clauses of the former statutes, and to have deliberately departed from them; and that with knowledge of the law that every unappropriated penalty goes to the king, and that a common informer cannot have any right to or interest in a penalty imposed by a public statute, unless it is given to him, either expressly, or by a just and reasonable implication from the words which the Legislature has used. The whole provisions of the earlier Acts as to the manner of recovering penalties might easily have been kept alive by proper words of reference, and applied to the new form of oath, as had been done by 6 Geo. 3. c. 53, 10 Geo. 4. c. 7. s. 4, and 21 & 22 Vict. c. 48, if that were the intention; and this although the personal disabilities and incapacities might have been removed. But it was not done; new words, omitting the grant of the penalty to "him or them that should sue for the same," were (designedly, as I must take it) used; and all the former Acts, so far as they related to the oaths to be taken by members of either House of Parliament, were absolutely, and without reservation, repealed.

I am, for these reasons, of opinion that your Lordships ought to construe the words of the penal clause of the Act of 1866 as they stand, without importing into them any considerations of policy from the provisions of the former Acts as to popular actions, which are not in terms re-enacted. It follows that, in my judgment, the present appeal ought to succeed, and I shall humbly move your Lordships that the judgment appealed from be reversed, and the action of the respondent against the appellant be dismissed with costs, and that the respondent do pay the costs of this appeal.

LORD BLACKBURN.—On the argument of this appeal all the other questions were disposed of in favour of the respondent; but your Lordships took time to consider the question whether, on the construction of the statutes, the penalty of 500*l.*, which was clearly imposed on the appellant, could be recovered by any one who sued for it, which was the view which the Court of Appeal took; or whether, as the appellant contended, it could be sued for by the sovereign only, and not by any one else.

The Act for securing the succession of the Crown (1 Geo. 1. st. 2. c. 13) required oaths of allegiance, supremacy and abjuration to be taken by different persons. Amongst others, by the 16th section, it required them to be taken by the members of both Houses of Parliament. By section 17 it is enacted that if any member of either House vote before taking the oaths, he shall incur heavy disabilities, "and shall forfeit the sum of 500*l.*, to be recovered by him or them that shall sue for the same, to be prosecuted by action of

debt, suit, bill, plaint or information in any of His Majesty's Courts at Westminster, and by way of summary complaint before the Court or Sessions" (probably a misprint for Court of Session), or prosecution before the Court of Justiciary in Scotland." Whilst this remained in force it is quite plain that the intention of the Legislature was that the penalty was to be recovered in England by what is called an action popular, thus defined in the *Termes de la Ley*: "Action popular is an action given upon the breach of some penal statute, which action every man that will may sue for himself and the king, by information or otherwise, as the statute allows and the case requires, and of these actions there are an infinite number .... And because this action is not given to one especially, but generally to any of the king's people that will sue, it is called an action popular. But in this case, when one hath begun to pursue an action, no other may sue it; and in this, as it seems, it varies from an action popular by the civil law."

It is not, I think, material to enquire how it was to be enforced in Scotland, though it is material to notice that a remedy was given in the Scotch Courts.

The nature of the oaths to be taken was varied by several Acts, but all contained a clause to the like effect with the 3rd section of 21 & 22 Vict. c. 48, which is that "the taking, and subscribing of the oath hereby appointed shall have the like effect as the taking, and taking and subscribing respectively, of the oaths of allegiance, supremacy and abjuration would have had if this Act had not been passed; and the refusal, neglect or omission to take and subscribe the oath hereby appointed, shall be attended with the like disabilities, incapacities, penalties, liabilities and consequences as now by law provided in the case of refusal, neglect or omission to take, or take and subscribe respectively, the oath of allegiance, supremacy and abjuration; and all provisions now in force shall be construed and take effect accordingly." So, as the law stood up to 1866, the omission to take the altered oath still rendered the party offending liable to great disabilities, and also to a penalty of 500*l.*, to be recovered in England by action popular, and in Scotland by some process.

Such being the state of the law, the Parliamentary Oaths Act, 1866, was passed. The preamble is—"Whereas it is expedient that one uniform form of oath should be taken by members of both Houses of Parliament on taking their seats in every Parliament"; and the four first sections are strictly within the object specified by this preamble. But the 5th and 6th sections go further. The Acts and parts of the Acts specified in the schedule are repealed; and amongst those so specified are the 16th and 17th sections of 1 Geo. 1. st. 2. c. 13, and the various enactments which, whilst varying the form of oath, preserved the effect of section 17, and applied it to the omission to take the substituted oath.

In lieu of these repealed enactments it is by section 5 enacted, "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of 500*l.*, to be recovered by action in one of Her Majesty's Superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made or subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence; and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

It is impossible to doubt that the Legislature have sufficiently expressed an intention that the offender shall no longer be liable to any of the disabilities imposed by section 17, and that the penalty shall no longer be recoverable in the Scotch Courts; and in both respects, though the enactment goes beyond the object stated in the preamble, a Court of law must give effect to the intention thus expressed. But it seems to me equally beyond doubt that the Legislature have expressed an intention to impose a penalty of 500*l.* on the member offending by omitting to take the oath now in force; and the question in my mind is

whether or not the Legislature have expressed an intention that this penalty shall not be recoverable, as the penalty under the repealed legislation was, by an action popular, but only by a suit brought by information by the Attorney-General suing on behalf of the sovereign. And on this question, and on this alone, I have not been able to agree with the rest of your Lordships.

All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by enquiring what is the intention expressed by those words used in a statute with reference to the subject-matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one, what was the object for which it appears that the statute was made.

In *Garnett* v. *Bradley* (4) Lord Hatherley takes the law "as laid down by Lord Justice Turner in a well-known case which gave rise to considerable discussion, that of *Hawkins* v. *Gathercole* (10)." Lord Justice Turner in that case says that the rule is well expressed in *Stradling* v. *Morgan* (11). That was a case in 2 Eliz. The report says that "it was argued by the counsel for the defendants, and also it was argued and held by all the Barons," that the defendants were not within the purview of the statute, though they all agreed that they were within the words of the statute. Many cases are referred to, and then, at p. 205, comes the passage which Lord Justice Turner cites, so well expressing the rule upon the subject: "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." The same thing is stated by Lord Coke in *Heydon's Case* (9) in 26 Eliz. to have been resolved in different words, but to the same effect.

In most cases in which general rules have to be applied, the difficulty is as to their application. I think, in modern times, much more weight has been given to the natural meaning of the words than was done in the time of Elizabeth; and in some cases in which the old Judges have given effect to the general intention as overruling the particular words, a modern Court would have given effect to the particular words as shewing that the intention really went further than what was supposed. The Civil Code of Canada, article 12, well expresses what I think is the principle, and also the qualification which I think must now be put on the older authorities. "When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the Legislature, and to attain the object for which it was passed. The preamble, which forms part of an Act, assists in explaining it." It is upon this principle that it is held, as I think it has always been held, that where a statute was passed for the purpose of repealing and, in part, re-enacting former statutes, all the statutes *in pari materia* are to be considered, in order to see what it was that the Legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the Legislature intended to enact something quite different from the previous law; and where that is the case, effect must be given to the intention. But when the words used are such as may either mean that former enactments shall be re-enacted, or that they shall be altered,

(11) Plowd. 199.

it is a question for the Court which was the intention. And in this case, as there never had been any objection to the mode in which the penalty was to be recovered —namely, by action popular—as that was not, in the language of *Heydon's Case* (9), the mischief for which it was intended to provide a remedy; and as there obviously might be serious objections made to an alteration of the law which left to the Crown alone a chief means of enforcing the taking of the oath, and in the case of a peer the only means, I think it not too much to say that the burthen rests on those who say that the words used shew that it was the intention of the Legislature so to enact. I do not say that this is conclusive against the appellant's construction of the statute. I only say that the case is more favourable to the respondent than it would have been if the statute had been one for the first time imposing a penalty in the words here used, instead of being, as it is, one containing a repeal and partial re-enactment of a previous statute.

The appellant argued that the prerogative of the Crown is not taken away except by express words, and that it was part of the prerogative of the Crown to have forfeitures. This is, I think, a mistake; the forfeiture goes in the manner in which the statute enacting it directs it to go. It goes to the Crown, unless it sufficiently appears that the intention was to make it go elsewhere; but that intention may be shewn by implication. But the appellant did succeed in shewing to my satisfaction that part of the reasoning of the Lords Justices, and that a part on which their judgment was based, was not correct.

In the popular use of words an information by the Attorney-General to recover a debt due to the Crown is spoken of as an information, and not as an action, which in popular language would be taken to mean an action by a subject. But in legal phraseology, "action" includes every suit, whether by a subject, or in the name of the sovereign, or by an information by the Attorney-General on behalf of the Crown. For this the definition of "action" given in *Coke on Littleton*, 285, is a sufficient authority; but it is still more distinctly laid down in the 3rd Institute, 136, where it is said by Lord Coke, "The king may have an action for such wrong as is done to himself, and whereof none other can have any action but the king (without being apprised by indictment, presentment or other matter of record), as a *quare impedit*, *quare incumbravit*, a writ of attaint, of debt," &c.

Lord Justice Bramwell says, that from the consideration that "action" was *nomen generale*, he should have had some doubt, if the words had been merely "to be recovered by action," whether the Court would have been justified in coming to the conclusion that a common informer might sue. He proceeds: "But, in addition, there are these other words, 'in one of Her Majesty's Superior Courts at Westminster.' Now unless we suppose that it was intended to confer on the Crown a new, exceptional and anomalous power—that is to say, of suing for a penalty due to Her Majesty in some Court other than a Court of revenue—it is manifest that the enactment cannot apply to the Crown." And Lord Justice Lush says: "Now it (the statute) does not in terms say who shall have that penalty, or who shall sue for it; and if the words had simply been 'by action,' I am inclined to think at present it would have belonged to the Crown alone, because the word 'action' is a generic term, and may be used as a general term. But it is evident that that is not the sense in which the word 'action' is here used. It is used here in the popular sense of a proceeding commenced by writ, because it is to be 'in one of Her Majesty's Superior Courts of Westminster,' which means, of course, in either of them. Now the sovereign could only sue by information in the Court of Exchequer. The sovereign could not have sued in the Court of Queen's Bench or the Court of Common Pleas for this penalty."

I think that the appellant was right when he argued that though the Court of Exchequer is a Court having jurisdiction over all causes which concern the king's profit, and is one therefore to which such a suit more properly belongs, yet the right of the sovereign, or the Attorney-General suing for the sovereign, to sue for a debt is not confined to suing in the Exchequer. The king has many privi-

leges in suits. It is laid down in *Fitzherbert, Natura Brevium*, 7 B, 32 E, and in the case of *Magdalen College* (6), that the king by his prerogative may sue in what Court he pleases; and in the two cases in the Year-book, cited in 3rd Institute 136, 19 H, 6, 47, and 34 H, 6, 3, debt was brought by the king's grantee in the name of the king in the Common Bench. And in *The King* v. *Gregory* (12), where the objection was that the king could not declare in his own name in debt in the King's Bench, but the Attorney-General should have sued in his name, though Lord Hale, then Chief Justice, said it was an unmannerly way of pleading for the king, and took time to consider, judgment was given for the king. It does not seem to have occurred to any one that the action would not lie in the King's Bench, and since the Revolution, in the case of an information for a penalty created by a statute which imposed the penalty, one half to go to the king and one half to whoever would sue for it, the whole penalty was recovered by information in the Court of King's Bench—*The King* v. *Clark* (3)—without any objection.

The last case in which the point was raised was in *The King* v. *Hymen* (2). There an information was brought by the Attorney-General in the King's Bench for a penalty incurred under 24 Geo. 3. c. 47. s. 2, by the 38th section of which one moiety of the several penalties in this Act mentioned shall be to the use of the king, and the other moiety shall be to the use of the person who shall prosecute for the same, and all such penalties "shall and may be prosecuted or sued for, and the causes and controversies arising thereupon tried and determined in any of His Majesty's Courts of Record at Westminster, or in the Court of Exchequer at Edinburgh, respectively." The defendant having been convicted, a doubt arose whether the king could sue for the whole penalty, and, if he could, whether it should not be by a prosecution in the Exchequer. The Court, after argument and taking time for enquiry, it being stated that there were many precedents in the Crown Office besides *The King* v. *Clarke* (3), directed that the Crown should recover the whole penalty. This is a direct authority that even under the repealed section 17 the king might have recovered the penalty by information in the King's Bench, unless some private person had first sued, though there could be no doubt that under that enactment any one might bring an action popular, unless the king had been before him. That is not the point now before this House. But it is also a direct authority for the position that the power to sue in some Court other than a Court of revenue was neither new nor exceptional. Indeed, words conferring this power on the Crown were superfluous and unnecessary, for the Crown could so sue without them. The appellant was, I think, justified in contending that if these authorities had been produced on the argument before the Lords Justices, they would not have decided as they did without solving the question on which Lord Justice Bramwell says that he should have had some doubt, and Lord Justice Lush says that he was inclined at present to agree with the now appellant—namely, whether there was enough in the words used in a popular sense to shew that an action popular would lie. He argued further, that if they had not been under this misapprehension they would have decided in his favour, and so claimed their judgments as authorities in his favour. I am not prepared to go so far with him.

I think, if this had been an enactment in the first instance imposing a penalty, I should have been much in the condition in which Lord Justice Bramwell says he was. Though certainly even in a book so little popular as *Coke's Entries*, suits on behalf of the Crown are collected, not under the head of "action," but of "information," so that there is little doubt that the word "action" in popular language would mean an action by a subject; and though the argument that the use of this popular language shewed that the intention was to enable a subject to sue is strengthened by the following provision, which would be useless unless a popular action was given (for the king could without it sue in any Court), I should have some doubt whether that would be

(12) 2 Lev. 82.

enough to justify the conclusion that it was intended that the penalty might be recovered by a popular action. The words may mean that, but they may not. But this is a statute repealing; and in part re-enacting, a former statute; and I think it would be dangerous if an alteration of the law, which no one contemplated or intended, could be brought about by the accidental use of uncertain words. I am chiefly influenced by this consideration in holding that we should not conclude that the Legislature intended an important alteration in the law, unless the words used shew, more clearly than those in this Act do, that such was the intention. In every case in which a previous enactment is repealed and re-enacted in different words, it is argued, on the one side, why are the words changed at all, unless it was intended to change the meaning? And, on the other side, why, if the intention was to change the meaning, are words repeated which at least afford an argument for saying that the meaning was to remain the same? In the present case why were the words, "by him or them who shall sue for the same," left out, if a popular action was intended to be continued? Why were the words, "to be recovered by action in one of Her Majesty's Superior Courts at Westminster," left in, if it was intended to confine the recovery to one by information at the suit of the Crown, in which case they are superfluous? It seems to me that those two arguments neutralise each other.

On the whole, though not without feeling that the case is one of difficulty, and on which opinions may well differ, if the case depended on my opinion the judgment would be affirmed, though not for the reasons given below. As the majority of your Lordships think otherwise, it must be reversed, and I agree that there is no reason why the ordinary rule as to costs should not be followed.

Lord Watson.—It is an unfortunate feature of this appeal that whilst the decision of the Court below—upon the merits of the cause—is not impeached, the only point argued at your Lordships' bar was a preliminary objection to the plaintiff's (respondent's) title to sue, which was not stated at all in the Court of first instance; and, though stated, was not satisfactorily argued before the Court of Appeal.

In the case of statutory penalties, enacted solely for the purpose of enforcing or protecting the interests of the public, the Crown alone has, by virtue of its prerogative, a title to sue and recover, unless the Legislature shall otherwise direct. That seems to me to be, beyond doubt, the law of England. The law of Scotland is the same; and the language used by the late Lord Neaves—with reference to the pursuer, in the case of *Mackintosh* v. *Weir* (13)—aptly describes what I take to be the position of the respondent in this appeal. In that case the learned Judge said: "With regard to the penalty here claimed, it is impossible to contend that the party injured is entitled to recover a statutory penalty, unless that is declared in the statute. It is not intended for his pecuniary benefit at all. It is imposed for the public interest, and is due to the Queen, if Parliament has made no other provision for its disposal."

The real controversy between these parties is, accordingly, reduced to this issue: Has the Legislature, by the provisions of the Parliamentary Oaths Act, 1866, empowered a common informer to sue for the penalties created by the 5th section of that statute? I do not think that, in order to confer the right to sue upon a common informer, express statutory words are required. It will be sufficient, in my opinion, if the intention of the Legislature to give him the right can be derived by reasonable implication from the language of the statute enacting the penalty. The creation of a penalty to be sued for by an informer is not in any proper sense an invasion, or even a limitation, of the royal prerogative; and the intention to enact such a penalty may be indirectly expressed in words which would be ineffectual to deprive the Crown of prerogative rights which had already vested.

Taking the words of section 5 of the Act of 1866 *per se*, I am unable to find any expression sufficient, in my opinion, to

(13) 2 Sess. Cas. 4th ser. 882.

sustain the inference that the Legislature intended that a suit for the penalties thereby provided should lie at the instance of a private person. The only possible foundation for such an inference is to be found in the words "to be recovered by action in one of Her Majesty's Superior Courts at Westminster." If it could have been shewn that the Crown could not sue for such penalties in the Court of Queen's Bench or in the Court of Common Pleas, as was held by the Lords Justices, I think the necessary result would have been that the respondent had a good title to institute the present action. But the authorities which the Lord Chancellor has cited—to which I need not again refer—conclusively establish that these words appropriately describe suits which might be competently brought by the Crown for recovery of such penalties in any one of Her Majesty's Superior Courts at Westminster. No doubt the words are also capable of being read as applicable to suits at the instance of Her Majesty's subjects; but I do not think that circumstance is, in itself, sufficient to indicate that they were intended, and therefore ought to be so read.

I am disposed to hold (although, after hearing the opinion of the noble and learned Lord who has just spoken, not without hesitation) that the enactments of section 5 are not characterised by any ambiguity which requires or justifies a resort to statutes—now repealed—for aid in their interpretation. The whole previous enactments upon the subject of Parliamentary oaths have been swept away by express words of repeal, and a new code of law has been substituted for them by the Act of 1866. It appears to me to be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the Legislature meant to enact in their room and stead. There may possibly be occasions on which such a reference would be legitimate. In the present case the words of the existing Act are, in my opinion, capable of being interpreted without such foreign aid; and I therefore do not think it competent to examine the enactments of statutes no longer existing for the purpose of imposing upon those words a meaning which, taken by themselves, they do not bear.

These are, shortly stated, the considerations which have led me to form an opinion that the judgment of the Court of Appeal ought to be reversed. But I desire to add an observation, on the suggestion made in argument for the respondent, to the effect that the real as well as the professed purpose of the Legislature in passing the Act of 1866 was simply to alter the form of the oath, and not to disturb the rights of private persons who were previously entitled to sue for penalties. A careful comparison of the provisions of the Act in question with those of the statute which it repeals has tended to strengthen my impression that it is incompetent to refer to these statutes for the purposes of the present case; but, assuming reference to them to be competent, I do not think it would assist the respondent's contention.

It is true that the preamble of the Act of 1866 sets forth, as the inducement to legislate, that "it is expedient that one oath should be taken by members of both Houses of Parliament on taking their seats in Parliament." Although the professed object of the Act is thus limited, it is manifest that the Legislature have gone far beyond it, and have altered not merely the form of the oath, but the penalties attached to sitting or voting without having taken it, or having made an equivalent affirmation. Instead of a pecuniary mulct of 500*l.* in terms of the repealed statutes, they have imposed cumulative penalties of that amount for each and every act of voting or sitting during debate. They have omitted, and by that omission have abolished, the numerous personal disabilities inflicted on offending members by the statutes. They have left out the important words "to be recovered by him or them who shall sue for the same," which occur in all the previous enactments, and have also left out the power to sue before the Court of Session, or the Court of Justiciary, which was given by the Act of 1 Geo. 1. st. 2. c. 13, not improbably for the convenience of common informers residing in Scotland. I see no reason to suppose that all these omissions were accidental, and as little reason to suppose that the enactments with regard

to personal disabilities were intentionally left out, whilst the express mention made of common informers was omitted through accident or inadvertence.

LORD FITZGERALD.—The plaintiff's cause of action and claim, as appearing on the writ of summons, are as follow:—"That the said Charles Bradlaugh voted and sat in the House of Commons during a debate, after the Speaker had been chosen, without having made and subscribed the oath to be taken by members of the House of Commons, according to the statute 29 & 30 Vict. c. 19, intituled 'An Act to amend the Law relating to Parliamentary Oaths,' and the defendant thereby became liable to pay to the plaintiff the said sum of 500*l.* pursuant to the said statute, and the plaintiff claims the said sum of 500*l.*" Your Lordships are not asked to determine whether or not the defendant incurred and became liable to that penalty of 500*l.* The defendant does not now raise that question, for a reason alleged by him at the bar, and it is not now before us. We must assume that the judgment of the primary Court, affirmed by the Court of Appeal, is correct in determining that the defendant did incur the penalty of 500*l.* The question now is, does the law require him to pay that sum to the informer suing for it?

The question was not raised before Mr. Justice Mathew, and when raised in the Court of Appeal appears to have been argued very shortly on the part of the defendant and not at all on the part of the plaintiff. The reply of the plaintiff's counsel on this question is given in one short passage thus: "The plaintiff can sue as a common informer; if the argument for the defendant were to prevail, the penalty could not be recovered by any one." The argument for the plaintiff (respondent at your Lordships' bar) was equally concise.

The reasons given for the decision in the Court of Appeal on the question before us did not seem to meet your Lordships' concurrence, and have now been considered by your Lordships to have been insufficient, and in that I concur.

There is one part of the observations of the Judges in the Court of Appeal from which I do not dissent. Lord Justice Lush is represented to have said, "The statute does not in terms say who shall have that penalty, or who shall sue for it, and if the words had simply been 'by action,' I am inclined to think at present it would have belonged to the Crown alone;" and Lord Bramwell says, "Still if the words had merely been 'to be recovered by action' . . . . I should have had some doubt whether we should be justified in coming to the conclusion at which we have arrived." I understand from these passages, that both the Lords Justices would probably have considered that the plaintiff could not have maintained his claim if the 5th section of the Parliamentary Oaths Act had not contained the words "in one of Her Majesty's Superior Courts at Westminster." I concur in that expressed view of Lord Justice Lush, and would think it quite clear in such a case that the plaintiff could not have the penalty.

The defendant rested his contention on two main propositions, which, he suggested, not only displaced the reasons of the Court of Appeal, but entitled him to judgment, and which may be thus stated:—First, that where a statute imposes a penalty as a punishment for an offence, that penalty when incurred belongs to the Crown, unless the statute provides otherwise, either expressly by distinct or particular terms, or unless from the language of the statute and its subject-matter, and the machinery provided for enforcing the penalty, it can fairly and reasonably be inferred that the Legislature intended to give it to the informer; and, secondly, that where the Crown is alone entitled to such a penalty, the suit to enforce it may be instituted by the Crown in any of the Superior Courts.

The authorities and precedents referred to seem to me to support both these positions. As to the first, the case in Sir Francis Moore's printed reports, *Anon* (14), is very high authority. He has always been esteemed as a learned and accurate lawyer, and his reports, first known in MSS., were published by his son-in-law Sir Geoffrey Palmer, also a distinguished lawyer. The report in Moore gives the distinctions taken by Chief Baron Man-

(14) Moore, p. 238, case 373.

wood, that where it is ordained by statute that for feasance, misfeasance, or nonfeasance, the offender shall forfeit a sum of money, and it is not expressed to whom he forfeits it—in all such cases the forfeitures shall be intended for the queen, save in cases of injury to property, where the penalty is assessed as compensation to the party injured; and in *Bacon's Abridgment*, title "Prerogative," B 10, vol. 10, the proposition is stated thus on the authority of Moore, "Also where a statute giveth a forfeiture, either for nonfeasance or misfeasance, the king shall have it, unless it be otherwise particularly directed by the statute."

The proposition so laid down by Chief Baron Manwood, nearly three centuries ago, is but a statement of the law deduced from previous authorities, and is now quite unassailable. It is essential to the due enforcement of the law that it should be so, for if the penalty did not in such a case go to the Crown it could not be enforced at all. It seems equally clear from the authorities and precedents referred to by the Lord Chancellor, that it is incontestable law that in such case the Crown has a prerogative right to sue for the penalty in any of the Superior Courts, and is not confined to an information in the Exchequer.

I was not able to collect from the argument for the plaintiff that so far there was any real controversy. The question still remains to be considered, whether it can be reasonably and fairly collected from the Parliamentary Oaths Act, that the Legislature intended that the penalty imposed by that statute as part of a punishment for what it calls "such offence," should be recovered by and belong to the first informer who should sue for it. The statute does not express such an intention. It does not say that the penalty shall be forfeited to, or be paid to, or be recoverable by the common informer; and the omission of the common form of words, "to be recovered by him or them that shall sue for the same," which are to be found in the 17th section of the statute of Geo. 1, which was then being repealed, seems to me to be a pregnant argument against the inference of an intention to do that which it has abstained from expressing. We cannot suppose that the omission of those words arose from ignorance of the law or from inadvertence.

I am disposed as much as any one to venerate the old canons for interpretation of statutes, sanctioned by the acquiescence of ages, as aids to us in the solving of ambiguities, and relieving us from doubts; but I apprehend that we should go much beyond what has hitherto been done, if we were to adopt an interpretation favourable to the plaintiff, and for that purpose read the statute now before us as implying an intention to confer a right which it does not expressly give.

I prefer to guide my judgment by the rule of construction laid down in *Warburton* v. *Ivie* (15), and so often quoted, approved of and followed. Mr. Justice Burton there says, "I apprehend it is a rule in the construction of statutes that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statute, or if it would involve absurdity, repugnance or inconsistency, the grammatical sense must then be modified, extended or abridged, so far as to avoid such an inconvenience, but no farther."

The language of the statute now before us does not appear to me to be open to ambiguity; and, having regard to its subject, it does not present to my mind any such difficulty of interpretation as would warrant us in departing from or adding to the ordinary sense of its terms, and we give effect to every word of it, whilst holding that no right is given to the informer. The statute takes away no common law right, but we are asked by the plaintiff to give effect to a supposed intention of the Legislature to confer a right which it has not created.

In the course of the argument, it was suggested that yielding to the defendant's contention would be to give to the Government of the day, in effect, a dispensing power; but, if such an argument could have any just weight, it would not be difficult to point out weighty reasons why the Legislature may have considered it better not to give a right of suit to the common informer, in whose hands it might be made

(15) 1 Hud. & B. 623.

an engine of oppression, and rather to leave the enforcement of the law in all proper cases to the Attorney-General, responsible to the Crown and to Parliament for the due performance of his duty.

I adopt entirely the reasons given by the Lord Chancellor for what is now to be the judgment of this House. The Parliamentary Oaths Act is "An Act to amend the Law relating to Parliamentary Oaths." It repeals the 17th section of the statute of Geo. 1, and does not re-enact its provisions. It substitutes a new oath or an affirmation instead. It creates a new public misdemeanour, imposing a penalty as a punishment, and does not in any manner express an intention that such penalty shall go to or be recovered by any one who shall sue for it; and I think it would be a dangerous enlargement of our powers of interpretation if we were to come to the conclusion that because it has enacted that the penalty may be enforced "in one of Her Majesty's Superior Courts at Westminster," we are therefore to infer an intention that the penalty should go to and be recoverable by the common informer.

Judgment appealed from reversed. Action of the respondent against the appellant dismissed with costs. The respondent to pay the costs of this appeal.

Solicitors — Lewis & Lewis, for appellant; Stuart & Tull, for respondent.

[IN THE HOUSE OF LORDS.]

1882. Dec. 6, 7, 13. } MEWS AND ANOTHER *v.* THE QUEEN.

Maintenance of Prisoners becoming Insane—3 & 4 *Vict. c.* 54—27 & 28 *Vict. c.* 29—*Prisons Act*, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4 *and* 57.

[For the report of the above case, see 52 Law J. Rep. M.C. 57.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. April 5. May 10. } THE MERSEY STEAMSHIP COMPANY *v.* SHUTTLEWORTH AND COMPANY.

Practice—Claim and Counter-claim—Application to sign Judgment on Admitted Claim—Rules of Court, Order XL. rule 11.

Although the mere fact that a counter-claim is pleaded does not preclude the Court from allowing a plaintiff to sign judgment under Order XL. rule 11, *on a statement of claim which the defendant admits, yet the Court will not as a rule make such an order when the counter-claim is not shewn to be frivolous, unsubstantial, or set up for the purpose of delay.*

Action by the plaintiffs for freight stipulated to be paid in London before the ship should sail for the port of destination.

The defendants admitted in the statement of defence that the freight claimed was due, and set up a counter-claim for the non-delivery of other goods forwarded in other ships, claiming a sum exceeding the amount claimed by the plaintiffs.

The plaintiffs moved under Order XL. rule 11 (1), for an order to sign judgment upon the admitted claim, and that the amount should be paid into Court by the defendants to abide the result of the action.

Gainsford Bruce, for the plaintiffs.—The claim being admitted, and the only defence being a counter-claim, the plaintiff is entitled, under Order XL. rule 11, to judgment on the claim as on an admission of fact in the pleadings, and to have the amount brought into Court to abide the decision of the action. This was ordered in *Showell & Co.* v. *Bouron* (2).

[MATHEW, J.—That would be depriving the defendants of the benefit of the Judicature Acts.]

(1) Rules of Court, Order XL. rule 11:—"Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may upon any admissions of fact in the pleadings be entitled to, without waiting for the determination of any other question between the parties. . . . ."

(2) *Ante*, p. 284.

No; the object of the Acts is to prevent cross actions.

[WILLIAMS, J.—More than that; they enable a defendant to set off a claim for unliquidated damages against a liquidated demand.]

Hollams, for the defendants, was not called upon.

WILLIAMS, J.—I am of opinion that the plaintiffs are clearly not entitled to judgment under Order XL. rule 11. The facts of the case are very short. The claim is for a liquidated sum, and is admitted by the defendants; but under Order XIX. rule 3, the defendant has made a cross-claim for 2,000*l.*, for damages for not carrying goods in other ships. The plaintiff contends that he is entitled to judgment on admissions in the pleadings, because no defence is shewn; but I do not think that is a correct view of the meaning of the rule. If it were to be adopted as a universal rule, its effect would be to take away absolutely the right of the defendant to set up a cross-claim by way of defence. I do not say that in no case would the plaintiff be entitled to judgment, and that in every case where there is a counter-claim he is not so entitled; but there are no special circumstances shewn such as would warrant us in giving him judgment at this stage of the case. I think that the proposition as broadly stated by Mr. Bruce is not right. I cast no doubt on the case of *Showell* v. *Bowron* (1), in which there may have been special circumstances warranting the Court in giving judgment on the pleadings. The report of that case in the *Weekly Notes* is necessarily merely a skeleton report, and it may be that the counter-claim was evidently fictitious, and an abuse of Order XIX. rule 3.

MATHEW, J.—I am of the same opinion. Mr. Bruce is constrained to admit that on his construction of the rule the plaintiff would be entitled to judgment and execution at this stage of the action; but this was not the intention of the framers of the rule, which only applies to cases where final redress can by this means be given to one of the parties. It never was intended to apply at all to such a case as the present, nor to control the salutary provisions of the Judicature Acts, that the defendant should be entitled to plead a set-off and counter-claim. If it would be right in the present case to give judgment for the plaintiff, it would be equally right in a case of set-off, and then the defendant would be in a worse position than he was in before the passing of the Judicature Acts.

The plaintiffs appealed.

G. Bruce, for the plaintiffs.

Hollams, for the defendants, was not called upon.

COTTON, L.J. (on May 10).—The plaintiffs claim to be entitled to sign judgment under Order XL. rule 11, upon their admitted statement of claim; but that rule only gives the Court power to make an order giving that relief to which it may consider the party to be entitled, subject to such terms, if any, as the Court may think fit. The rule in question gives the Court both a power and a discretion. In this case there is a counter-claim, and if we turn to Order XIX. we find that a defendant may set up a counter-claim in answer to the claim of a plaintiff. I do not say that the mere fact that a defendant raises a counter-claim must necessarily prevent the Court from making an order under Order XL. rule 11. Where the Court can see that a counter-claim is frivolous or unsubstantial, and is satisfied that it is pleaded merely for the purpose of delay, then it may well make the order for judgment which is asked for in this case. Here it is not said that the counter-claim is frivolous or unsubstantial, and indeed it appears that when the plaintiffs applied at chambers for leave to sign judgment under Order XIV. rule 1, the application was refused. It must be contended on behalf of the plaintiffs that in every case in which there is a counter-claim, the plaintiff is nevertheless entitled to an order to sign judgment, if the defendant admits that the claim of the plaintiff is a valid one, subject though it be to a counter-claim; but I am of opinion that this is not so, and that a defendant has a right to resist the motion of a plaintiff for judgment, unless the counter-claim set up by such defendant is shewn to be frivolous, unsubstantial, and to be pleaded for the mere purpose of delay. I think

that the judgment of the Divisional Court was right both in substance and in the reasons which were given. It is said that the case of *Showell* v. *Bowron* (2) is an authority to the contrary effect. It may be that there were reasons there for holding the counter-claim set up in that case to be frivolous; and, if so, that decision can be supported; but if that case lays down any general principle inconsistent with the decision which we are now giving, then I should be unable to agree with it. This appeal, therefore, must be dismissed.

BOWEN, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors—Flux, Son & Co., for plaintiffs; Hollams, Son & Coward, for defendants.

1883. April 24. } FERENS AND ANOTHER (*appellants*) *v.* O'BRIEN (*respondent*).

Larceny—Water in Pipes.

[For the report of the above case, see 52 Law J. Rep. M.C. 70.]

1883. May 25. } THE QUEEN *v.* THE RECORDER OF SHEFFIELD.

Public Health Act, 1875—*Apportionment of Works in a Street—Jurisdiction of Justices—Bad Notice to Pave, &c.—Appeal to Local Government Board.*

[For the report of the above case, see 52 Law J. Rep. M.C. 78.]

1883. May 28. } MURPHY *v.* WILSON AND SON.

Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5—"*Locomotive Engine*"—*Steam Crane fixed on a Trolly.*

A steam crane fixed on a trolly, and propelled by steam along a set of rails when it is desired to move it, is not a "locomotive engine," within the Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5.

This was an appeal from the County Court of Yorkshire holden at Huddersfield. The plaintiff brought an action for damages for injuries sustained by him, by reason of the negligence of certain persons in the employment of the defendants who had charge of a steam crane, so fixed on a trolly on a temporary line of rails, used in repairing a viaduct on the London and North Western Railway between Leeds and Huddersfield, that the steam power could be applied to the axle of the trolly, and the trolly with the crane on it propelled along the metals. The verdict passed for the plaintiff for 170*l.*, and the defendants obtained a rule *nisi* for a new trial, or to enter judgment for the defendants, on the ground that the learned County Court Judge was wrong in holding that the machine in question was a "locomotive engine," within section 1, sub-section 5, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42) (1).

J. Edge, for the plaintiff, shewed cause.—The rails on which this ran constituted a railway, though they were only temporary—*Doughty* v. *Firbank* (2).

This machine is capable of locomotion, and is a steam engine having also the power of raising weights. When the steam is applied to the axle of the trolly it is a locomotive engine, and it does not

(1) 43 & 44 Vict. c. 42. s. 1: "Where after the commencement of this Act personal injury is caused to a workman

(Sub-section 5) By reason of the negligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine or train upon a railway. . . . ."

(2) *Ante*, p. 480; Law Rep. 10 Q.B. D. 358.

make any difference that the steam power is also applicable to the purpose of lifting weights. *Cox* v. *The Great Eastern Railway Company* (3) and *Parkyns* v. *Priest* (4) were also cited.

Lockwood, Q.C., and *Wilberforce*, for the defendants, were not called on to argue.

POLLOCK, B.—In this case judgment has been given for the plaintiff by the learned County Court Judge, on the ground that the defendants are liable for injuries occasioned by persons working a steam machine in circumstances which caused them to be fellow-workmen with the plaintiff. It is admitted that there is no question of superintendence involved, but the whole question turns on section 1, sub-section 5, of the Employers' Liability Act, 1880 (1), and the dispute is as to whether the steam machine in question is a locomotive engine within the meaning of that sub-section. This machine was a steam crane, so fixed on a trolly that, by means of shifting gear working on the axles of the trolly, the crane and trolly could be moved from one place to another along rails, which in the present case were only temporary. It can only be said to be a locomotive engine in the sense that it is an engine, and by means of the trolly to which it is affixed it is capable of being moved about. Now the term "locomotive engine" has a well-known significance, and is used generally for an engine to draw a train of trucks or cars along a permanent or temporary set of rails. There is also a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to place, are never spoken of as locomotive engines. Was it then the intention of the Legislature to include these latter, or such an engine as the steam crane in question, or only to refer to those engines that are usually styled locomotive engines? The words used in the sub-section, in connection with the term "locomotive engine," refer exclusively to well-known things connected with the ordinary working of a railway. The machine in this case is intended to lift heavy weights of stone and other materials used in constructing a railway, having besides an accidental power of applying its steam force to the trolly. If the Legislature had intended to include any such machine they would have used proper terms. I can see no reason why the defendants in this case should be held liable under this section any more than if it were a case of a steam printing machine or a punching machine. I therefore think this case does not come within section 1, sub-section 5, and the appeal must be allowed, with costs.

LOPES, J.—I am of the same opinion. The question is, can a steam crane used for purposes for which cranes are used generally, but which is propelled by steam when it is desired to move it, be called, within the words of sub-section 5, a locomotive engine? I think that the words "locomotive engine" in section 1, sub-section 5, of the Employers' Liability Act, 1880, which have a well-known and ordinary meaning, must be read as having been used by the Legislature with that meaning, and only in that sense. It is difficult to suppose that if the Legislature had intended to include such a machine as this they would have employed words that in their proper and usual signification would only apply to a specific class of engine. And I am fortified in this reading of the sub-section by the words in company with which I find the expression "locomotive engine," words which refer entirely to the ordinary working of a railway. I find words such as "train," "signal box," "points," and so forth. This indicates to my mind that in using the words "locomotive engine" the Legislature only contemplated an engine used for traction purposes on a railway.

CAVE, J.—I am of the same opinion. Before the Employers' Liability Act, 1880, a master was not liable for injuries sustained by his servant through the act of one who was in the common employment with that servant, and this doctrine was carried to such an extent that at last it was held, that a servant of a railway company travelling home from his work could not recover against the company for injuries sustained by reason of the negligence of the guard who was in the same company's service. It was to abrogate this

(3) 38 Law J. Rep. C.P. 151; Law Rep. 4 C.P. 181.

(4) 50 Law J. Rep. Q.B. 648; Law Rep. 7 Q.B. D. 313.

principle, laid down in *Priestley* v. *Fowler* (5), and extended by several decisions until the case of *Morgan* v. *The Vale of Neath Railway Company* (6), that the Act was passed. It is contended that by virtue of section 1, sub-section 5, whenever there is an engine capable of moving on a line of rails it is a locomotive engine, and liability attaches. But, if so, why should it not arise when the engine can be moved along a road? And why should it attach in cases of locomotive rather than stationary engines. These considerations evidently shew that the principle involved is not one of common and immediate employment, but of common and not immediate employment; that, in fact, the risk contemplated is the general risk run by the servants of a railway company on that railway, and not risk incurred by the fact that the engine is capable of being moved. I think, therefore, the words must be read in their ordinary meaning, and the judgment must be reversed and entered for the defendants, with costs.

Appeal reversed, judgment for defendants, with costs. Leave to appeal refused.

Solicitors—Shum, Crossman & Co., agents for Sykes & Son, Huddersfield, for plaintiff; Elliott & Ash, agents for Neill & Broadbent, Bradford, for defendants.

1883. March 12. } THE AMESBURY UNION *v.* THE WILTS JUSTICES.

Highways—Highways and Locomotives Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13—*Contribution by County for Main Roads —"Maintenance"—Removal of Snow.*

[For the report of the above case, see 52 Law J. Rep. M.C. 64.]

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(5) 3 Mee. & W. 1; 7 Law J. Rep. Exch. 42.
(6) 35 Law J. Rep. Q.B. 23; Law Rep. 1 Q.B. 149.

[IN THE COURT OF APPEAL.]

1883. May 28. } COOPER AND ANOTHER *v.* PRITCHARD.*

Partnership—Fraud by one Partner—Liquidation of Partnership—Order of Discharge obtained by Innocent Partner—Effect of, on his Liability for Debt incurred by Fraud of his Partner—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 49.

One of two partners in a firm of solicitors misappropriated money entrusted to the firm for investment, and then absconded. The firm subsequently went into liquidation, and the other partner, who was not a party to the misappropriation, received his order of discharge.

In an action against the innocent partner to recover the amount of the money misappropriated,—

Held, *that the defendant was not protected by the order of discharge, for that the partnership was liable for the fraud committed, and that section* 49 *of* 32 *&* 33 *Vict. c.* 71, *does not limit the liability of a partner for partnership debts to those incurred by means of his own personal fraud or breach of trust.*

Appeal by the defendant from the judgment of Pollock, B., at the trial, without a jury.

Action to recover from a solicitor a sum of money fraudulently misappropriated by his partner, to whom it had been entrusted for investment.

It appeared that the defendant was a partner in the firm of Chapman, Turner & Pritchard, there being really only two partners, Turner and the defendant. This firm carried on business in two branches, one in the City and the other at Lincoln's Inn.

In 1879 the plaintiffs employed Turner in connection with the sale of some land, directing him to receive the purchase-money, and to invest it on mortgage. Turner received the money, misappropriated it, and subsequently absconded. The firm then went into liquidation, and the defendant received his discharge. The plaintiffs then sued the defendant for the

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

sum of money misappropriated by his partner. The defendant contended that he could not be sued after he had received his order of discharge under section 49 of the Bankruptcy Act, 1869.

Pollock, B., gave judgment for the plaintiffs.

The defendant appealed.

Davey, *Q.C.*, *Grantham*, *Q.C.*, and *G. Lawrence*, for the appellant.—The defendant is not liable, for if there has been a breach of trust or fraud, each participator is liable, and therefore the defendant, who did not participate in the *tort*, is not liable in this action—*Ex parte Adamson* (1). The defendant has received his discharge, and is therefore protected by section 49 of the Bankruptcy Act, 1869 (2), for this was not a debt or liability incurred by means of a breach of trust; that section being punitive in its nature must be held to apply only to trusts strictly so called, and not to *quasi* trusts. Moreover, section 4, sub-section 4, and section 15 of the Debtors Act, 1869 (3), shew that the debt which is intended to be excepted must be one incurred by the personal fraud of the debtor.

[BRETT, M.R.—The question of trust need not be considered, as there was fraud in this case.]

If that is so, still the contention remains, that as the defendant was not party to the fraud, he is not within section 49 of the Bankruptcy Act. *Blair* v. *Bromley* (4), *The Emma Silver Mining Company* v. *Grant* (5) and *Ex parte Heath* (6) were cited.

Wills, *Q.C.*, and *D. Gardiner*, for the plaintiffs, were not called on.

(1) 47 Law J. Rep. Bankr. 103; Law Rep. 8 Ch. D. 807.

(2) 32 & 33 Vict. c. 71. s. 49: "An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy. . . ."

(3) 32 & 33 Vict. c. 62.

(4) 5 Hare, 442.

(5) 50 Law J. Rep. Chanc. 449; Law Rep. 17 Ch. D. 122.

(6) 4 Jur. 28.

BRETT, M.R.—Pritchard was partner with Turner in the business of a solicitor and scrivener. I am aware that it has been held in law that these are distinct businesses, but I should be surprised if any solicitor were now to assert that he was not also a scrivener, and in fact the businesses are not practically distinct.

Part of this partnership business was the receiving money from clients to invest, if the firm was so directed to do. Turner acting as a partner in the firm, and able as a partner to bind the firm, received money to invest, and he was bound to invest it as agent for the partnership, but he committed a fraud, and then was driven to utter a falsehood to conceal his fraud. The partnership was liable for both these frauds, for prior to the liquidation one partner could thus bind the partnership.

Then the question arises whether the order of discharge made in the liquidation of Pritchard freed him from liability for this fraud. Section 49 of the Act of 1869 (2) enacts that "an order of discharge shall not release the bankrupt from any debt." Now it is clear that the words "any debt" must mean any debt of the bankrupt—that is a necessary implication; but the section then goes on: "incurred by means of any fraud or breach of trust."

Now to prevent Pritchard from coming within those words it is necessary to alter the word "any" to "his," or to add the words "committed by him." But there is a sound rule of construction which forbids us to alter or to add to a statute unless it is impossible otherwise to make sense of the enactment. We have no right to speculate, but if we were at liberty to do so, I think I could see very good reasons why the statute was only intended to protect honest bankruptcies, and this bankruptcy was caused by the dishonesty of one partner. There being then no reason which obliges or enables us to alter the words of the Act, it seems to be clear that Pritchard's case is not covered by the enactment as to release of debts, and that he is not discharged from his liability by the order of discharge in his liquidation. The judgment must therefore be affirmed.

Cooper v. *Pritchard, App.*

LINDLEY, L.J.—I also am of opinion that Pritchard is liable as one of the partners in this firm. That there was either fraud or a breach of trust cannot I think be doubted, regard being had to the evidence as to Turner's conduct. Turning then to section 49 of the Bankruptcy Act of 1869 (2), we find that an order of discharge substantially releases a bankrupt from all debts proveable under the bankruptcy, with certain specified exceptions; but it provides that the order shall not release the bankrupt from any debt incurred "by means of any fraud or breach of trust." It is argued that these words ought to be restricted so as to apply only to the personal fraud of the bankrupt; but it seems to me that the language of the Act does not limit the exception in that way. The case may be tested by a reference to other exceptions contained in the same section. There are exceptions relating to debts due to the Crown, and for offences against the Revenue Acts. Suppose then that there was a distillery partnership, and that one partner were to infringe the provisions of some revenue statute, so that a liability to the Crown was incurred, it is clear that the discharge of the innocent partner would not free him from that liability; and so I am of opinion that in the present case we cannot limit the general language of the Act, and therefore that the plaintiffs are entitled to succeed on this appeal.

FRY, L.J.—I have come to the same conclusion. I can see no ground for limiting the language of the Act in the way suggested.

Appeal dismissed.

Solicitors—Hindson, Miller & Vernon, for plaintiffs; Smith, Fawdon & Low, for defendant.

[IN THE COURT OF APPEAL.]

1883. March 3. } THE QUEEN *v.* FOOTE.*

Criminal Matter—Appeal—Jurisdiction of Appeal Court—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19 *and* 47.

The refusal of an application by a prisoner to be admitted to bail is a judgment in a criminal matter, within the last clause of section 47 *of the Judicature Act*, 1873, *and the Court of Appeal has no jurisdiction to entertain an appeal from such refusal.*

That clause relates to the High Court in its ordinary jurisdiction, and not only to the Court for Crown Cases Reserved, and the word "judgment" used in it has the general meaning of any decision in criminal matters, and not the technical meaning only of a "final judgment" in criminal cases.

This was an application on behalf of Foote and Ramsay, by way of appeal against a refusal of the Divisional Court to discharge an order of North, J., refusing the prisoners' application to admit them to bail.

The prisoners were tried on the 1st of March for publishing blasphemous libels in the *Freethinker*. The jury being unable to agree were discharged, and the Judge appointed the 5th of March for a new trial. On the 2nd of March counsel for the prisoners made the application above-mentioned to admit them to bail, which North, J., refused.

On appeal to the Divisional Court the application was dismissed on the ground of want of jurisdiction.

The prisoners appealed to this Court.

Cluer, for the appellants, *ex parte*, contended that there was an appeal in all cases to this Court from the Divisional Court, except where expressly excepted by the Judicature Act. Section 47 of that Act only applied to final judgments, and not to merely incidental applications, like the present, which came before the Court

* *Coram* Jessel, M.R.; Baggallay, L.J., and Lindley, L.J.

in its ordinary jurisdiction. He referred to *The Queen* v. *Weil* (1).

[BAGGALLAY, L.J., referred to *The Queen* v. *Steel* (2), where the Court held that the taxation of costs allowed to a successful defendant in a criminal information for libel was a proceeding in a criminal cause within the meaning of section 47, and that there was no appeal from an order as to such taxation.]

JESSEL, M.R.—I am of opinion that this application must be refused. The point raised is of importance as regards the jurisdiction of this Court in criminal matters. The first question is, whether the latter clause of section 47 of the Judicature Act, 1873, which enacts that "no appeal shall lie from any judgment of the said High Court in any criminal cause or matter save for some error of law apparent upon the record," is general, and relates to the High Court in its ordinary jurisdiction, and not only to the Court for Crown Cases Reserved. That has been decided in the affirmative in the case of *The Queen* v. *Steel* (2). I have no reason to doubt the correctness of that decision, even if we were not bound by it.

The next question is whether the word "judgment" in that clause is used in its large sense, or in the technical sense as meaning a final judgment in criminal cases. I do not entertain any doubt but that it is used in the larger sense, as meaning any decision in criminal matters; and that was so decided in the case of *The Queen* v. *Steel* (2), where Lord Justice Mellish discussed the point, and decided that an order for taxation of costs in a criminal information was a judgment in the meaning of the word as used in that clause.

The last question is whether this is a decision in a criminal matter. I have no doubt that it is.

Consider the position of the prisoners. They were in prison under a charge for a misdemeanour. They were tried; the jury disagreed, and were discharged, and the Judge appointed another day for the trial. The counsel for the prisoners applied that they might be let out on bail, but the Judge rejected the application. Then this appeal is brought. If this is not a criminal matter it is difficult to see what is one. The Court has no jurisdiction to entertain the appeal, and it must therefore be dismissed.

BAGGALLAY, L.J., and LINDLEY, L.J., concurred.

(1) Law Rep. 9 Q.B. D. 701.

(2) 46 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. D. 37.

Solicitors—Harper & Battcock, for Foote; Lewis & Lewis, for Ramsay.

[IN THE COURT OF APPEAL.]

1883. May 30, 31. } PEARSALL *v.* THE BRIERLEY HILL LOCAL BOARD.*

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *ss.* 179, 180 *and* 308—*Compensation for Damage sustained by the Exercise of the Powers of the Act—Arbitration—Dispute as to Liability as well as to Amount—Order in which Questions are to be Determined.*

A person who claims compensation for damage sustained by reason of the exercise of the powers of the Public Health Act, 1875, *is entitled, under section* 308, *to have the amount of compensation determined by arbitration in the manner provided by that Act, even though a dispute exists as to the liability of those from whom he seeks to recover compensation; and the prior determination of that question of liability is not a condition precedent to the claimant's right to go to arbitration to settle the question of amount.*

Appeal by the plaintiff from the judgment of Bowen, L.J., on further consideration.

Action upon an award by the plaintiff, as the owner of premises in High Street, Brierley Hill, against the defendants, as the urban sanitary authority of the district, for damage done to his premises by

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

the alteration of the level of the road in front of his premises.

The statement of claim alleged that the defendants altered the road under the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149; that a dispute arose as to the fact of damage and amount of compensation; that the plaintiff appointed an arbitrator; that the defendants declined to appoint an arbitrator; that the enquiry proceeded before the arbitrator appointed by the plaintiff, when the defendants contended that they had not acted under the Public Health Act, 1875, and that the arbitrator awarded to the plaintiff 234*l.*

The defence alleged that the defendants acted as surveyors of highways, attended before the arbitrator under protest, and that the award was invalid.

The action was tried before Bowen, L.J., without a jury, who delivered on further consideration the following judgment:—

BOWEN, L.J.—The defendants in this case have based their defence to the plaintiff's claim upon three grounds. In the first place they have insisted that the alterations of which the plaintiff complains are not alterations effected by them under the powers conferred upon them by the Public Health Act, 1875, but were nothing more than a restoration to its former level of an ancient highway, which they were legally justified in effecting as surveyors of highways. This raises an issue of fact, on which the evidence before me is conflicting. Nearly forty years ago there had unquestionably been a subsidence of the plaintiff's houses, and of the roadway and path. A restoration of the roadway to some extent took place not long afterwards; but the extent of the restoration is a matter of dispute between the parties, the defendants contending that the pathway outside the plaintiff's house had never in fact been restored to its original level, and that they were now only relaying it at that level as they were entitled to do. The burden of proof upon this portion of the case rests, I think, upon the defendants. They have failed to satisfy me that what has been really done under the resolution of the board is simply the restoration of the level of the old highway, and I find as a fact that what has been done has not been the restoration of the old road, but an act done by the local board under the Public Health Act, and I decide accordingly the issue affecting this part of the defence for the plaintiff.

There remains however to be considered the serious objection of law raised on the part of the defendants, which, if made good, goes to the root of the plaintiff's claim. This is an action upon an award of an arbitrator professing to act under sections 179 and 180 of the Public Health Act, 1875. The arbitrator was appointed by the plaintiff upon the 30th of December, 1881, and a notice in writing was given of his appointment to the defendants. As the defendants did not on their side name another arbitrator, the plaintiff's arbitrator, purporting to act under sub-section 4 of section 180, proceeded with the arbitration, the defendants appearing under protest, and in the result an award was made in favour of the plaintiff for the sum of 234*l.*, to recover which sum this action is now brought.

It was contended before me that the arbitration was wholly invalid, upon the ground that the arbitration sections of the Public Health Act, 179, 180 and 308, can only be invoked by the claimant when the dispute is one as to the amount of compensation to be awarded or as to the fact of damage having been sustained; and as from the outset there has been in this case a *bona fide* dispute between the plaintiff and the board as to the legal liability of the board, the plaintiff has prematurely resorted to the arbitration sections. It is true that the dispute on the 30th of December, 1881, and since that date down to the present time, has been one not of amount only, but also as to legal liability. The question I have to decide is, whether this fact renders the whole proceedings before the arbitrator *ultra vires* and of no effect.

Reliance is placed by the defendants on the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1), decided in the year 1853. This was a case decided under 11 & 12 Vict. c. 112. ss. 69 and 77,

(1) 1 E. & B. 694 22 Law J. Rep. Q.B. 234.

which, though not identical in language with the present Act, nevertheless contains language so nearly similar as to afford some elucidation in considering the point under discussion. It is provided by the former of these two sections that the commissioners should make full compensation for any damage sustained by the exercise of any of the powers of the Act, and that in case of dispute as to the amount of the same, the question is to be settled by arbitration. By the latter of the sections, 70, it is enacted that in case of dispute as to the amount of any compensation, one of the two parties might appoint an arbitrator, and that if the other party failed to appoint an arbitrator, the arbitrator appointed by the other might make an *ex parte* award. The plaintiffs sought in that case to enforce by *mandamus* an award made *ex parte* against the commissioners; but it appearing that the commissioners had from the first disputed their liability to make any compensation, on the ground that their contractors only were liable, the Court of Queen's Bench refused the plaintiff's application for a *mandamus*. In discharging the rule, Lord Campbell said as follows: "Those sections point out a particular case in which there is to be an arbitration, and it seems to me that this case is confined expressly and anxiously to questions merely of amount. The 69th section enacts that full compensation shall be made. If it stopped there the remedy would be either action or *mandamus*; the words so far impose a duty, but say nothing as to remedy. What follows then? Are there any words that embrace questions of liability? It seems to me there are not, but that the words which do follow are confined to disputes as to *quantum*; therefore as to all other disputes the statute leaves us in the same position as if the later words were omitted."

Similar language was used by Mr. Justice Wightman. He says: "I am of the same opinion. The question turns entirely upon the construction of 11 & 12 Vict. c. 112. It is safer to found our opinion on that than to rely on analogies drawn from other Acts, which may differ in their object, or be liable to be distinguished from the present. Section 69 enacts that compensation be given to all persons sustaining damage, and in the particular case of a dispute as to amount refers the amount to arbitration."

Mr. Justice (afterwards Lord Chief Justice) Erle, says: "The question before us substantially is as to the jurisdiction of the arbitrator under section 69. That is conferred only in questions of amount."

The next case which was relied upon by the defendants was that of *The Queen* v. *The Burslem Local Board* (2), which came before the Court of Queen's Bench twice, and finally before the Exchequer Chamber. It arose under the 11 & 12 Vict. c. 63. s. 144. A writ of *mandamus* had been directed to the Burslem Board of Health, directing them to cause compensation to be made out of the general or special district rate to the prosecutor, for the damage sustained by him by reason of the exercise of the powers given to the defendants. The writ recited that the defendants denied all liability to make such compensation, an allegation which was traversed by the return. The judgment on the demurrer to the return, reported out of its date, was given in favour of the prosecutor; but it is not necessary to consider this judgment with reference to the present point, and I only allude to it as part of the narrative of the case. Therefore the issue of fact raised on the return went down to be tried at *nisi prius*, and on the trial it was found that the defendants had always denied their liability to make compensation. It did not appear upon the return—and this is important—that there was any dispute as to the amount. The Court of Queen's Bench refused to disturb the verdict which had been entered at the trial for the prosecutor. The defendants contended that the plaintiff had misconceived his remedy, and that he ought, instead of applying for a *mandamus*, to have proceeded under the arbitration section; but Lord Campbell pointed out that the arbitrator would have had no jurisdiction, unless there had been a dispute as to compensation. This decision was affirmed by the Exchequer Chamber (3). This case, however, although the language of the Court of Queen's

(2) 1 E. & E. 1077; 29 Law J. Rep. Q.B. 21 and 243.

(3) 29 Law J. Rep. Q.B. 243.

Bench and Exchequer Chamber is worthy of attention, only decides of course that where there is at the outset no question of amount but only a question of liability, the question of liability may be, and probably ought to be, settled first, before the arbitration clauses of the Public Health Act, 1848, are put in force.

The question which is raised in the present action is one in which both amount and liability were disputed, in which respect it differs from the case of *The Queen* v. *The Burslem Local Board* (2) last referred to; but it remains to be considered whether it is governed by the view expressed by Lord Campbell, and acted upon in the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1), which was decided no doubt on a different Act of Parliament, that if there is a question of liability it should be tried by the superior Court; but if of amount only, then the arbitration clauses are the proper remedy. This case I think is binding upon me, if the Act of Parliament under which the present question arises does not differ from the Act, as respects the point now raised, under which the Metropolitan Commissioners of Sewers' case was decided.

I proceed accordingly to consider what is the true meaning of the arbitration sections in the Public Health Act, 1875. The first section is section 308 (4), which provides that "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of 20*l*., the same may at the option of either party be ascertained by and recovered before a Court of summary jurisdiction." It will be observed that this section is couched in language slightly wider than the language under which the case of the Metropolitan Commissioners of Sewers was decided. Arbitration is to be the mode of settling any dispute as to the amount of compensation or as to the fact of damage. I do not, however, think that in substance this alteration in language is material for the purpose of the case I am now about to decide, because I do not find in this section any intention that questions of liability should in any event be submitted to an arbitrator. I pass next to the arbitration clauses proper in the Act, and the first is section 179 (4), which directs "in case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator, to whom the matter shall be referred." This applies to the procedure for the purposes of arbitration in the cases pointed out in section 308.

Now it is plain that no provision, as I have said before, is made in this Act for referring the question of liability; but it is said on behalf of the plaintiff that he did not agree to refer to the arbitrator the question of liability. There is a dispute as to damage; there is a dispute as to liability as well; and what he desires to do is, at the earliest moment to be able to invoke the arbitration clauses, in spite of the fact that the question as to liability is

(4) 38 & 39 Vict. c. 55. s. 179: "In case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred."

Section 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of twenty pounds, the same may at the option of either party be ascertained by and recovered before a Court of summary jurisdiction."

outstanding, and he says that he is not the less proceeding within his rights because he has allowed that question of liability to stand over to be decided after the award. I cannot think that this is the right construction of the section. It seems to me that, apart from the authority of the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1), which really I am unable substantially to distinguish from the present, convenience would lead one to believe that it was not the intention of the Public Health Act, 1875, to make so great a change as to allow a claimant, in the first instance, to ride over, or at all events to postpone for a time, the decision and discussion of the question of liability, with a view of proceeding under the arbitration clauses, upon the bare ground that there was a dispute as to the amount. Such a construction, it seems to me, would not only be attended by inconvenience, but very probably with additional expense. I think the policy of the Legislature in these Acts—the Public Health Act of 1875, and the Acts I have alluded to under which the cases I have referred to have been decided—was different, and it was intended not merely that the question of liability should be decided by the Court, but that it should be decided at once.

An illustration of the difficulty which would arise upon any different construction is presented by this very case. This is a case in which the question arises, whether the local authority has, in restoring the road, been acting under its powers as surveyors of highways, or under the Public Health Act itself; and that question must be determined according to the view which the tribunal appointed to decide the issues of fact should take of this further controversy, whether the alteration of the road which has been effected is, in fact, more than the restoration of the road to its original level.

Now I have, in fact, decided that nothing that has been done has been done otherwise than under the Public Health Act of 1875; but I might, if the facts had enabled me to do so—and the facts in a case like the present must be more or less obscure—have decided that what the board had done was partly the restoration of the old road. But they have done more than restore the old road, and they have been obliged to fall back upon their powers under the Public Health Act; and how can an arbitrator, until the particular amount of liability has been decided generally, consider the question of what damage has been sustained under the Act? I mention this as an illustration; I do not know that I could find a better one if I were to travel through the region of imagination, than the one which has been presented in this case.

A third point was taken by the defendants as to the sufficiency of the claim which was presented by the claimant. It is not necessary for me to decide that, or even to express an opinion. I am not convinced that there is anything in the point. I express no opinion.

On the broad ground that the plaintiff has invoked the arbitration clause of the Public Health Act too soon, I decide this case, as I think I am bound to do, against him.

The judgment, therefore, will be entered for the defendants; but as upon the issue of fact tried before me with reference to the restoration of the road the plaintiff has, in my opinion, succeeded, he will have the costs of all that part of the action which relates to that.

The plaintiff appealed, and the defendants then gave notice that they should contend that the finding in fact of Bowen, L.J., was erroneous.

Bosanquet, Q.C., with him *Matthews, Q.C.*, for the appellant.—There was a threefold dispute, as liability, fact and amount of damage were all disputed. The plaintiff does not contend that he is entitled to have the question of liability decided by an arbitrator, but he claims to have the amount assessed, even though the question of liability may not have been determined. There is nothing in the Public Health Act, 1875, which prevents this from being done. Section 308 (4) says that "any dispute as to the fact of damage or amount of compensation shall be settled by arbitration," and the balance of convenience is in favour of the plaintiff's contention. *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) is not adverse to

this view, as there the arbitrator decided the question of liability.

Burgess v. *The Northwich Local Board* (5) was cited.

Jelf, Q.C., *Anstie, Q.C.*, and *Kettle*, for the defendants.—The cases decided on Acts similar in phraseology shew that where liability is disputed the Courts will not enforce an award. The Public Health Act, 1875, does not depart from this principle; and if section 179 be read with section 308 (4), the conclusion to be drawn is that an arbitration can only be held in cases in which liability is admitted, and that it is only a dispute confined to the amount of compensation which is to be referred to arbitration.

[BRETT, M.R.—Is it not rather that a dispute referred to arbitration is confined to the question of amount?]

The Queen v. *The Commissioners of Sewers* (1) decided that the arbitrator had no right at all to enter upon the enquiry, because the question of liability had not been determined.

[BRETT, M.R.—That case decided that the award was bad, because the arbitrator assumed to decide the question of liability.]

In *In re Bradby* (6), Crompton, J., said that where the case is that the local board is not liable, the case cannot go to arbitration.

The decision of Wood, V.C., in *The Bradford Local Board* v. *Hopwood* (7) was not approved of by the Exchequer Chamber in *The Queen* v. *The Burslem Local Board* (2).

If inconveniences must arise, whichever enquiry is taken first, still the balance of convenience is in favour of the mode of proceeding suggested by the defendants.

If, however, it be considered that the analogy of cases under 8 & 9 Vict. c. 18, is not favourable to the contention of the defendants, it must be observed that the phraseology of that Act differs from that of 38 & 39 Vict. c. 55. And further, section 179 of 38 & 39 Vict. c. 55, must be read with section 308 (4); and then the conclusion follows that an arbitration can only take place in cases in which liability is admitted.

The plaintiff's notice of claim was invalid, as it mentioned no sum; and the finding of Bowen, L.J., as to the facts cannot be supported.

BRETT, M.R.—With some diffidence—because I am differing from a judgment of Lord Justice Bowen delivered after consideration—I have come to the conclusion that this appeal must be allowed, and that the plaintiff is entitled to recover the amount found by the arbitrator. Lord Justice Bowen held that, as the question of the liability of the defendants had not been determined before the amount of the compensation to which the plaintiff would be entitled, if there were any liability on the part of the defendants, was assessed and determined by the arbitrator, therefore the plaintiff could not recover—that is, he construed section 308 of the Public Health Act, 1875, to mean either that it is a condition precedent to the jurisdiction of the arbitrator to award the amount of compensation in cases where there is a dispute, that the question of the liability of the defendants to the plaintiff must be determined before the arbitration is held to determine the fact of damage and the amount of compensation; or else he held that there must be no dispute as to the right of the plaintiff to recover, or as to the liability of the defendants to make compensation. He did not decide that the jurisdiction of the arbitrator only arises where there is no dispute as to liability; but he decided that either there must be no dispute as to the liability of a defendant in such an action as the present, or that if such a dispute arises, that question must be determined before the arbitrator has jurisdiction to settle the fact of damage or the amount of compensation to be paid. He did not come to this conclusion on the exact words of the statute; but he gave a particular construction to the statute, on the ground that obvious inconvenience would arise if the statute were construed in any other way; so that he felt compelled either to interpolate words by implication, or to give a particular meaning to the words of the statute.

(5) 37 Law Times, 355; the same case in another stage, 50 Law J. Rep. Q.B. 219; Law Rep. 6 Q.B. D. 264.
(6) 24 Law J. Rep. Q.B. 239.
(7) 6 W.R. 818.

The argument before us has not turned upon the construction to be placed on the actual words of the statute; but the contention on behalf of the defendants has been that great inconvenience must of necessity follow if the construction suggested by them is not adopted. It is said that the words of the Public Health Act, 1875, differ from the words used in section 68 of the Lands Clauses Consolidation Act, 1845. No doubt they do in some respects differ; but after considering the construction which has been put by judicial decision upon that section of the Lands Clauses Act, it seems to me the legal effect of the words used in that Act is that which is expressed in section 308 of the Public Health Act, 1875; and if that be so, all the inconveniences which it is said will follow upon our construction of this Act would equally arise in cases under the Lands Clauses Act.

It is urged that if an arbitration is held to settle the amount of compensation before the question of legal liability has been determined, a long and expensive enquiry will take place, which may prove to be entirely futile; but the same remark may be equally true of cases under the Lands Clauses Act, as if a claimant were to make an erroneous claim under that Act, and were then to bring an action upon the award made in the arbitration, he might fail in that action, and then all that had been done under the arbitration would prove to be futile. If, therefore, we were to construe this statute in the way suggested by the defendants, the same difficulties and inconveniences might arise as it is said will arise if our judgment is in favour of the plaintiff, for the enquiry into the liability of the defendants may well be a long and expensive enquiry, and may prove after all to be a futile enquiry. The question of amount of compensation to be paid may indeed be a comparatively easy question; while the question of the liability of the defendants, or the right of the plaintiff to compensation, may lead to a difficult and expensive enquiry. Whichever way, therefore, the Act is construed, inconveniences may equally arise in cases in which there have to be separate enquiries; so that the argument from inconvenience does not assist us to construe the statute otherwise than according to the ordinary meaning of the words.

It was then argued that there had been decisions on a statute which is substantially the same as the statute now under consideration, and it is said that we must overrule the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) if we allow this appeal.

It is also argued that that decision was given on a statute which is worded differently from the Lands Clauses Act, 1845, and it was said that there was a difference between the two statutes in the words which were used to give a right to compensation and to give a remedy. It was urged that the construction to be placed on the statute depends on whether the right to compensation is given in express words, or whether it arises by implication from the words used. I cannot follow that argument. I thought that when anything has to be read by necessary implication into a document, then when once it had been read in, the document was to be interpreted as though the matter thus read in had been originally fully expressed in the document. I do not think that the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) is inconsistent with our decision in this case.

I agree that cases must be considered, regard being had to the decision itself; and if a case was decided on the same point as the point before the Court in a subsequent case, then the reasons for the decision are a guide to the Court in deciding the subsequent case; but if the decision in the earlier case was given on a point not before the Court in the later case, but on a different point, then the reasons do not afford the Court assistance in deciding the later case. The Judges decided the case of *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) on the ground that the arbitrator had determined the question of liability, and not the question of compensation, so that the judgment in that case does not help us to decide whether it is necessary that the question of liability should be decided before the question of amount can be considered. I have no doubt that that decision was correct, and our decision in this case is in no way inconsistent with that case.

Indeed, in the later case of *In re Bradby* (6), Lord Campbell said that the decision in *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) proceeded on that ground. I do not think *The Queen* v. *The Burslem Local Board* (2) raises this question; but I do not propose to discuss all the cases referred to, as it has been admitted that the point now raised, as to which enquiry ought to be held first, has never been decided, and therefore that we are not bound by any authority on the point. The argument of inconvenience being gone, we must determine the question on the words of the statute; but I would say that I think that if this point had arisen on either 11 & 12 Vict. c. 112, or the Lands Clauses Act, 1845, we should have determined it in the same way; and that as to this point, the course of procedure under those statutes is the same as that under the Public Health Act, 1875. It seems to me that on the consideration of all three statutes the same conclusion results, and that there is nothing in the wording of the statute now before us which enables us to give it any but its ordinary grammatical meaning, and that we cannot make any implication in, add to, or alter in any way the words of section 308 (4).

The question is, whether the enquiry as to the amount of compensation is subject to any condition precedent that the enquiry as to liability shall be held first. Section 308 of the Public Health Act, 1875, says, "Where any person sustains damage by reason of the exercise of any of the powers of this Act . . . . full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act."

Now there is no limit of time fixed by that section; there is in it no statement that it must take place before anything else or after any other enquiry; and it seems to me that there is no condition precedent fixed, for there is nothing which compels me to imply any particular sequence of events. I do not decide that the question of compensation must be settled before the question of liability is determined; it may be that the question of liability may be settled first, as in those cases where there was an application for a *mandamus* before the question of amount had been determined.

I cannot therefore agree with the ground on which Lord Justice Bowen based his judgment, and I think that the fact that the question of amount was determined first is in itself no bar to the right of the plaintiff to maintain this action. There is no difficulty in determining the question of liability in that action—Lord Justice Bowen in fact did so; and his finding on that point has not been seriously questioned. I do not think that the point that the plaintiff did not mention any sum in his notice of claim was more than hinted at, and I cannot think there is anything in it. No question is raised as to the propriety of the amount awarded, so that the case becomes one of costs. This appeal must be allowed, and I repeat that I think the procedure under all the statutes to which I have referred is uniform; it is not rigid, and it may be alternative; but I think that it is similar in all the three cases.

LINDLEY, L.J.—I am of the same opinion. The pleadings shew that the real question which the defendants intended to raise was whether they could justify what they did by contending that they did it as surveyors of highways. That was found against them at the trial, and I think Lord Justice Bowen was right in saying that what they did they did under the Public Health Act, 1875.

Then the question is raised whether it is incumbent on the plaintiff, who is entitled to get compensation, to take certain steps to get the question of liability determined first, and whether the omission to do this is fatal to his claim. That, I think, must turn on the statute; and when we read section 308 (4) we do not find anything there about it. It does not say that the right to compensation only arises when the question of liability is determined; and I do not see why the Court should say that it is imperative on the plaintiff to get that question determined first, or how we can impose that liability on him. The plaintiff has done

nothing wrong under the statute, and it cannot be said that he has departed from the literal language of the Act.

We are, however, referred to decisions given on other statutes which are somewhat similar to the one now before us —that is, to cases decided on 11 & 12 Vict. c. 112, and on the Lands Clauses Act, 1845; and it is said that in consequence of those decisions we must put a particular construction on the Act of 1875.

The first case is *The Queen* v. *The Metropolitan Commissioners of Sewers* (1). I think it is important to observe that that case was decided in 1853, for it is well known that at that time there was a difference of opinion between different Judges and Courts as to the proper mode of proceeding under the Lands Clauses Act. It was not then settled that a party who appeared under protest at a reference to assess compensation was not precluded from afterwards contesting his liability, nor was it then settled what were the exact limits of the power and duty of an arbitrator; whereas now those questions are definitely settled. In *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) the arbitrator had assumed to determine the question of liability. The plaintiff then asked for a *mandamus* directing the commissioners to make him compensation out of the rates. That being so, and the question of liability not being a question for the arbitrator, the decision of the Court to refuse the *mandamus* was unavoidable.

It has been urged that the case goes the length of deciding that the award was altogether bad. There may be isolated expressions which favour that view; but in the subsequent case of *In re Bradby* (6) Lord Campbell explains that the decision really proceeded on the ground that the arbitrator had assumed to determine the question of liability. In the case of *The Queen* v. *The Burslem Local Board* (2) no amount was in dispute, and the Exchequer Chamber thought that it was more convenient that a different course should be adopted.

That decision proceeded on the balance of convenience and inconvenience—there may be inconvenience in either course; but it appears to me that the practice is now settled.

This case is certainly not governed by either *The Queen* v. *The Metropolitan Commissioners of Sewers* (1) or *The Queen* v. *The Burslem Local Board* (2), for it is clear that doubts have been cast on the correctness of those decisions, and actions have been brought on award without the point being taken which has been here urged, as in *Uttley* v. *The Todmorden Local Board* (8). Again, we find in *The Queen* v. *The Wallasey Local Board* (9) that a *mandamus* was granted to cause compensation to be made to a person damaged by the exercise of the powers of the Public Health Act, 1848. The practice which was unsettled may, I think, now be considered to be settled; and if that is so with regard to cases under the Lands Clauses Act, I see no reason why the same practice should not be applied to cases under the Public Health Act, 1875. I do not say that a claimant is obliged to adopt this particular order of procedure; but he is at all events at liberty to do so.

FRY, L.J.—I agree that this judgment must be reversed. Section 308 of the Public Health Act, 1875 (4) enacts that full compensation shall be made to a person who sustains damage, and that "any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act." I do not think sections 179 (4) and 180 explain section 308; but the result of that section is that, although a plaintiff or claimant may have several questions as to which litigation or contest may arise, two only out of those are to be of necessity referred to arbitration; all the rest are to be determined in the ordinary way by the ordinary tribunals. *Prima facie* a claimant is like a plaintiff, *dominus litis*, and therefore one ought to look carefully to see whether the statute has interfered with his rights, and whether it has said that one question is of necessity to be tried before the other. I cannot find anything of the sort. Then is there any decisive balance of convenience and inconvenience in

(8) 44 Law J. Rep. C.P. 19.
(9) 38 Law J. Rep. Q.B. 217; Law Rep. 4 Q.B. 351.

favour of any particular course? It appears that there is not. It is said that the question of compensation may become immaterial; but if the question of liability is taken first, that question may also become immaterial; so that I fail to see any reason in that suggestion for restricting the meaning of the section. There are, as Lord Justice Lindley has pointed out, two lines of decisions on statutes which are *in pari materia* with this statute; and there is therefore no such course of decision as to compel us to say that this claimant has lost his right to try *quantum* before the question of right. The only mode of trying the question of right before that of *quantum* would be by an application for a *mandamus*, and as in such a case the Court has a discretion it might be that in certain cases the *mandamus* would be refused.

Appeal allowed.

Solicitors—Mackeson, Taylor & Arnold, agents for Higgs, Brierley Hill, for plaintiff; Byrne & Lucas, agents for Homfray & Holberton, Brierley Hill, for defendants.

[IN THE COURT OF APPEAL.]

1883. March 15. MARTIN *v.* THE ASSESSMENT COMMITTEE OF THE WEST DERBY UNION.

Poor—Rate—Rateability of House occupied by Superintendent of Police—House Quarter of a Mile distant from Police Station—43 *Eliz.* c. 2. *s.* 1.

[For the report of the above case, see 52 Law J. Rep. M.C. 66.]

[IN THE COURT OF APPEAL.]

1883. May 25, 28. CASSABOGLON *v.* GIBB, LIVINGSTONE AND COMPANY.*

Principal and Agent—Foreign Agent and Consignor—Goods supplied not according to Order or Description—Impossibility of procuring Goods ordered—Measure of Damages.

The defendants, commission agents in China, could not obtain the goods ordered by the plaintiff, a merchant in London, but they by mistake informed the plaintiff that they could do so, and forwarded goods of an inferior quality supposing them to be the goods ordered:—Held, *affirming the judgment of the Queen's Bench Division, that the defendants were liable to recoup the plaintiff all the actual loss which he had suffered, but that they were not liable to pay to him the difference between the price which the goods sent fetched in the market when rejected by the plaintiff and sold for the benefit of all concerned, and the market price on that day of the superior goods which he had ordered; for that the relation between the plaintiff and the defendants was one of principal and agent, and not one of vendor and purchaser.*

Appeal from the judgment of the Queen's Bench Division on a Special Case.

The case is reported 51 Law J. Rep. Q.B. 593.

The Special Case stated that the plaintiff was a merchant in London, and that the defendants were merchants and commission agents carrying on business at Hong Kong, and having as their London agents Messrs. T. A. Gibb & Co.

In March, 1880, the plaintiff bought from the defendants, through their agents, ten cases of the "finest dry new Persian opium," and later in the same month the plaintiff ordered of the defendants twenty more cases of the same drug. The defendants informed the plaintiff that they had executed the order. The defendants then drew bills on the plaintiff for two sums of 1,221*l.* 3*s.* 11*d.* and 2,346*l.* 12*s.*, and the plaintiff accepted these bills, which were paid at maturity.

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

Cassaboglon v. *Gibb, Livingstone & Co., App.*

The defendants purchased for the plaintiff, and shipped thirty cases of what they erroneously believed to be the "finest dry new crop Persian opium." The plaintiff, on the arrival of the opium so shipped, found, and the defendants admitted it to be the fact, that no part of the opium shipped was in accordance with the description above given. The defendants alleged that there was in fact no such opium to be then obtained at Hong Kong, and "the plaintiff, for the purposes of this case, but not otherwise nor for the purposes of the action generally, admits such alleged fact, but alleges in turn that he was never informed by the defendants of such alleged fact, as the defendants for the purposes of this case in turn admit." The plaintiff rejected the thirty cases sent by the defendants, and twenty of them were sold on account of all concerned, the proceeds of the sale being 2,281*l.* 3*s.* 9*d.* The plaintiff had before arrival resold ten cases, and in consequence of the opium not being in accordance with the description, he had to pay 170*l.* 14*s.* 6*d.* as compensation to his vendees. If the thirty cases sent by the defendants had contained the "finest dry new crop Persian opium," they would have been worth in the market an amount considerably exceeding the proceeds of the sale of the drug actually sent.

The plaintiff claimed to be paid by the defendants the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent.

The defendants paid into Court the sum of 300*l.* The plaintiff admitted that if the defendants were only liable to make good the loss actually incurred by him, then that sum was enough to satisfy the claim.

The Queen's Bench Division gave judgment for the defendants.

The plaintiff appealed.

Pollard, for the appellant.—The plaintiff claims to be put in the same position as if the goods ordered had been sent; his claim is not for profit on a resale; but his damage is measured by the market price. He is entitled to the same damages as though the case were one of vendor and vendee; for in the case of a foreign agent there is superadded to the contract of agency, and to the relation of principal and agent, a new contract and a new relation, a contract of purchase and sale, and a relation of vendor and vendee. In such a case the agent has the rights of a vendor—he can stop *in transitu*; and if he has these rights, he must also have the liabilities and duties of a vendor. There is no privity between the purchaser and the producer—so that the agent first buys of the producer, and then becomes a principal to sell to the ultimate purchaser here—*Feise* v. *Wray* (1).

[BRETT, M.R.—Le Blanc, J., says that the relation of vendor and vendee may exist for the purposes of stoppage *in transitu*, but not for all purposes.]

Blackburn, J., puts the doctrine plainly both in *Blackburn on Sales*, at p. 214, and in his opinion given to the House of Lords in *Ireland* v. *Livingstone* (2). In *Turner* v. *The Liverpool Docks Trustees* (3), which was not cited in the arguments in *Ireland* v. *Livingstone* (2), it is assumed that in such a case the relation is one of vendor and vendee. Until a foreign agent ships, he must be considered as a vendor with a lien for the unpaid price; and when he ships he is still vendor; unless he were vendor he would not be entitled to stop *in transitu*.

[BRETT, M.R.—May it not rather be true to say that a consignor who is a mere agent cannot stop *in transitu*? LINDLEY, L.J.—Can an agent to buy be transformed into a vendor? FRY, L.J.—For certain purposes such an agent may be clothed with the rights of a vendor.]

The opinion of Blackburn, J., in *Ireland* v. *Livingstone* (2) is unqualified; he says that the legal effect is a contract of sale, "and consequently the commission merchant is a vendor."

Bell v. *Cunningham* (4) is in favour of the plaintiff's claim, and establishes that positive and direct loss arising from breach of orders may be taken into account; so

(1) 3 East, 93.

(2) 41 Law J. Rep. Q.B. 201; Law Rep. 5 E. & Ir. App. 395.

(3) 6 Exch. Rep. 543; 20 Law J. Rep. Exch. 393.

(4) 3 Peters 69, cited in Mayne on Damages, p. 415.

that here the plaintiff is entitled to the difference of the price which the inferior opium fetched, and that which the opium ordered would have fetched. *Falk* v. *Fletcher* (5), *Siffken* v. *Wray* (6), *Maspons* v. *Mildred* (7) and *Story on Agency*, section 350, were cited.

Cohen, Q.C., and *Anstie, Q.C.*, for the defendants.—The question is, what was the contract, and what ought the plaintiff to receive to place him in the same position as though the defendants had not made any mistake. Commission agents may in a certain sense be considered as vendors for certain purposes, as they do transfer property for valuable consideration, and that may be considered to be a *quasi* sale; but they are only to be considered as vendors in a limited and qualified sense. Whenever an agent violates his duty to his principal, and is negligent, and loss is caused thereby, he is bound to indemnify the principal; but he is not bound to place the principal in a better position than he would have been if the contract had never been made.

The right to stop *in transitu* has been extended to *quasi* vendors and generally to consignors; so that the fact that the right exists does not convert the relation of principal and agent into that of vendor and purchaser. There is no difference in this respect between an agent abroad and an agent in England—*Tucker* v. *Humphrey* (8). *Bell* v. *Cunningham* (4) does not apply, for there the agent could have got the particular goods ordered, so that he was liable. In the present case the defendants acknowledge their liability with regard to the ten cases; but they cannot be liable to compensate the plaintiff for a possible loss of profits.

Pollard, in reply.

BRETT, M.R.—In this case the contract between the plaintiff and the defendants was a contract of principal and agent, the plaintiff being a merchant in London and the defendants commission agents abroad. The contract of agency was that the defendants should buy certain goods abroad, and ship them to the plaintiff in England. Certain duties are by necessary implication imposed upon such an agent, besides the duty of buying as cheaply as possible and of duly shipping the goods when bought. It is the duty of the agent to inform his principal if he is unable to procure the goods required, and it is his duty to take reasonable care to send correct information to his principal. In this case the defendants did not buy the goods required in the market at Hong Kong, and it is stated in the Special Case that "The plaintiff, for the purposes of this case, but not otherwise nor for the purposes of the action generally, admits such alleged fact, but alleges in turn that he never was informed by the defendants of such alleged fact, as the defendants for the purposes of this case in turn admit."

I myself do not think that a Special Case should be stated in this form, or that the Court should be asked to decide a hypothetical question.

It is clear that the defendants would not incur any liability to the plaintiff if they had not bought the particular kind of opium at all, because all that they undertook to do was to buy that opium if they could. They, however, omitted to inform the plaintiff that they could not buy the opium in question; but that breach of their duty has not, in fact, in the circumstances of this case, caused the plaintiff any damage. The defendants, however, carelessly gave the plaintiff wrong information as to the opium sent by them; and further, they drew upon the plaintiff bills for the amount of the price of the opium and for their commission, which bills were duly met at maturity. That which the defendants shipped was something which the plaintiff had not ordered; and when it arrived the plaintiff exercised his undoubted right in rejecting it, and in selling it for the benefit of all parties concerned. As to ten out of the thirty cases sent, the plaintiff had resold these ten cases before the ship arrived, and as the quality of the opium delivered did not correspond with that ordered, the plaintiff had to make compensation to his vendees, but this amount he has already been repaid by the defendants.

(5) 18 Com. B. Rep. N.S. 403; 34 Law J. Rep. C.P. 146.

(6) 6 East, 371.

(7) 51 Law J. Rep. Q.B. 604; Law Rep. 9 Q.B. D. 530.

(8) 4 Bing. 516.

It appears to me that on principle the plaintiff is entitled to the actual damage which he has suffered by reason of the defendants' breach of duty, subject to the limitation that the actual damage suffered must not be obnoxious to the doctrine which prevents damage from being recovered if it is too remote. Of course the plaintiff is entitled to get back the money which he has actually paid, and he is entitled to recover the money which he has had to pay as compensation to the person who purchased the opium from him, for both those losses arise by reason of the defendants' breach of duty; he has also incurred other smaller expenses; but in respect of all these three heads of claim the defendants have paid to the plaintiff a sum sufficient to recoup him; so that he has, in fact, been repaid all the actual loss which he has suffered.

The plaintiff, however, claims to be entitled to recover more than this; he says that he has suffered a further loss, because he would, if the defendants had fulfilled their contract, have got something which he has in the circumstances of the case failed to get. His contention is that if opium in accordance with the description had been shipped and had arrived, and if he had had a mind then to sell it, then as the market price had gone up by the day of the arrival of the ship, he would have received that price and made a profit, and that is what the plaintiff claims. It is said on his behalf that the contract was originally a contract of principal and agent, but that there supervened or was superadded afterwards a contract of sale and purchase; and then it is said that the rule as to damages to be applied in this case is the rule which applies between a vendor and a purchaser. That rule, however, applies to the case of non-delivery of goods, and not to a cause of action such as must be the cause of action in this case. It is argued that Lord Blackburn has said that (9) "it seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name and on his own credit, it is rather too qualified a phrase to say merely that he stands in the situation of vendor *quoad* the consignee"; and that in *Ireland* v. *Livingstone* (10) he said that "an agent who in thus executing an order ships goods to his principal is, in contemplation of law, a vendor to him."

That is no doubt a high authority; but Lord Blackburn has never said that as long as the contract of principal and agent remains executory the principal can sue the agent as though the contract were one of purchase and sale, and as though the parties to it were in the relation of vendor and purchaser. Lord Blackburn has spoken of this doctrine in respect of two matters, one being in respect of the theory of the passing of property in goods, and the other as to the power to stop *in transitu*; and he has said that "the property in the goods passes from the country producer to the commission merchant; and then when the goods are shipped from the commission merchant to his consignee" (11); that is, that by the appropriation of the goods to the principal the property in them passes from the commission agent to the principal. Whether it was necessary to say that much is problematical; but he has said that, and that the property passes as though the agent were a vendor.

With regard to the right to stop *in transitu*, what Lord Blackburn and other Judges have said is, that if a commission agent has not been paid, and if after the goods have been shipped the principal becomes insolvent, so that the agent will have to pay the person from whom he has purchased the goods, then the commission agent has a right to stop *in transitu* as though he were a vendor. It is pointed out in *Benjamin on Sale* that this right of "stoppage *in transitu* is so highly favoured, on account of its intrinsic justice, that it has been extended by the Courts to *quasi* vendors, to persons in a position similar to that of vendors." It is a just mercantile doctrine; and a commission agent is in certain cases treated with respect to this doctrine as though he were in the position of a vendor. The argument for the plaintiff attempts to extend this further, and it is contended that the

(9) Blackburn on Sales, at p. 214.

(10) 41 Law J. Rep. Q.B. 201, at p. 205; Law Rep. 5 E. & Ir. App. 395, at p. 408.

(11) Ibid. p. 409.

same rule of damages applies as though a commission agent were in fact a vendor; all the authorities, however, agree in this, that he is only considered to be for that purpose in that position where he has paid for the goods which he has supplied.

The damage in this case ought to be, according to the plaintiff, the difference between the contract price and the market price on the day of the breach; but there never was any contract price between the plaintiff and the defendants. When did the breach occur, and what day can be fixed as the day of the breach? On behalf of the plaintiff it is answered that the day of the arrival of the ship was the day of the breach; but that cannot be the case. It is, I think, obvious that a contract of agency between a principal and an agent is never turned, for the purpose of damages arising on a breach of duty by the agent, into a contract of purchase and sale.

It has been asked what would be the measure of damages supposing this opium could have been bought in the market; but, as it is admitted it could not, it is not necessary to decide that point in this case. I am, therefore, of opinion that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The plaintiff has, I think, obtained all that he is entitled to receive. It is admitted that the defendants could not get the opium which the plaintiff desired to have, and therefore there was no breach of duty on their part in not getting it. The defendants, however, were in error when they, through some mistake, informed the plaintiff that they had shipped the kind of opium which he required. What damage then has the plaintiff suffered by this error? He had sold before arrival ten out of thirty parcels, and he was therefore liable to make compensation to the persons who had purchased those ten cases. The damage thus caused to the plaintiff was consequential damage, and for that the defendants are liable; but the sum which they have paid into Court is sufficient to cover not only that, but also the price paid by the plaintiff and the expenses incurred, so that it covers all the loss caused by their mistake or misconduct.

The plaintiff, however, claims to be indemnified on the footing that the defendants are bound to put him in the position in which he would have been if the right kind of opium had been shipped—that is, if he had made a certain gain which he alleges he might have made; but, as it seems to me, the facts stated in the Special Case shew that he cannot maintain that claim. It was urged that the defendants were really in the position of vendors, and that this follows from what Lord Blackburn has said in his Treatise on Sale and in *Ireland* v. *Livingstone* (2). I do not think that conclusion does so follow, for I do not think that the defendants were in any sense vendors; and it seems to me that on the plain rules as to damage the defendants have already indemnified the plaintiff for all loss caused by their mistake or breach of duty.

FRY, L.J.—I agree that this appeal cannot succeed; and I agree with the Master of the Rolls that the hypothetical form in which this case is stated is highly inconvenient. I observe that the plaintiff asks for damages on the footing that there was a particular kind of contract made between him and the defendants, and this on two grounds—first, that there was in fact such a contract; and, secondly, that even if there were not such a contract, then the measure of damages for which he contends is in fact the true measure of damages between a principal and agent. First, then, was there in fact such a contract? Was the relation of principal and agent merged in the relation of vendor and purchaser? I think not, for this must be a question of fact in each case, and here there was no contract of sale and purchase between this principal and his agent.

Then it has been argued that a contract of sale and purchase must be inferred, because if this be not done the property in goods would never pass from a foreign agent to an English principal; but I am of opinion that the property in goods does pass from the agent to the principal by virtue of the relation of principal and agent. Suppose that a principal orders an agent to buy certain goods in the market, that the agent does

buy them, and does appropriate them to the principal, then the property in them passes by that appropriation; and after that the agent cannot be allowed to say that he did not buy those goods as agent.

It was further said that because there remains in the agent a right of stoppage *in transitu*, therefore there is a relation of vendor and purchaser; but there may be a right to stop *in transitu* in cases which are not only cases of vendor and purchaser. In *Lickbarrow* v. *Mason* (12), in *Smith's Leading Cases*, the principle is laid down that the person who stops *in transitu* must be a consignor or a vendor; and cases are collected which establish that position.

The right to stop *in transitu* is a just mercantile doctrine, and it is an equitable right, whether it first had its existence in the Courts of common law or in the Court of Chancery, a question which had been much discussed, as may be seen by reference to *Gibson* v. *Carruthers* (13), and cases can be cited in which it existed even though there were no contract of purchase and sale.

Reliance has been placed on *Feise* v. *Wray* (1). It may be that some of the Judges spoke as though there were an equitable contract of purchase and sale; but Mr. Justice Grose said, "What is this then but the plain and common case of the consignor of goods who has not received payment for them stopping them *in transitu* before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal merely, I should find difficulty in saying that it did." In the same case Mr. Justice Le Blanc said, "For the purpose then of stopping the goods *in transitu*, they stood in the relative situation of vendor and vendee, though, perhaps, not so as for all purposes. Fritzing pledged his own credit in the purchase of the goods from the original owners, and Browne could not be called upon for the value by the original owners unless the goods came to his hands, and he had not paid or accounted for the value of them to Fritzing, with whom he alone dealt." The Judges there thought it enough to say that for that purpose the foreign agent might be considered as a vendor. In *Falk* v. *Fletcher* (5) Mr. Justice Willes said, "The fact of the plaintiff being agent for De Mattos is no doubt a circumstance that is not to be lost sight of. But in the sense of being the person who put the goods on board he is in the same condition as if he had been an ordinary unpaid vendor. For this the case of *Feise* v. *Wray* (1) is an authority, though that was a case of stoppage *in transitu*." In *Ireland* v. *Livingstone* (2) Baron Cleasby said that the contract there "was not a mere contract between vendor and vendee (like the case of *Kreuger* v. *Blanck*, which will be shortly noticed), although after the goods were shipped a relation like that of vendor and vendee might arise."

No doubt Mr. Justice Blackburn used stronger language in the same case; but he did not say that as a matter of fact a contract of purchase and sale must exist between the principal and agent, although he says, "The legal effect of the transaction between the commission merchant and the consignee . . . . is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*." Baron Martin said, "When they bought the sugar they did so on their own account" —that is, the commission agents—"and when they had collected a sufficient quantity to enable them to perform the order, and thought fit to appropriate it for or to the defendant, the relation of vendor and vendee would arise;" but he does not say that an actual contract of purchase and sale would exist between them. Lord Chelmsford puts it so as to shew plainly that in his opinion there was no contract of purchase and sale. He says, "I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage *in transitu*."

There being thus in fact no contract of purchase and sale, ought the damages to be

(12) 1 Sm. L.C. 8th ed. 753.

(13) 8 Mee. & W. 321; 11 Law J. Rep. Exch. 138.

Cassaboglon v. *Gibb, Livingstone & Co., App.*

assessed on a different principle from that which would apply between principal and agent? I think not; and as I agree that what the defendants have paid into Court covers the whole damage which the plaintiff has actually suffered, I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors—Paines, Layton & Pollock, for plaintiff; Flux & Leadbitter, for defendants.

1883. April 16. } BRIGGS (*appellant*) *v.* SWANWICK (*respondent*).

Fish—Preservation of Freshwater Fish—36 & 37 Vict. c. 71. s. 15—Placing a Device to catch Fish descending Stream—Ancient Weir constructed with Trap.

[For the report of the above case, see 52 Law J. Rep. M.C. 63.]

1883. May 30. } WEBB *v.* BEVAN.

Slander — Words imputing Criminal Act—Offence not necessarily indictable.

An action for slander will lie for imputing to the plaintiff a criminal offence, although the offence be not the subject of an indictment.

This was a demurrer to a statement of claim in an action for damages for slander. The slander alleged was in these words, "I will lock you up in Gloucester gaol next week. I know enough to put you there."

The defendant demurred, on the ground that the words pleaded are not actionable.

W. H. Nash, in support of the demurrer. —The claim is bad, as the slander alleged does not necessarily impute any indictable offence—*Ward* v. *Weeks* (1). A man might be imprisoned in Gloucester gaol under an order in a judgment summons for a mere debt.

Hammond-Chambers, for the plaintiff. —It is slander, not only to impute an indictable offence, but to impute any offence involving punishment under the criminal law—*Curtin* v. *Curtin* (2).

POLLOCK, B.—I think this demurrer must be overruled. The old rule that, in order to support an action for slander, the offence charged must be an indictable offence, was adopted when many offences which can now be treated in a summary manner before Justices were the subject of indictment or information only. And it seems to me that it would be limiting the law of slander to hold that unless the offence charged is indictable there can be no slander. It is sufficient, in my judgment, if a criminal act is imputed by the words.

LOPES, J., concurred.

Demurrer overruled with costs. Leave to plead.

Solicitors—Doyle & Sons, agents for Taynton & Sons, Gloucester, for plaintiff; E. Sweeting, agent for J. M. Clark, Cheltenham, for defendant.

[IN THE COURT OF APPEAL.]

1883. April 24. 26, 27. } THE MADELEY UNION *v.* THE BRIDGNORTH UNION.

Poor—Settlement—Abolition of Derivative Settlement—39 & 40 Vict. c. 61. s. 35.

[For the report of the above case, see 52 Law J. Rep. M.C. 71.]

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(1) 7 Bing. 211.
(2) 10 Bing. 477; 3 Law J. Rep. C.P. 158.

[IN THE COURT OF APPEAL.]

1883. May 24. } *In re* FRESTON.*

Contempt of Court—Solicitor—Attachment—Solicitor returning from Attendance at a Police Court—Privilege of, from Arrest—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4. *sub-s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

An order was made directing a solicitor to deliver up certain documents, to pay a sum of money and the costs of the order. This being disobeyed, the persons in whose favour the above order was made obtained an order for attachment. Before this order was executed the solicitor did all that he was directed to do except paying the costs. He was afterwards arrested while returning to his office from defending a client at a preliminary enquiry before a police magistrate. He then applied to the Court for his discharge, on the ground that he was at the time privileged from arrest:—Held, *affirming the judgment of the Queen's Bench Division, that the attachment, being an attachment for disobedience of an order made on a solicitor, was punitive and disciplinary in its nature, and that against an arrest under such an order no privilege exists.*

Appeal from the Queen's Bench Division.

Freston, a solicitor, having been arrested under an order of attachment, applied to Manisty, J., at chambers, for an order of discharge from prison. Manisty, J., referred the application to the Court. It appeared that in March, 1882, an order was made by a Master, and affirmed on appeal by North, J., at chambers, directing Freston to deliver up to Messrs. Benn certain documents, to pay a sum of 10*l.* which he had received for a specified purpose, but which had not been so applied by him, and to pay the costs of the order. Freston failed to comply with this order; whereupon Messrs. Benn obtained, on the 19th of April, 1882, an order from Denman, J., that they should "be at liberty to issue a writ of attachment against the said Freston for his contempt in not complying with the order of North, J., by delivering up certain documents, and not paying the sum of 10*l.* therein mentioned respectively, and for the non-payment of the costs of the said orders." This order was indorsed with a direction that it was to lie in the office for a week. Freston then delivered up the documents, paid the 10*l.*, but did not pay the costs. The order was given to the sheriff to execute in October, 1882, but Freston was not arrested until the 26th of April, 1883.

He applied for his discharge from prison on the ground that he was privileged from arrest, because he was arrested in Great Queen's Street, Lincoln's Inn Fields, while returning to his office from Bow Street Police Station, where he had been engaged as a solicitor in defending certain persons brought before a police magistrate on a preliminary enquiry into a charge of treason felony.

H. W. Hart, for the applicant.—All persons attending a Court to assist in the administration of justice are privileged from arrest *eundo et redeundo*—*Meekins* v. *Smith* (1) and *Ex parte Jackson* (2). The privilege has even been extended to a solicitor in attendance at a Master's office —*In re Hope* (3). In *Newton* v. *Constable* (4) it was no doubt held that a barrister who had been actually engaged at petty sessions for a party, or on a summary conviction, was not privileged *redeundo*. But this was on the ground that there had been no previous retainer. Here there was a retainer, and the fact that it was not in writing makes no difference. He also cited *Clutterbuck* v. *Hulls* (5), *Spense* v. *Stuart* (6), *The Attorney-General* v. *The Leathersellers' Company* (7) and *Spencer* v. *Newton* (8).

A. T. Lawrence, contra.—The privilege from arrest does not extend to a preliminary enquiry before Justices. An advocate has no right to take part in such

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

(1) 1 H. Black. 636.
(2) 15 Ves. 116.
(3) 9 Jur. 846.
(4) 2 Q.B. Rep. 157; 10 Law J. Rep. Q.B. 349.
(5) 4 Dowl. & L. P.C. 80; 15 Law J. Rep. Q.B. 310.
(6) 3 East, 89.
(7) 7 Beav. 157.
(8) 6 Ad. & E. 623; 6 Law J. Rep. K.B. 119.

In re Preston, App.

an enquiry except by the permission of the Justices—*Collier* v. *Hicks* (9). The decision in that case is in no way impaired by Jervis's Act (11 & 12 Vict. c. 42), unless the terms of section 17 can be construed as conferring any right to attend on the part of counsel or solicitors. The 17th section of the last-mentioned statute permits in certain cases the depositions of a witness to be read at the trial of an accused person if, *inter alia*, "it be proved that such deposition was taken in the presence of the person so accused, or that he or his counsel or attorney had a full opportunity of cross-examining the witness"—words which, it is submitted, contemplate that a counsel or solicitor may attend, and nothing more. The right given by section 12 of 11 & 12 Vict. c. 43, for the party against whom a "complaint is made or information laid . . . to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf," &c., does not extend to a mere preliminary investigation. The privilege of freedom from arrest extends only to such persons as are taking a regularly authorised part in the administration of justice; the case of a solicitor who attends only on sufferance and by permission of the Justices is outside any such privilege.

Again, the privilege claimed is inconsistent with the power of the Court to commit for contempt of Court. This is not an attachment for non-payment of a sum of money, but for contempt in disobeying an order of Court—a distinction which is recognised in *Ex parte Parker* (10). He also cited *Eyre* v. *Barrow* (11).

A. Cock appeared for the sheriff, but took no part in the argument.

Hart, in reply.—The distinction between an attachment for non-payment of a sum of money and for disobeying an order of the Court does not exist. Moreover, the order of the Court has been obeyed in so far as it relates to the delivery up of the documents, so that the attachment is really for costs only. He cited *Dodd* v. *Holbrook* (12).

(9) 2 B. & Ad. 663.
(10) 3 Ves. 554.
(11) 6 W.R. 767.
(12) 35 Law J. Rep. Chanc. 175.

GROVE, J.—I am of opinion that the applicant is not entitled to his release. The first point that has been argued is one of very considerable difficulty, upon which, if it had been necessary to pronounce a decision, I should have desired to take time, in order that I might consult the authorities. I am by no means clear at present how far solicitors who attend petty sessions on preliminary trials before Justices are exempt from arrest *eundo, morando, redeundo*. It is not clear that solicitors have any right to attend at all on such occasions, though it is generally supposed they have; and certainly the practice has been for them to attend for many years past. The 17th section of 11 & 12 Vict. c. 42, commonly known as Jervis's Act, seems to shew, it is true, that that statute contemplated the appearance of counsel and attorneys on such occasions; but that is not sufficient of itself to decide that the right exists, because there might be permission given to appear; and the only object of section 17 was to take care that a proper opportunity for cross-examination was given to an accused person before a deposition was made evidence against him on his trial in case of the death or absence from illness of a witness. The other statute, 11 & 12 Vict. c. 43, applies only to the summary jurisdiction of Justices, and in no way touches the present question.

I do not, however, wish to allude further to this branch of the argument, because I am of opinion that Mr. Lawrence has shewn another good reason why the applicant should not be released upon the present application. This attachment is for disobeying an order of Court, and not for mere non-payment of a sum of money. The order is to attach him for contempt, and the ground of contempt is endorsed on the writ—namely, for not complying with an order of a Master and of Mr. Justice North in not delivering up certain papers and paying certain costs. The attachment is, therefore, for a disobedience of an order of the High Court of Justice in refusing to deliver up certain documents and the non-payment of certain costs. It has been suggested by the applicant's counsel that he has satisfied the order; no details, however, are given, and

the proper mode under such circumstances for the applicant to pursue would be to come to Court and purge his contempt. Solicitors attending to defend accused persons in certain cases are, no doubt, privileged to some extent from arrest *eundo et redeundo*, but not where there is an attachment against them for contempt of Court for failing to do something which the Court has ordered to be done, such as the delivering up of documents. No privilege, in my judgment, exists under such circumstances; if so, attachments for contempt would seldom be effectual, because the persons attached would frequently be in Court at the time when the attachment was sought to be effected, and the whole process would be very much impaired. A writ for contempt in disobeying an order of Court differs from a mere attachment for non-payment of a sum of money; the latter is a process in the interest of the client as distinguished from that of the Court. The two cases cited were for attachment, in the nature of an execution. In *Ex parte Parker* (10) the distinction I have alluded to was clearly recognised. There is a clear distinction between a mode of execution for recovery of a debt and a contempt, which is an offence against the Court itself. *Dodd* v. *Holbrook* (12) is a similar case. On this short ground I have come to the conclusion that the occasion of this gentleman's arrest was not privileged, and this motion must be dismissed, with costs.

STEPHEN, J.—I am of the same opinion, for the reasons stated by my brother Grove. I am glad to be able to decide this matter on the second point, because the other point that was raised was one of much difficulty, as to which I should not like to express any opinion without further consideration.

Application refused, with costs.

The applicant appealed.

Rowlands, Q.C., and *H. W. Hart*, for the appellant.—The deeds were all given up and the money paid before the writ of attachment was delivered to the sheriff, so that the only thing left undone was the payment of costs. It is not contended that the privilege would prevail if there had been contempt *facie curiæ*, but the privilege must prevail against arrest for that which is in the nature of civil process. This proceeding is, in fact, a proceeding to obtain the payment of money, and therefore it is a civil proceeding—it is an attachment to enforce a civil obligation. The order made is not punitive or disciplinary; it is an order given to an individual to deal with at his pleasure; it is, in fact, an additional remedy given to one who, like a plaintiff, is *dominus litis*.

[BRETT, M.R.—Such an order as this could only be made against a solicitor—a trusted officer of the Court.]

In *Cobham* v. *Dalton* (13) James, L.J., expressed an opinion that a solicitor would, if returning from Court, be privileged from arrest for disobedience to an order.

[BRETT, M.R., referred to *Marris* v. *Ingram* (14).]

That shews that some orders made under the Debtors Acts, 1869 and 1878, are punitive, and thus the remark of James, L.J., in *Cobham* v. *Dalton* (13) is the more forcible in favour of the appellant—*The Attorney-General* v. *The Leathersellers' Company* (7), *Eyre* v. *Barrow* (11), *Mountague* v. *Harrison* (15), *Dodd* v. *Holbrook* (12), *In re Ball* (16), *Jackson* v. *Mawby* (17), *In re Hope* (3), *Persse* v. *Persse* (18), *Ex parte Vine* (19), *Spense* v. *Stuart* (6), *Long Wellesley's Case* (20) and *In re Charlton* (21).

32 & 33 Vict. c. 62. s. 4. sub-s. 4, and 41 & 42 Vict. c. 54, were referred to.

A. T. Lawrence, for Messrs. Benn.—If this attachment had been merely a means of enforcing process the privilege claimed would be allowed; but this order was punitive, and was part of the exercise of that jurisdiction which the Court has over solicitors for the furtherance of the due

(13) 44 Law J. Rep. Chanc. 702; Law Rep. 10 Chanc. 655.
(14) 49 Law J. Rep. Chanc. 123; Law Rep. 13 Ch. D. 338.
(15) 27 Law J. Rep. C.P. 24.
(16) 42 Law J. Rep. C.P. 104; Law Rep. 8 C.P. 104.
(17) 45 Law J. Rep. Chanc. 53; Law Rep. 1 Ch. D. 86.
(18) 5 H.L. Cas. 671.
(19) 1 Rose Bankr. Cas. 421.
(20) 1 Russ. & M. 639.
(21) 2 Myl. & Cr. 316.

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administration of justice. There is no right of discharge, simply because the order has been complied with. There must be an application to the Court, and the Court can impose terms. Some orders are framed in terms which shew that, if the order is obeyed, the matter is at an end; but this is not so.

Further, in this case there could be no privilege, for the applicant was only attending a preliminary enquiry before a magistrate.

[BRETT, M.R.—Surely the privilege extends to that.]

It is submitted that it does not, for it is not equivalent to a public examination at petty sessions.

Cock, for the sheriff of Middlesex, was not called on.

Rowlands, Q.C., in reply.

BRETT, M.R.—In this case an order was made upon a solicitor to deliver up certain documents, to repay to a client a sum of 10*l.* which he had received for a specific purpose, and to pay the costs incident to the application and the making of the order. That order was disobeyed, whereupon an order for attachment was made, and the order was indorsed with a direction that it should lie in the office for a week. At the time when the order for attachment was made the solicitor had not delivered up all the deeds. Under pressure of the order he delivered up all the deeds, and he paid the sum of 10*l.*, but he did not pay the costs of the order. He was accordingly arrested, and he now claims to be privileged from such arrest on the ground that he was, when arrested, returning to his office from a police court, where he had been engaged on behalf of a client at a preliminary investigation before one of the metropolitan police magistrates. The real question therefore is, whether the claim of privilege can be allowed under the circumstances of this case. It was urged on behalf of the respondents that, even although the privilege claimed might attach to a person attending any other Court of justice, yet it would not attach to a person attending such a preliminary enquiry as this before a police magistrate; but I am clearly of opinion that that argument cannot prevail, and that in the absence of any other circumstances the privilege claimed would exist in the case of a solicitor attending such an enquiry.

The case, however, is a difficult one with regard to other points. The question is, whether this arrest was a kind of arrest in respect of which any privilege can be claimed. It is clear that there are some arrests in respect of which no privilege whatever can be claimed—as, for instance, in the case of a criminal charge; but it is equally clear that there are arrests in respect of which privilege can be claimed, such as an arrest under mesne process or after judgment—for these arrests are merely part of a process for enforcing the result of a civil dispute between parties to a civil proceeding, and in such cases there is a privilege from arrest which can be claimed by persons entitled to it, such as members of Parliament, witnesses, barristers and solicitors attending a Court of justice, both while there and while going thither or returning thence.

But it is necessary to consider the case of an arrest under an attachment issued on the ground of a contempt of Court. It was urged that all arrests for contempt of Court are the same, and have the same incidents; but I am of opinion that that is not so, but that there are different kinds of attachment for contempt of Court, and that they have different incidents. The nature of the contempt makes the difference in the nature of the attachment. An attachment in the Court of Chancery for the purpose of enforcing a decree of that Court was equivalent to a *capias* for enforcing the judgment of a Court of common law, and a judgment of a Court of common law was given upon a civil dispute between the parties to a cause. In the same way an attachment in the Court of Chancery was issued for the purpose of enforcing a decree of the same nature, and therefore in such a case a well founded claim of privilege would be valid. There are, however, other attachments, which issue, not for the purpose of enforcing a judgment in a civil dispute, but for the purpose of enforcing the decree of a Court against an individual, and for the purpose of maintaining the discipline of the law; and the question is, whether an arrest under those attachments ought to be

treated in the same way as arrests for crime, in respect of which no privilege can be claimed, or whether they are similar to arrests under attachments issued for the purpose of enforcing a judgment given between the parties to a civil dispute.

That there are distinctions such as I have suggested is shewn by Lord Redesdale in *McWilliams' Case* (22). "There can be no doubt," he says, "that the thing to be considered is, not the form of the process, but the cause of issuing it: if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt—as, for instance, disobedience of some order of the Court, where the object was not to recover a debt by means of the process—the consequences of such a process are in some degree of a criminal nature."

That shews clearly that the distinction between the two kinds of attachment depends on the nature of the contempt committed. I now turn to the judgment of Lord Brougham in *Long Wellesley's Case* (23), where I find he says, "The line then which I draw is this: that against all civil process privilege protects, but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of Parliament, in all civil matters, matters which, whatever be the form, are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege: that members of Parliament are privileged against commitment *qua* process to compel them to do an act: against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of a punishment, but rather in the nature of process to compel a performance: that in all such matters members of Parliament are protected; but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a Court of competent jurisdiction, and has been duly and regularly pronounced."

(22) 1 Sch. & Lef. 169, at p. 174.
(23) 2 Russ. & M: 639, at p. 665.

I do not profess to be guided by the exact words so used, but by the legal principle thus enunciated, which applies to any Court. The principle is, that where the attachment issues for the purpose of enforcing a judgment on a civil dispute between parties, obedience to which has not been given, then privilege from arrest can in proper cases be claimed. I indeed incline to go farther, and I am disposed to say that if there is nothing in the nature of the act done, or left undone, which could be said to be in the nature of an offence at all, then, although the attachment was not merely for the purpose of enforcing a dispute between the parties to a civil cause, still the privilege could be claimed. The principle laid down by Lord Brougham is that when the attachment issues for the purpose of forcing a person to do his duty under the law, or under an order which directs him to do something or to remedy something which he has done against the law, then, as in the case of a crime, there is by the law of England no privilege from arrest, so that there is nothing which can prevent the result in law of an offence against the law.

Then the question arises, whether an order made by the Court on a solicitor in his character of a solicitor to do something within his duty to the law, or to remedy something done by him as a solicitor contrary to the law, is an order made in respect of an offence, or whether it is merely an order in the nature of civil process.

Prior to the passing of the Debtors Act of 1869 the Courts always exercised a peculiar jurisdiction over solicitors. Solicitors had in the eye of the law peculiar privileges, trusts and confidence which were recognised by law and in equity. They were not considered merely as trustees; but having such a recognised position and such privileges they were under a peculiar jurisdiction which was exercised with relation to them by all the Courts, and they were bound to act towards clients and the Courts with peculiar good faith and strictness; and if they failed so to act, all the Courts exercised a peculiar disciplinary authority over them as solicitors and acting as solicitors in respect of any breach

of the duty which they as solicitors owed to the law.

Now, as it seems to me, the Debtors Act of 1869 took notice of this state of the law, and in sub-section 4 of section 4 enacted an exception from the substantive enactment of the Act. I say this because, as it seems to me, unless this were so, there would be no reason why the statute should preserve the power of arresting solicitors for acts done or left undone by them as solicitors, when the power to arrest other persons was abolished; but I do not say that the same reasoning applies to the cases mentioned in the other sub-sections of section 4 of 32 & 33 Vict. c. 62.

This being so, we have to consider the argument urged on behalf of the appellant, that this order could not be considered to be an order in the nature of a punitive or disciplinary order, as it was said that the moment the solicitor complied with the order, and as soon as he did what he was ordered to do, he would be released as a matter of course, and the conclusion suggested was that this order was therefore only an order to enforce process. I do not feel convinced that, even if mere obedience to the order would entitle the appellant to be released, that would shew that the order was not disciplinary; but further, I am of opinion that the doing the things ordered would not after arrest entitle the person on whom the order was made to his release *ex debito justitiæ*; he must apply to the Court for an order; and whether that order was treated as an order of course, or whether a special order was made, in either case the Court always shewed that it was not a mere civil right by insisting on the payment of the costs of the application—whereas if it had been an order *ex debito justitiæ*, no such condition would have been imposed. An amending Act was passed in 1878 (41 & 42 Vict. c. 54), and that Act recognised the existing law, but also recognised that with respect to contempts of Court of the nature specified the Courts had a discretion. I incline to agree that this last Act was a mitigating enactment, and in dealing with matters after an arrest it gave the Court probably a larger discretion than it had before, and it certainly recognised that the Court had a duty to perform in dealing with an application for discharge after arrest.

The late Master of the Rolls expressed in *Marris* v. *Ingram* (14) his view as to the reason for and the effect of the Act of 1878, and he directed his remarks especially to the case of trustees. Now there is a criminal statute which makes misconduct by trustees in certain cases a criminal offence (24), and it is clear that the late Master of the Rolls thought that attachments for some breaches of trust would be attachments for something which would be in the nature of a crime, and that both sub-sections 3 and 4 of section 4 of the Debtors Act of 1869 pointed to acts requiring and orders inflicting punishment. I do not desire to adopt the words he there used, but I think that his view was right, and that the acts of solicitors specified in sub-section 4 of section 4 of the Debtors Act, 1869, being acts which are omitted from the substantive part of the Act, afford strong evidence that the Legislature adopted the view that those acts were acts in the nature of criminal offences. This contempt, therefore, is in the nature of a criminal offence, and consequently no privilege can be claimed. The attachment was an order made by way of discipline, and for the purpose of punishing an offence. Against such an order no privilege can, in my opinion, be claimed, any more than it could be in the case of a criminal charge. I do not think that the case of *The Attorney-General* v. *The Leathersellers' Company* (7) places any difficulty in the way of our decision, as the point was not argued or presented to the Court in that case.

The appeal will therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion, and I agree that no distinction is, as regards this privilege, to be drawn between different enquiries before Courts of justice. The history of the case should be considered with the view of determining whether the case is merely one of civil process. In March, 1882, a summons was taken out asking for the delivery of certain deeds, the payment of a certain sum

(24) 24 & 25 Vict. c. 96. s 80.

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of money which Freston had received for a certain purpose, and for the payment of certain costs. An order was made, and afterwards, as it was not obeyed, the order for attachment was made by Mr. Justice Denman, and no appeal was brought from it.

No doubt all attachments do not stand on the same footing, as all contempts are not of the same kind; but it seems to me that this was a case of wilful disobedience, and that the order which was made thereon was something more than an order on a mere matter of civil process. That view is strengthened by the language of the Debtors Act, which contains in section 4, sub-section 4, the words, "Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such," and it is clear that this order was justified, notwithstanding the general provisions of the Debtors Act. It is said that the authorities are inconsistent with this view; but in the cases of *The Attorney-General* v. *The Leathersellers' Company* (7) and *Eyre* v. *Barrow* (11) the contempt was not of the same sort, and in one of these cases the element of wilful disobedience was wholly wanting, nor was the point now argued taken. The theoretical question is, whether the applicant is to be discharged from prison on the ground that he was privileged from arrest; but the practical question appears to be whether he is to be discharged without payment of costs.

FRY, L.J.—It is plain that where the attachment issues as a mere matter of civil process a person in the position of this applicant is privileged from arrest; but where it is disciplinary or punitive there is no such privilege. Lord Brougham decided that in *Long Wellesley's Case* (20), and his judgment was referred to and approved of in *Charlton's Case* (21), and I would add that if there is any difference between the privilege of a member of Parliament and the privilege of a solicitor the difference is not in favour of the solicitor. The attachment in this case was directed on the ground that a solicitor had not done certain things contained in an order made at chambers, and had not paid certain costs occasioned by his own misconduct. The order was a mixed order; it was undoubtedly an order respecting process in so far as those who asked for it were interested in it; but it was more, it was punitive and disciplinary in so far as it embodied an order of the Court proceeding against its own officer for misconduct. If the order for attachment had been mere process the person affected by it could get his discharge *ex debito justitiæ* on complying with it; but could the appellant here have so obtained his release? Clearly not, for the Court could have said that it deemed it right that he should even after compliance remain in prison. The Court would have a discretion, and so the order being both process and punitive the privilege claimed cannot attach.

The case of *Cobham* v. *Dalton* (13) was much pressed on us, and reliance was placed on the expression of opinion of Lord Justice James, who said, "I am disposed to think that he would also have been entitled to have the attachment discharged on the ground that he was privileged from arrest while returning from the Court." But the point taken in this case was not seriously argued in that case, the question there arising under the Bankruptcy Act; and further, the attachment was obtained against a solicitor, not as solicitor, but as an executor and trustee; so that the remark of Lord Justice James does not apply to this case.

Appeal dismissed.

Solicitors—W. A. Freston, in person, for appellant; Brownlow & Howe, for Messrs. Benn; Maynard, for the Sheriff of Middlesex.

[IN THE COURT OF APPEAL.]

1883. April 7, 9. May 11. } THE QUEEN *v.* THE JUSTICES OF MIDDLESEX.*

Prisons Act, 1877 (40 & 41 *Vict. c.* 21), *s.* 36—*Superannuation Allowance or Gratuity—Officer Retired to facilitate Improvements in Organisation of Prison—Apportionment of Allowance between Rates and Fund provided by Parliament—Superannuation Act*, 1859 (22 *Vict. c.* 26), *s.* 7.

The Lords of the Treasury have power under the second and last clauses of section 36 *of the Prisons Act*, 1877, *coupled with section* 7 *of the Superannuation Act*, 1859, *to apportion between the rates and the funds provided for that purpose by Parliament the amount payable by way of superannuation allowance or gratuity, to an officer who, being under the age of sixty, and not become incapable, by age, sickness or other infirmity received in actual execution of his duty, of executing his office in person, has retired from office to facilitate improvements in the organisation of the department to which he belonged.*

Special Case stated by consent under Order LXII. rule 3, from which the following facts so far as material appeared:—

Before the passing of the Prisons Act of 1877 the Coldbath Fields Prison was under the control of the Justices of Middlesex. The governor of that prison was at that time Colonel Colvill, and after the Prisons Act was passed he retired, and an allowance or pension, or compensation, was awarded to him by the Treasury, amounting to the sum of 582*l.* per annum, which sum was apportioned by the Treasury in this way—429*l.* was made payable by the ratepayers, and 153*l.* by the Government.

Colonel Colvill at the time of his retirement was less than sixty years of age, and he had not become incapable, from confirmed sickness, age or infirmity received in actual execution of his duty, of executing his office in person, nor has or had a medical certificate of any such age, infirmity or injury ever been made or given.

The office held by Colonel Colvill has not been abolished, nor has he been deprived of any salary or emoluments by reason of the abolition of the office which he held. By reason, however, of his ceasing to be governor as aforesaid, he ceased to enjoy the salary and emoluments which as governor he had enjoyed.

Colonel Colvill retired from his governorship for the purpose of facilitating changes in the general system of administration of all prisons vested in the Secretary of State by the Prisons Act, 1877, and the improvements in the organisation of the Prison Department, which were then in course of being carried out for the purpose of economy and efficiency.

The county authorities, considering that the Treasury had no power to direct the sum of 429*l.* to be paid out of the rates, raised the question in this case.

The judgment of the Queen's Bench Division was (on Dec. 21, 1882) delivered by

STEPHEN, J.—This was a Special Case, the material parts of which were as follows:—Up to the coming into operation of the Prisons Act, 1877, the Justices of Middlesex were the prison authorities for Coldbath Fields Prison. On the 7th of December, 1854, Colonel Colvill was appointed governor of that prison, and he continued to act as such till the 24th of August, 1878. After the Prisons Act came into force, the prison was taken over by the Secretary of State, and Colonel Colvill continued to act as governor till August, 1878. He was then told by one of the Prison Commissioners that he might, if he pleased, resign his appointment at once, and receive the full rate of pension, and he told the Prison Commissioners that he was willing to retire on a pension of two-thirds of his salary and emoluments. He wrote a letter to that effect to the commissioners, and his successor was appointed. The Lords of the Treasury awarded to Colonel Colvill an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows:—429*l.* 6*s.* 8*d.* to be paid by the Justices of Middlesex, and 153*l.* 6*s.* 8*d.* out of funds provided by Parliament. The question for the Court substantially was, whether this apportionment was one which, under the various statutes herein

* *Coram* Brett, M.R.; Lindley, L.J., and Bowen, L.J.

after referred to, the Lords of the Treasury had a right to make. By the Prisons Act, 1877, s. 36 (1), if any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison, who by reason of such abolition, retirement or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act, 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs. By the Superannuation Act, 1859 (22 Vict c. 26), s. 7 (2), it is enacted that the Lords of the Treasury may grant to any person retiring or removed from the public service for the purpose of facilitating improvements in the organisation of the department to which he belongs, such special annual allowance by way of compensation for his loss of office as may seem to the Lords of the Treasury to be a reasonable and just compensation for the loss of his office. If the compensation so granted exceed the amount to which the person would have been entitled under the scale of superannuation provided by the Act if ten years were added to the number of years which he may have actually served, the allowance is to be granted by special minute stating the special grounds for granting the allowance. The minute is to be laid before Parliament, and the amount is in no case to exceed two-thirds of the salary and emoluments. This provision, no doubt, applied to Colonel Colvill's case, as he retired from his office in order to facilitate improvements in the organisation of the

(1) 40 & 41 Vict. c. 21. s. 36: "If at any time after the commencement of this Act it appears to the Treasury that any existing officer of a prison has been in the prison service for not less than twenty years, and is not less than sixty years of age, or that any existing officer of a prison has become incapable, from confirmed sickness, age or infirmity or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity or injury is certified by a medical certificate, and there shall be a report of the Prison Commissioners, testifying to his good conduct during his period of service under them, and recommending a grant to be made to him, the Treasury may grant to such officer, having regard to his length of prison service, an annuity by way of superannuation allowance, not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year.

"If any office in any prison to which this Act applies is abolished, or any officer is retired or removed, any existing officer of a prison who, by reason of such abolition, retirement or removal, is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act, 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organisation of the department to which he belongs. . . . .

"Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act, and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department, shall be paid by the prison authority of the prison in which the officer to whom such annuity or allowance is granted was serving at the date of the commencement of this Act, out of rates which, at or immediately before the commencement of this Act, were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament."

(2) 22 Vict. c. 26. s. 7: "It shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the reorganisation of the department to which he belongs, by which greater efficiency and economy can be effected, such special annual allowance by way of compensation, as on a full consideration of the circumstances of the case may seem to the said Commissioners to be a reasonable and just compensation for the loss of office; and if the compensation shall exceed the amount to which such person would have been entitled under the scale of remuneration provided by this Act if ten years were added to the number of years which he may have actually served, such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament, and no such allowance shall exceed two-thirds of the salary and emoluments of the office."

department to which he belonged; and the result appears to us to be that the Lords of the Treasury were entitled to make to him such special allowance as they pleased, subject only to the following conditions—it was not to exceed two-thirds of his pay and emoluments; if it exceeded the amount to which he would have been entitled by bare length of service, and if the excess over that amount was more than would have been earned by ten additional years' service, the allowance must be made by special minute stating the special grounds, and laid before Parliament. Section 2 of the same Act sets out the scale of superannuation provided. After eleven years' service one-sixtieth of the annual salary and emoluments is to be added to the allowance. By section 4 the Lords of the Treasury are empowered, with regard to classes of officers whose offices require peculiar qualifications, and as to which it is for the public interest that a person should be appointed to them at an age exceeding that at which public service ordinarily begins, to direct that a certain number of years shall be added to their service. Colonel Colvill had served twenty-three years. He would, if he had been in the public service proper, have been entitled to five years' extra service under regulations issued under section 4, and would thus have been entitled, if "dealt with in manner provided by the Superannuation Act," to a pension as for twenty-eight years' service. The sum actually allowed to him by the Lords of the Treasury consisted of—(*a*) the amount earned by twenty-three years' service; (*b*) the amount due in respect of five years allowed under section 4; (*c*) an amount equal to what would have been earned by ten years' extra service. The whole was 582*l.* 13*s.* 4*d.*, which is a little less than two-thirds of 920*l.*, which was the amount of his salary and emoluments. There was thus no occasion for a special minute to be laid before Parliament. So far, little or no question arose between the parties. The question between them was as to the right of the Lords of the Treasury to apportion the annuity between the rates and the fund provided by Parliament. The decision of the question depended on the construction of the last paragraph of section 36 of the Prisons Act, 1877. The material words of the paragraph in question are as follows:—"Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act and the period of service after the commencement of this Act, and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department, shall be paid by the prison authority" out of the rates. The whole of Colonel Colvill's service, except a few months, was before the commencement of the Prisons Act of 1877, and the apportionment made between the funds provided by Parliament and the rates did not charge to the rates the amount allowed by the Lords of the Treasury in excess of the twenty-eight years to which Colonel Colvill would have been entitled under the Superannuation Act. For these reasons it was contended that the apportionment was valid, and in our judgment that contention is in accordance with the words of the two Acts, and must prevail. The argument to the contrary was, that the last paragraph of the 36th section applied only to the superannuation allowance or gratuities referred to in the first paragraph of the section, and not to allowances by way of compensation referred to in the second paragraph; and Mr. Wright, in his able argument on the subject, referred to several other Acts more or less analogous, in order to shew that there is a distinction between compensation and superannuation allowance. The question must, however, we think, be decided by the words of the very provision under consideration, and we are unable to understand how it is possible to read the fourth paragraph of section 36 otherwise than as applying to all the payments mentioned in the preceding paragraphs. It is impossible, without resorting to constructions which, however ingenious, appear to us unnatural and far-fetched, to suppose that the words

"but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department," were not intended to apply to the payments sanctioned by paragraph 2. I may repeat the very words of section 7 of the Act of 1859, and must refer to it; but that section is referred to in paragraph 2 of section 36 of the Act of 1877, and is not referred to in paragraph 1. This consideration appears to us conclusive. Some other objections were taken to the grant of the pension, but they were so slightly relied upon that we do not think it necessary to discuss them in detail. The Special Case concludes by asking the opinion of the Court on the question, whether the defendants ought to discharge out of the county rates the portion of the annuity so charged on them as aforesaid. We are of opinion they ought to pay the whole of it.

The Justices appealed.

R. S. Wright, for the appellants.—The provisions of section 36 (1) of the Prisons Act, 1877, which relate to annuities, are confined to superannuation allowances or gratuities, and do not extend to any other cases. Here the complainant was not compulsorily retired; he accepted an option, for he could have continued to be governor if he had so chosen. The expression "is retired or removed" is imported from section 7 (2) of the Superannuation Act, 1859 (22 Vict. c. 26). This was not an annuity, by way of superannuation allowance or gratuity, so as to be chargeable upon the county rates, but it was a compensation allowance chargeable upon the Treasury. Section 36 deals in its first clause with superannuation allowance; then the second clause deals with compensation allowances, and the last clause relates to superannuation and not compensation allowances. The various Superannuation Acts distinguish between superannuation and compensation. Thus the statute 4 & 5 Will. 4. c. 24, in ss. 9, 23, 26 and 30, deals with and distinguishes between pensions to State officers, superannuation allowances and compensation. A like distinction is made in the Superannuation Act, 1859, where sections 2 to 6 deal with superannuation allowances, the word "compensation" not being used in them at all. Then comes section 7, which is the section to which section 36 of the Prisons Act, 1877, refers, and there the words used are special annual allowance "by way of compensation," not "by way of superannuation allowance." The distinction between these two expressions is preserved in various Acts of Parliament—35 & 36 Vict. c. 83. s. 2; 36 Vict. c. 33; 39 & 40 Vict. c. 73, and 41 & 42 Vict. c. 63. The words "compensation and superannuation allowance" are words of set purpose, and, having regard to their established use in the various Acts, have a definite and technical meaning. Thus superannuation allowances are confined to permanent civil servants of the Crown who are defined, whilst compensation applies to any person who is retired or removed from the public service. Again, the superannuation allowance can, but compensation cannot, be commuted; and, lastly, the superannuation allowance depends upon length of service, but compensation does not. The annuity referred to in the first and last clauses of section 36 of the Prisons Act, 1877, is carefully limited to any annuity by way of superannuation. The only difficulty created in the section is by the introduction of the words "without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department." These words are negative words; but there is a case in which they might apply—namely, that of a man who, being over sixty years of age, and having served twenty years, might get both a superannuation allowance under the first clause of section 36 of the Act of 1877, and also compensation under section 7 of the Superannuation Act, 1859. But the county is not liable to pay the compensation.

The Prisons Act, 1842 (5 & 6 Vict. c. 98), s. 30, and the Prisons Act, 1865 (28 & 29 Vict. c. 126), ss. 15, 73, 74 and 79, were also referred to.

A. L. Smith (with him *The Attorney-General, Sir H. James, Q.C.*), for the Treasury.—The effect of the argument for the appellants is that the Treasury are to

pay the whole of the allowance to Colonel Colvill; but every allowance made for past services is to be paid out of the county rates, whilst gratuities are to be paid by the Treasury. This is not a special annual allowance, for section 36 expressly provides that the annuity is to be assessed by way of superannuation allowance.

Wright replied.

Cur. adv. vult.

The following judgments were delivered on the 11th of May:—

LINDLEY, L.J., after stating the facts as above given, proceeded:—The first Act to which it is necessary to refer is the Prisons Act, 1877, which is the main Act; and I may say at once that we have all felt very considerable difficulty in interpreting section 36. Up to a certain point that section is plain and intelligible; but the introduction into it of certain words by way of parenthesis has made the real meaning of the section extremely obscure. The section cannot be construed alone, but it must be construed with regard to the provisions in the Superannuation Act, 1859, and that Act has to be construed with reference to previous Acts, and more particularly with reference to the statute 4 & 5 Will. 4. c. 24, which was passed in the year 1834.

There is a series of Acts which relate to allowances, superannuation allowances, compensations and pensions of various kinds; and I think that it can be established by a minute examination of that series of Acts that there has been a tendency, at all events of late, to class these various pensions in different divisions and sub-classes, and to entitle them by different names. Thus a distinction, which has to be borne in mind, is drawn between superannuation allowances and compensations. In the Act of 1834, which is the governing Act of the series, we find all kinds of words are used to denote pensions of various sorts. We have the words "compensation for office abolished or reduced," and the words "pension," "allowance," "superannuation," "superannuation allowance or compensation" and "retired allowances or reward for the benefit of service"; all of which words are used to denote the various kinds of pensions or allowances. Studying the Act of 1834 alone, so far as I can make out, the three words "compensation," "superannuation" and "allowance" seem to denote different things; the word "allowance" being applied generically, but mainly, to unusual superannuation allowances. The importance of this observation is to shew that I have endeavoured to ascertain and appreciate the distinction between the various words which are used.

Bearing that in mind, I now come to section 36 (1) of the Prisons Act, 1877. It is admitted that the first clause of that section does not apply to Colonel Colvill, for he was under sixty years of age. That part of the section is applicable to cases of "an annuity by way of superannuation allowance"; which means a retiring allowance in proper cases—that is to say, in cases specified in the section. Then we come to the second clause of the section, which does apply to the present case, and it was contended, although not very strenuously, that Colonel Colvill did not come within it because he was not retired. But we are of opinion that that contention cannot prevail, and that Colonel Colvill is in the position of a person who was retired under this section. The fact is that he was allowed to retire, and that seems to come within the expression; for the expression "is retired" does not refer exclusively to compulsory retirement. Pausing there, that second clause throws us back upon the Superannuation Act, 1859, for it in substance says that Colonel Colvill shall be dealt with in the manner provided by that Act. The substance of the enactment in section 36 of the Act of 1877, if it had stopped there, would have been this: that Colonel Colvill would be entitled to be paid by the Treasury, not out of the rates at all, but by the Government, such a sum as the Treasury might award to him under the provisions of the Act of 1859 (22 Vict. c. 26). Section 2 of the Act of 1859 relates to the ordinary rate of remuneration allowance; and it is sufficient to observe that the rate of superannuation allowance is there made to depend upon the period of service; for there are various scales according to the period of service, whether ten years or more.

Section 4 also contains a provision for computing the amount of superannuation allowance to persons who hold professional and other special offices. I refer to that section simply for the purpose of shewing the scheme upon which the Act is based—namely, that where an extra allowance is to be made, a certain number of years are added under the Act, and the officer who is to be pensioned is treated as having served longer than he actually did serve, and then the Treasury apply the scale which is applicable to that period of service. Then we come to section 7, which is the important section in this particular case, and which, if section 36 of the Act of 1877 had stopped at the end of the second clause, would be applicable. The first half of that section seems to shew that, in theory at all events, the Treasury could grant to a person whose case fell within it such a sum by way of compensation as they might think right, without having regard to anything—they might take a general view of the case, and grant a lump sum. But although that is theoretically possible, the latter part of the section, I think, shews that it was not contemplated that the Treasury would act in any arbitrary manner; but that they would, in granting compensation under this section, have regard to the period of service which the officer has already served, and would apply to that period, not rigidly possibly, but as a standard, the scale referred to in section 2; so that, although it may be theoretically possible for the Treasury to make an arbitrary grant, yet such a method of proceeding was never contemplated. I do not think that it would be right for us to assume that the Treasury would take that view of their powers, and exercise them in that way in any case; and we ought to attribute to them the duty, in granting compensation, of proceeding upon the lines sketched out by the Act. I make this observation for the purpose of the last clause of section 36 of the Act of 1877. Pausing for a moment, I repeat that if section 36 had stopped at the end of the second clause of that section, Colonel Colvill would be entitled to be paid, not by the ratepayers, but by the Treasury, such compensation by way of allowance as the Treasury might think fit to grant to him under section 7 of the Superannuation Act, 1859. The expression "any annuity by way of superannuation allowance or gratuity," in the latter clause of section 36 of the Act of 1877, evidently refers to superannuation allowance or gratuity as distinguished from compensation. But the whole difficulty in this case arises from the introduction into this last clause of the words "without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organisation of the department." Those words are not applicable simply to the case of a person who retires and who is simply entitled to a remuneration allowance under the early part of that section; they can only apply to the case of a person who is entitled beyond, or in addition to that, to compensation as distinguished from superannuation allowance. We are therefore in this difficulty, that in order to give effect to the words which I have just read, we must extend the meaning of the words "superannuation allowance or gratuity," and hold that they include "compensation," or we must deprive those words of the effect which it was intended that they should have and of the purpose for which they were apparently introduced. The difficulty is one of language, and must be grappled with as best one can. I quite feel the difficulty, and that it is not possible by any method to interpret these words with strict accuracy without extending some or restricting others. It was suggested on behalf of the appellants, and the suggestion struck us as being a very important one, that there might arise the case of a governor of a prison who had served his full time, who was over sixty years of age, but who did not wish to retire. If he liked to retire he could do so, and would be entitled to a superannuation allowance under the first clause of section 36. But, although he was in good health and did not care to retire, it was, notwithstanding, considered desirable by the Treasury, as representing the Government, that for the purpose of facilitating the re-organisation of the office he should retire and be compensated. It was said on behalf of the appellants

that these words were put in to meet the case of a person entitled to retire and who was also entitled to be compensated. I am by no means prepared to say that that is not right. These words would certainly provide for such a case; but the question which we have to consider is whether they are confined to that case, and I cannot say that I can see any reason for so confining them.

It appears to me that the true construction of this extremely obscure section is this, that by a blunder in drafting, the expression "superannuation allowance" in the early part of the last clause has been used in a technical sense as excluding compensation; but in the clause which I have read, it has been inserted upon the supposition that it included compensation. I cannot otherwise read the section. It appears to me that the only difficulty in the construction that was suggested is this, that this parenthetical clause would cease to be applicable if the Treasury were to adopt an arbitrary method of compensating the officer under section 7 of the Superannuation Act, 1859. But if the Treasury be treated as acting, as it appears to us it was intended, although not so expressed in words, that they should act under that statute—that is to say, that in granting compensation they should base their calculation upon past services—the difficulty is got over.

It appears to me, therefore, that notwithstanding the extreme obscurity of section 36 of the Act of 1877, the judgment of the Court below is right, and this appeal ought to be dismissed.

The Master of the Rolls desires me to say that he concurs in this view.

BOWEN, L.J.—I have given, like the other members of the Court, much time to and reflection upon this difficult question as to the construction of this almost impenetrably obscure section. One cannot arrive at a conclusion in favour either of the appellants or of the respondents without doing considerable violence to the wording of the Prisons Act, 1877, not to mention the Superannuation Act of 1859. In the presence of insuperable difficulties in the way of either construction, in the presence of the unanimous decision of the Court below and the opinion of the Master of the Rolls and of Lord Justice Lindley, I do not feel justified in expressing dissent from the view they have taken. Nor do I see, and I have carefully thought about it, that anything is to be gained by pointing out the difficulties which appear to me still to be in the way of the view of the case taken by the Court. But I must add that I follow the judgment of the rest of this Court with great hesitation and doubt. I cannot say with confidence that I should myself have arrived at the same conclusion by the natural light of my own reasoning.

Appeal dismissed, without costs.

Solicitors—The Solicitor to the Treasury, for the Crown; Nicholson & Herbert, for the Justices.

[IN THE COURT OF APPEAL.]

1883. April 24. } WALL *v.* TAYLOR. WALL *v.* MARTIN.*

Musical Composition—Right to Sole Liberty of Performing—Performance at a Place not a Place of Dramatic Entertainment — Copyright — Right to recover Penalty or Damages—3 & 4 Will. 4. c. 15. s. 2—5 & 6 Vict. c. 45. ss. 20 and 21.

By 3 & 4 Will. 4. c. 15. s. 1, the author or his assignee has as his own property the sole liberty of representing for a certain period, at a place of dramatic entertainment, an unpublished dramatic piece.

By section 2, if any person represents such a piece without permission at any place of dramatic entertainment, he is made liable to the payment of an amount not less than 40s., or to the full amount of the benefit received by him, or of the injury sustained by the owner, whichever shall be the greater damages.

5 & 6 Vict. c. 45. s. 20, creates a right in the sole liberty of representing or performing any musical composition; and section 21 enacts that the person who has

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

the sole liberty of representing a dramatic piece or musical composition shall have the remedies given by 3 & 4 *Will.* 4. *c.* 15, *"as fully as if the same were re-enacted in this Act."*

In an action by the owner of the sole liberty of performing a musical composition, which was not a dramatic piece, to recover penalties for the unauthorised performance of that composition at a place which was not a place of dramatic entertainment,—

Held (*affirming the judgment of the Queen's Bench Division*), *by* BRETT, M.R., *and* BOWEN, L.J. (*dissentiente* COTTON, L.J.), *that the plaintiff was entitled to recover the penalty given by* 3 & 4 *Will.* 4. *c.* 15. *s.* 2, *and was not limited to the recovery of damages only, for that the right to recover the penalty is not confined to cases in which there has been an infringement of the sole liberty of performing a musical composition by an unauthorised performance at a place of dramatic entertainment.*

Appeal by the defendants from the judgment of the Queen's Bench Division.

The case is reported 51 Law J. Rep. Q.B. 547.

The plaintiff, the assignee of the sole liberty of representing or performing a descriptive song called "Will o' the Wisp," sued the defendants for penalties for the infringement of his right by the defendant Taylor, in allowing the song to be sung at a concert under his management at Bolingbroke Hall, Clapham; and by the defendant Martin for a similar infringement at a concert at Over Darwen. At Clapham, admission was charged for; at Over Darwen admission was by refreshment ticket, price 8*d.*

The jury found, in answer to questions left by Day, J., that the song was not a dramatic piece, and that the places where it was sung were not places of dramatic entertainment.

The Judge held that the plaintiff was not entitled to recover a penalty, but only such damages as were proved, and the jury found a verdict for him for 1*s.* in each case. The Judge ordered the plaintiff to pay the defendants' costs in each case.

The plaintiff moved in the Queen's Bench Division for a new trial, on the ground of misdirection, in that the Judge had directed the jury that if they found the places where the song was sung were not places of dramatic entertainment, then the plaintiff was not entitled to recover penalties, but only such damages as might be proved.

The Queen's Bench Division on this motion entered judgment for the plaintiff for 40*s.*, with costs in each case.

The defendants appealed.

J. Fox, for the defendant Taylor.

E. Wilberforce, for the defendant Martin.

—This Court can exercise the same power as the Divisional Court exercised on the motion for a new trial, and therefore, on the admitted and undisputed facts, this Court can give judgment for the defendants. The places where this song "Will o' the Wisp" was performed were not places of dramatic entertainment, and the song itself is not a dramatic piece; so that the performance of it did not make the places of performance places of dramatic entertainment within the decision in *Russell* v. *Smith* (1)

3 & 4 Will. 4. c. 15 (2), confers on dra-

(1) 12 Q.B. Rep. 217.

(2) 3 & 4 Will. 4. c. 15, enacts, by section 1, that "the author of any tragedy, comedy, play, opera, farce or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, ... or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever . . . . any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof. . . ."

Section 2 enacts: "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment . . . . any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor. . . ."

matic authors a property in the liberty of representing dramatic pieces; 5 & 6 Vict. c. 45 (3), extends that right to musical compositions; and if section 20 (3) stood alone, the owner of such a right would have an action on the case for damages if that right were infringed, according to the principle laid down by Willes, J., in *The Wolverhampton Waterworks Company* v. *Hawkesford* (4). But that section gives no other or special remedy; the plaintiff therefore is entitled to sue for damages, but he cannot recover a penalty. The penalty was given by 3 & 4 Will. 4. c. 15. s. 2 (2), and that section is incorporated into 5 & 6 Vict. by section 21 (3); but the penalty is created by the statute of Will. 4, and in that statute it is only given for the infringement of the right "at any place of dramatic entertainment," so that it cannot apply to these cases in which the performance was not at such a place.

[BRETT, M.R.—Does not that make section 20 of 5 & 6 Vict. c. 45, almost inoperative?]

No; for it contains by reference other provisions, such as an extension of the time during which the right is to belong to the author. This is a penal statute, and must therefore be construed strictly; and it is an essential condition of the right to recover the penalty that the place of performance should be a place of dramatic entertainment. 5 & 6 Vict. c. 45. s. 20 (3), gives a more extensive right than the remedy given by section 21 (3), for this latter section carries the plaintiff back to 3 & 4 Will. 4. c. 15. s. 2 (2), and limits his remedy to the remedy there given; so that the plaintiff is thus limited to an action for such damages as he may prove he has suffered. The jury rightly found that this song is not a dramatic piece, and that there was at neither of these places anything which could rightly be called a dramatic entertainment.

T. Fillan, for the plaintiff.

[BRETT, M.R.—The defendants allege that 3 & 4 Will. 4 gives a right, and that an action will lie for the infringement of that right; then that section 2 gives a further remedy, that is, a penalty; that 5 & 6 Vict. c. 45. s. 20, gives a similar right in respect of musical compositions, for the infringement of which an action lies; but that if it is sought to apply the further remedy given by 3 & 4 Will. 4. c. 15. s. 2, then the condition of that remedy must be incorporated into the later statute as well as the remedy, and thus that a penalty can only be recovered if the infringement of the right is at a place of dramatic entertainment.]

That contention is based on a misapprehension of the right created by 3 & 4 Will. 4. c. 15 (2); and moreover 5 & 6 Vict. c. 45 (3) is wider in its terms than 3 & 4 Will. 4. c. 15 (2). The right given by section 20 (3) of the later Act is general, there is no restriction as to place; the remedy given by section 21 (3) is equally general, and equally without restriction. The provisions found in 3 & 4 Will. 4 are appropriate, for, as it applies to dramatic pieces and not to musical compositions, the circumstances mentioned in section 2 are the only circumstances in which an infraction of the right given could take

(3) 5 & 6 Vict. c. 45, enacts, by section 2: "That the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce or other scenic, musical or dramatic entertainment. . . ."

Section 20: "And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: and whereas it is expedient to extend to musical compositions the benefits of that Act and also of this Act: Be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition shall endure and be the property of the author thereof and his assigns for the term in this Act provided for the duration of copyright in books. . . ."

Section 21: "And be it enacted that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition, shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act."

(4) 6 Com. B. Rep. N.S. 336; 28 Law J. Rep. C.P. 242.

place. The right of representation given is a right to represent musical compositions in a public place; the whole course of legislation is directed to public performances. The remedy given is 40*s.* and costs, and that may be considered as ascertained damages—*Chatterton* v. *Cave* (5). 5 & 6 Vict. c. 45. s. 21 (3), gives the same remedy as that given by 3 & 4 Will. 4. s. 2 (2)—that is, the remedy alone, not the whole section, is re-enacted, and the remedy given is a penalty for any infringement of the right given by section 20. If the Court should be against the plaintiff on this point, then it is submitted that this place was a place of dramatic entertainment, for the interpretation clause of 5 & 6 Vict. c. 45 (3), provides that "the words dramatic piece" shall include every "musical or dramatic entertainment"—here there was a musical entertainment, so that there was a dramatic piece, and the places where the song was sung became places of dramatic entertainment.

There was evidence that the song is itself a dramatic piece, and that at the concert at Over Darwen a sort of farce was performed representing the advantages of temperance, and this would constitute the place a place of dramatic entertainment.

BRETT, M.R.—It is admitted that the plaintiff had exclusive rights with regard to a certain song, and that these rights existed pursuant to the provisions of 5 & 6 Vict. c. 45. s. 20 (3); it is also admitted that the defendants in these actions did something in derogation of the right of the plaintiff, whereupon the plaintiff sued for penalties. At the trial before Mr. Justice Day, certain questions were left to the jury, upon the answers to which the learned Judge held that the penalties sued for could not be recovered; but that damages might be awarded to the amount to which the plaintiff had been damaged by the acts of the defendants. The jury thereupon gave the ignominious verdict of 1*s.*, and the Judge gave judgment for the plaintiff for that amount, but ordered him to pay the costs of the defendants. There was then an application to the Divisional Court, and the question before that Court was whether the decision of the Judge was right. That Court held that the penalties could be recovered; but as the motion was a motion for a new trial, the Court, considering that it had before it all the materials necessary for finally determining the questions in dispute, exercised the power given by the Rules of Court, gave the judgment which they thought ought to be given, and entered judgment for the plaintiff for the amount of the penalties, with costs. From that judgment an appeal has been brought to this Court; and I am of opinion that we are in the same position upon this appeal as the Divisional Court was upon the motion for the new trial, and that if we are satisfied that we are in possession of the necessary materials, we ought to give the judgment which we think is the right judgment to be given, as though this were a motion for a new trial.

The first point is, whether the plaintiff can in the circumstances of these cases recover the penalties claimed. The circumstances are, that the sole liberty of representing or performing a certain song belonged to the plaintiff; yet that that song was performed at two concerts conducted by the defendants at two places not otherwise used as places of dramatic entertainment. It is argued that this song is a dramatic piece, that it was sung publicly, and therefore that a dramatic piece was represented or performed. In answer to this, it is argued on behalf of the defendants that, assuming this song to be a song in respect of which the plaintiff possesses exclusive rights of performance, still that as it was sung at places which were not places of dramatic entertainment, therefore the plaintiff is not entitled to recover a penalty, but only such damages as he may be proved to have suffered. The contention of the plaintiff is that his right is given to him by 5 & 6 Vict. c. 45. s. 20 (2), and that the remedy is given by section 21 (3) of that statute; it is said that while section 21 incorporates the remedy contained in 3 & 4 Will. 4. c. 15. s. 2 (2), it does not incorporate what is called the condition contained in this last-named section, under which the remedy given by the Act of Will. 4 arises, but

(5) 47 Law J. Rep. C.P. 545; Law Rep. 8 App. Cas. 483.

that the condition under or on which the remedy arises must be looked for solely in 5 & 6 Vict. c. 45.

In answer to this it is argued on behalf of the defendants that the plaintiff may acquire an exclusive right to the sole liberty of performing this song, and that he may acquire that right under 5 & 6 Vict. c. 45; but that his remedy for any infringement of that right is to be found in the provisions of 3 & 4 Will. 4. c. 15, and that, only if the circumstances exist which it is necessary should exist in order to satisfy the requirements of that statute. The view of the plaintiff is that only a portion of 3 & 4 Will. 4. s. 2 (2), is incorporated into 5 & 6 Vict. c. 45. s. 21 (3). The view, on the contrary, of the defendants is that the whole of the section of the earlier statute is incorporated into section 21 (3) of the later statute. If part only of the section in the earlier statute which gives the remedy is so incorporated, then the condition, as it is called, is not incorporated, whereas if the whole of the section of the statute of Will. 4 is incorporated, then the condition as to the place being a place of dramatic entertainment is brought into 5 & 6 Vict. c. 45. s. 21 (3). In the one case a penalty is recoverable, but in the other case no penalty can in such cases as these be recovered, because the right of representation or performance was not infringed "at any place of dramatic entertainment."

I am of opinion that it is fair, in attempting to arrive at the intention of the Legislature, to consider the result of the arguments addressed to us upon the construction of the statutes under consideration. Now the right which is given by 5 & 6 Vict. s. 20 (3), is a right not circumscribed by any condition that the representation or performance must take place at a place of dramatic entertainment. 5 & 6 Vict. c. 45. s. 20, enacts that the provisions of 3 & 4 Will. 4. c. 15, and of 5 & 6 Vict. c. 45, "shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition" shall be the property of the author or his assigns for a certain period. To constitute therefore an infringement of the right of the proprietor there must be a performance or a representation, and these words must be interpreted according to their ordinary meaning, regard being had to the subject-matter of the enactment. Now it seems to me that singing a song for one's own gratification in private is not to represent or to perform it, nor would the fact of some other person being in the room make the singing of the song a representation or performance, for I think that those words "representing or performing" mean that there must be publicity; and, that being so, the question must to some extent be one of fact to be decided by the circumstances which exist in each case. In this case there has been what amounts to a representation or performance within 5 & 6 Vict. c. 45. s. 20. So far there has been an infringement of the right of the plaintiff; but yet it appears to me that if the whole of 3 & 4 Will. 4. c. 15. s. 2 (2), is incorporated into 5 & 6 Vict. c. 45. s. 21 (3), the result will be that this part of the latter Act will, as far as musical compositions are concerned, be a dead-letter, and that in respect of them the right to a penalty would hardly ever arise. This consideration leads me to look with some care at the form of the two sections in the two statutes.

The 1st section of 3 & 4 Will. 4. c. 15 (2), gives a right, for the infringement of which an action lies; then section 2 proceeds to give a remedy for such a breach of right only in certain circumstances and under certain conditions. Section 2 enacts "that if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or rights of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment," any composition specified by the Act, he shall be liable to pay not less than forty shillings, or the amount of the benefit received by him, or the injury sustained by the plaintiff, "whichever shall be greater damages." So that a new remedy is given, and the remedy is a penalty or damages, whichever shall be the greater.

Coming now to the statute of the

Queen, we find that a right is given with regard to musical compositions, and we find a declaration in section 20 (3) that certain things if done will amount to an infringement of that right; so that a right is given to something, and on the infringement of that right so given by section 20 a right to bring an action arises, and that is what section 20 gives. Then section 21 (3) gives a remedy; but, unlike section 2 of 3 & 4 Will. 4. c. 15 (2), it introduces no new circumstances, no limiting circumstances under which alone the penalty is to arise; it enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act" of 3 & 4 Will. 4.

If I am right in this view, then under the Act of Will. 4 the remedy is a penalty of not less than forty shillings, or damages, whichever shall be the greater, and then that also is the remedy given by 5 & 6 Vict. c. 15. If section 2 of Will. 4 only enacts the circumstances in which the remedy is to be given by that statute, then those circumstances are left out in the later Act, and are not necessary to be fulfilled in a case arising under 5 & 6 Vict. c. 45. The remedy under that statute is given on an infringement of a right which is created by and is to be determined by that statute. The words of section 21 may be said to present on this view a difficulty, for it may be said that the words "such dramatic piece or musical composition" alter the contingency on which the right to the penalty for a dramatic piece can be enforced. If indeed a dramatic piece could be performed at a place which is not a place of dramatic entertainment, perhaps they would effect such an alteration; but, as it seems to me, the words "dramatic piece" in section 21 are really words of supererogation, for, following the decision of the Court in *Russell* v. *Smith* (1), that the performance of a dramatic piece makes the place where it is performed a place of dramatic entertainment, it follows that no greater right is given with regard to a dramatic piece in this respect by 5 & 6 Vict. c. 45, than existed under 3 & 4 Will. 4. c. 15, save as to the extension of time.

In this case therefore I am of opinion that the penalty was recoverable, and, substantially for the reasons assigned in the judgment of the Divisional Court, I think that on that point the judgment appealed from must be affirmed.

But then the further question arises, whether we ought now to use the power and authority which we have equally with the Divisional Court in the same way and to the same extent as that Court exercised it on the motion for a new trial. I feel that Mr. Justice Day had fuller opportunities than we have, or than the Divisional Court could have, of considering the whole conduct of the plaintiff in this litigation, and he gave a reason for directing him to pay the costs of the defendants. That reason was that he had failed to recover the penalty, and had only recovered 1*s.* damages; but I think that the Judge meant to express his sense that the plaintiff had failed to get what he tried to obtain, and that he ought not to have tried to obtain that which he did get. These actions in fact ought not to have been brought at all, and I think we ought to take notice of what the Judge who tried the case said, and therefore that, although the plaintiff is entitled to recover the penalties, yet there should be no costs of the action or the appeal.

It has been said that the interpretation clause makes plain what is intended by the words dramatic piece or dramatic entertainment, for that section 2 of 5 & 6 Vict. c. 45 (3) enacts that the words "dramatic piece" is to include every "musical or dramatic entertainment"; but I do not consider that the interpretation clause can be used for that purpose: it must apply to the particular composition, whatever it may be, and not to the whole collection of pieces performed or rights existing so as together to make a concert a dramatic entertainment, and thus constitute the place where it was held a place of dramatic entertainment.

COTTON, L.J.—I should agree with the proposal of the Master of the Rolls as to the costs, assuming the judgment of the Queen's Bench Division to be right on the construction of the Act.

I am, however, unable to agree with

the view taken of the statute by the Queen's Bench Division, by the Master of the Rolls, and also, as I understand, by Lord Justice Bowen. The plaintiff here had, as is conceded, a right, and it has been interfered with. In these circumstances the Divisional Court considered that he was entitled to recover the penalties irrespective of any damage suffered by him.

It is said that, if this be not so, he has no sufficient protection; but he can sue for damages, and the Court would, if there were proof of an intention to continue to interfere with his rights to his prejudice, grant an injunction, so that his interests would be protected.

The plaintiff here claims a penalty or damages, whichever may be the greater, and he does this under 3 & 4 Will. 4. c. 15. s. 2 (2), and 5 & 6 Vict. c. 45. s. 21 (3). Section 20 of the later Act applies not only to persons who are entitled to property in the performance of a musical composition, but also to those who have a property in the performance of dramatic pieces; the same words apply to both; and the protection previously given to a right of representing dramatic pieces is extended to a similar right in musical compositions. Then section 21 (3) gives a remedy, and, apart from this section, there is in the owner of the right of performing musical compositions no right to recover a penalty for the infringement of that right. The primary object of the statute was to extend the period during which the rights given by 3 & 4 Will. 4. c. 15, could be enforced, and also to protect the right of performing musical compositions. This being done by section 20, then section 21 (3) enacts that persons who possess the rights so given are to have the remedies given by the earlier Act "as if the same were re-enacted in this Act." That probably means the same remedies; but then the remedies given are given by the earlier Act, and we have to turn to 3 & 4 Will. 4. c. 15, to see what they are. It appears to me that in section 2 of that Act (2) the remedies given are given subject to certain circumstances stated, and that they involve compliance with a condition. The section says that if certain things are done, "every such offender shall be liable" to certain consequences. The words might have been placed in different order, and then I think the section would enact in effect that every person who does the act forbidden by the section in the circumstances of that section shall be liable to the penalty given by the section, for the condition or circumstances specified in the beginning of section 2 are included in the latter part of the section by the word of reference "such." Therefore the right to recover a penalty is not given except as against persons who do certain things in a certain place specified by the Act; and, in my opinion, that remedy is a remedy for an act within the circumstances specified by the Act, under which alone the 40*s.* penalty is recoverable. Nor do I see how the plaintiff is assisted by the previous section of the Act of Will. 4, nor, unless some alteration is made in the statute, how the plaintiff is entitled to a penalty, for I think he is entitled to damages, but not to the penalty. With regard to the argument based on the interpretation clause in 5 & 6 Vict. c. 45 (3), I agree with the Master of the Rolls that the statute intended to deal with each piece, and did not intend by that clause to make that a place of dramatic entertainment which would otherwise not be one.

I do not think there is any ground for a new trial; in the first case there was no evidence on which a jury could find otherwise than they did, and if in the second case there was a little more evidence of a dramatic entertainment, still we could not say that a jury could not reasonably come to the conclusion at which this jury arrived.

BOWEN, L.J.—I agree with the judgment of the Master of the Rolls; and although the dissent of Lord Justice Cotton has caused me to doubt, on the whole I have formed a clear opinion that the judgment should be affirmed, so far as it decides that the plaintiff is entitled to recover a penalty.

The plaintiff is the proprietor of the sole liberty of performing a musical composition, and he claims the protection of 5 & 6 Vict. c. 45 (3), which was passed to protect, *inter alia*, such a right. He seeks,

by virtue of section 21 (3) of that Act, to incorporate into that Act and to apply to his property in the right of performing musical compositions the remedy given by 3 & 4 Will. 4. c. 15. s. 2 (2), in respect of property in the right of representing dramatic pieces.

The view of the plaintiff is that the penalty given by the Act of Will. 4 is incorporated into the Act of the Queen, and that the penalty may be sued for whenever the right of property which I have described is infringed. The defendants, in contradistinction to that view, say that they are liable to pay damages if any are proved, but that they are not liable to the penalty; and that 3 & 4 Will. 4. c. 15. s. 2 (2), is only incorporated when the condition, as the defendants call it contained in that section is fulfilled—namely, when the performance complained of takes place "at any place of dramatic entertainment." Is it then true that the owner of the property of the right of performing a musical composition can only recover the penalty when the musical composition is performed in a place of a dramatic entertainment, or is it true that the penalty without any condition, as it is called, is the remedy incorporated by 5 & 6 Vict. c. 45. s. 21 (3)?

The true answer I think is that what has been called in the argument a condition of recovering the penalty in section 2 of 3 & 4 Will. 4. c. 15, is nothing of the kind, but that it is part of the definition of the offence upon commission of which the penalty is to be incurred. The 1st section of 3 & 4 Will. 4. c. 15 (2), created a special kind of property in dramatic pieces: it enacted that the author or his assignee of any dramatic piece "shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment" a dramatic piece which had not been published; so that the right of performance at a place of dramatic entertainment was made thereby a definite right of property, and it is not merely a condition of recovering a penalty; the right is the sole liberty of representing a dramatic piece at a place of dramatic entertainment. If that is so, then we may pass on to section 2 (2), and see how much of that section is remedy and how much is description of right. Section 2 enacts "that if any person shall, during the continuance of such liberty as aforesaid, contrary to the intent of this Act or right of the author or his assignee, represent or cause to be represented" dramatic pieces "at any place of dramatic entertainment"—that is, as it seems to me, not a condition precedent to the attaching of the penalty, but it is the essence of the offence, the very definition of the infringement, which of course is correlative with the definition of the right infringed, and the remainder of the section contains the remedy given to the person whose right has been infringed. It is now necessary to turn to 5 & 6 Vict. c. 45. s. 20 (3), where we find it enacted that the provisions of the Act of Will. 4 (2) are to apply to "musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assigns for the term in this Act provided for the duration of copyright in books." Leaving out the words "dramatic piece," we find that this section gives a new right in respect of musical compositions; it gives a right in the sole liberty of representing them before others, but it does not go on to define the right so given as the right to represent them at places of dramatic entertainment. Then section 21 (3) enacts that the persons who have the right so created "shall have and enjoy the remedies given and provided" in the Act of Will. 4 "as fully as if the same were re-enacted in this Act." Why should we read into the word "remedies" the qualification that it is only to be put in force when the right is infringed at a place of public dramatic entertainment? That would be to read into it what is not a condition or limitation of the previous penalty, but merely part of the description or definition of the previous offence.

I am of opinion that the remedy is co-extensive with the injury, the *remedium* commensurate with the *jus*, and I think it may be said, as has been pointed out by the Master of the Rolls, that the protection of the author would be insufficient if it

were otherwise. There is a considerable difference between dramatic pieces and musical compositions, and it is much easier to represent the latter than the former, so that the difference in the construction of the clauses may be based on practical considerations.

Is it a satisfactory remedy to say that a man may recover such damages as he has suffered? Suppose a song were sung all over the country, could any one measure the damage thereby caused? It is said that an injunction would be granted; but if an injunction were granted against one person or one institution, the musical composition might be performed at another and then at another; moreover, it might not be easy to prove that the offenders intended to repeat the offence, and so the remedy would be ineffectual.

I agree that each party should pay their own costs of all the proceedings, and that there should be no costs of the appeal.

Appeal dismissed.

Solicitors—T. L. Allen, for plaintiff; Wilkinson & Howlett, for defendant Taylor; G. Lucas, agent for Broomhead, Wightman & Moore, Sheffield, for defendant Martin.

[IN THE COURT OF APPEAL.]

1883. April 18, 19, 20. POUNTNEY *v.* CLAYTON.*

Railway Company—Mines—Land compulsorily taken by Railway Company sold as Superfluous Land—Right to Support of Surface—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 77, 78 *and* 79.

Under sections 77, 78 *and* 79 *of the Railways Clauses Consolidation Act*, 1845, *a railway company have an option to purchase compulsorily land either with or without the minerals, and the owner of the minerals in default of such purchase or of payment of compensation may as against the railway company work the mines to the utmost extent, provided that he works them in a proper manner and "according to the usual manner of working such mines in the district where the same shall be situate." The purchaser of such land as superfluous land acquires no greater right of support to the surface than the railway company possessed.*

Appeal from the Divisional Court discharging a rule *nisi* for a new trial.

The action was brought to recover damages from the defendant for so working his mines as to cause injury to the surface of land which had been sold to the plaintiff by a railway company as superfluous land.

The land in question originally belonged to one Penson, who, in 1865, demised the minerals under it to the defendant for a term of twenty-one years; there was no mention of any right of support in the lease.

In September, 1867, Penson conveyed the surface of the land to the Wrexham, Mold and Connah Railway Company, under the compulsory powers conferred by the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), which was incorporated with the company's special Act.

In October, 1876, the railway company, under section 127 of the Lands Clauses Consolidation Act, 1845, sold part of the land to one Price as superfluous land; and on the same date also sold another part to one Jones.

In November, 1876, Jones sold a portion of the land which he had purchased to Price; and subsequently Price sold to the plaintiff both the land which he had bought from the company and that which he had bought from Price.

The defendant worked the minerals under the land in question, and caused a subsidence, which damaged five houses which had been erected upon the land by the plaintiff.

The defendant had not before working the minerals given notice of his intention to do so as prescribed by section 78 of the Railways Clauses Consolidation Act, 1845 (1).

* *Coram* Brett, M.R., and Bowen, L.J.

(1) 8 Vict. c. 20. s. 77: "And with respect to mines lying under or near the railway be it enacted as follows: The company shall not be

Pountney v. *Clayton*, *App.*

At the trial before Williams, J., and a special jury at the Shrewsbury Summer Assizes, 1882, a verdict was found for the plaintiff.

The defendant obtained a rule *nisi* for a new trial, upon the ground that the learned Judge misdirected the jury in telling them "that a purchaser of land sold as superfluous land by a railway company and originally purchased by them compulsorily under the powers of the Lands Clauses Consolidation Act, 1845, has the same right of support as an ordinary purchaser of land."

The Divisional Court (Denman, J.; Manisty, J., *dissentiente*) discharged the rule.

The defendant appealed.

Jelf, *Q.C.*, and *Bosanquet*, *Q.C.*, for the defendant.—The contention is that the plaintiff took no greater rights than the railway company themselves had; for the company could not convey any greater right to the plaintiff than they themselves had. Having taken the land compulsorily, and not having purchased the minerals under the powers conferred by the Railways Clauses Consolidation Act, 1845, the company acquired no right to support whatever. The plaintiff has the same rights only as the company had, and as they only bought the surface without any right to support, the plaintiff cannot claim such a right.

The question as to the effect of sections 77, 78 and 79 of the Railways Clauses Consolidation Act, 1845 (1), is concluded by the decision of the House of Lords in *The Great Western Railway Company* v. *Bennett* (2).

H. Matthews, *Q.C.*, and *Poyser*, for the plaintiff.—Sections 77, 78 and 79 of the Railways Clauses Consolidation Act, 1845, do not apply to this case. That statute deals with cases in which the owner of the surface is the same person as the owner of the minerals. If a person grants away his property in minerals, he need not reserve to himself a right of support by express words; for as soon as the severance is made, the right to support arises, and that incidental right to support passes to a purchaser of the surface, together with the principal subject-matter of the conveyance. The lease of the minerals to the defendant only enabled him to work them without letting down the surface. The case of *The Great Western Railway Company* v. *Bennett* (2) is not adverse to the contention of the plaintiff, because there the land was not superfluous land; the railway company gave notice of their willingness to treat for the minerals; and there the surface rights and the mining rights were sold separately.

Smith v. *Darby* (3), *Rowbotham* v. *Wil-*

entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

Section 78: "If the owner, lessee or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee or occupier thereof, then he shall not work or get the same; and if the company and such owner, lessee or occupier do not agree as to the amount of such compensation the same shall be settled as in other cases of disputed compensation."

Section 79: "If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate . . . ."

(2) 36 Law J. Rep. Q.B. 133; Law Rep. 2 E. & Ir. App. 27.

(3) 42 Law J. Rep. Q.B. 140; Law Rep. 7 Q.B. 716, 722.

son (4), *Dixon* v. *The Caledonian Railway Company* (5) and *Fletcher* v. *The Great Western Railway Company* (6) were also cited.

Jelf, Q.C., replied.

BRETT, M.R.—The action is brought by an owner of land against the defendant, the owner of the mines under the land, for that the defendant has so worked his mines as to let down the surface of the land, and thereby injure certain buildings which belonged to the plaintiff upon that land. The plaintiff's title was proved to have arisen in this way. The land and mines originally belonged to one Penson, who leased the minerals to the defendant; and I will assume for the purposes of my judgment, for it was hardly disputed, that as between the defendant and Penson, the defendant would have been bound to work the mines so as not to let down the surface as against his own lessor. I agree that the meaning of that lease is that all the minerals are, as it were, sold by the owner of them to the lessee if there is time to get them, but that they must be so worked as not to let down the surface. In such circumstances the lessee must leave a certain amount of coal, unless he can otherwise provide a support. The next step was that the railway company desired to purchase the lands under the compulsory powers of the Lands Clauses Consolidation Act, 1845, and under their special Act. But by the Railways Clauses Consolidation Act, 1845, railway companies have certain powers given to them which were obtained by the railway interest—namely, that although other owners who can buy compulsorily under the Lands Clauses Consolidation Act, 1845, must buy both the land and the mines under the land, yet a railway company have an option reserved to them to buy the land but not the minerals. A railway company have a right to buy all the mines under the land which they are entitled to purchase, but have the power of electing at the time of the first purchase whether they will purchase the mines as well as the lands. In popular language the railway company are said to have a right to buy the surface. The surface is not only that which is actually on the top of the mines, but all that is underground to the centre of the land except the mines. Therefore, even where the mines are excepted, any person who by digging down under the mines was to let down the railway would be a trespasser. The only things that the railway company have not bought are the mines.

The position of a railway company who have exercised their option at the time of the first compulsory purchase by electing to purchase all the land except the mines, depends on the true construction, not of the Lands Clauses Consolidation Act, 1845, but of sections 77, 78 and 79 of the Railways Clauses Consolidation Act, 1845, when read together. It would seem, and I think it is the case, that the right of the railway company depends upon what right was left to the owner of the minerals. Section 77 says that "The company shall not be entitled to any mines of coal . . . . under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased." Therefore, unless the mines have been expressly purchased, the company shall have no title to any part of them. Then the section continues—"and all such mines, excepting as aforesaid," that is, excepting such parts of the land as it is necessary to dig out or to carry away or to use for the construction of the works, "shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby." If that section had stood alone, the question might have been raised whether, although there are the words "all such mines shall be deemed to be excepted"—that is, that the railway company shall have no property in any part of the mines—nevertheless a right would have been by implication reserved to them of what is called natural support, or of support necessary to maintain the railway. If the owner of the land and

(4) 8 H.L. Cas. 348, 360; 30 Law J. Rep. Q.B. 49.

(5) Law Rep. 5 App. Cas. 821, 829 (Scotch).

(6) 4 Hurl. & N. 242; on app. 5 ibid. 680; 28 Law J. Rep. Exch. 147; on app. 29 Law J. Rep. Exch. 253.

minerals had granted the land to the company by way of purchase and sale, the mines being excepted out of the conveyance, it may be that inasmuch as he was selling to the company all but the mines, for the purpose of building a railway thereon, it would not be an unnatural implication to say that when he sold the land for that purpose it was right and reasonable to imply against him that he did not mean so to sell the land that he might let down the railway afterwards. In that case there would be an implication that he gave the right to support the railway, because he had granted the land to the railway company. But here, if section 77 had stood alone, that would be not because he granted the land to the railway company, but because they took from him against his will all but the minerals, and insisted that he should keep the minerals, although they had an option of buying them. They took the land without the minerals, having exercised their judgment as to whether they wanted them for the purposes of the railway or not. If the section had stood alone I should have been inclined to have agreed with Lord Westbury that there would not have been an implied right of support. But it is not necessary to determine that, because the section is accompanied by other sections.

Now, as to what is the true construction of these sections, we have the direct decision of the House of Lords in the case of *The Great Western Railway Company* v. *Bennett* (2). Although the circumstances which gave rise to that discussion were not the same as in the present case, it seems to me impossible to say that the question of what is the true construction of the statute as to determining the respective rights of the railway company and the owners of the land, at the time when the company originally purchased the whole of that land, including or excepting the mines, was not brought before the House of Lords in that case, and that it was not, at all events, reasonably necessary to enable them to decide the case before them. It seems to me that the House of Lords did decide what in their view was the true construction of these three sections, 77, 78 and 79, when read together, so as to determine the respective rights of railway companies and owners of land and minerals where a company purchases compulsorily. It seems to me that every one of their Lordships who gave an opinion in that case came to the same conclusion on that point—namely, that the Legislature, knowing what is called the natural right of an owner of land to support, and knowing also what would be the implication made by law in the case of a grant of all but the minerals by an owner of land and minerals to a company, meant by this statute to alter the ordinary law. Their Lordships came to the conclusion that, inasmuch as railway companies had obtained from Parliament a right of choosing whether they would buy the land either with or without the minerals, the meaning and the construction of the statute were, that when a company at the first purchase exercises a choice of buying the land only and not the minerals, the ordinary implications of law are gone, and that the minerals may be worked, as against the company, to the utmost extent, without regard to whether the working will or will not injure the railway, subject to their being worked in the way usual in the district. That is a boon partly to the company and partly to the owner of the minerals or to the person entitled to work them; but, with regard to a railway, it postpones the necessity of buying the whole of the minerals, and so leaves the capital necessary to purchase them in the hands of the railway company, because they may never want the minerals for any purpose. It may be, as has been pointed out, that the minerals will not be worked for a hundred years, and so, if the company were obliged to purchase, they would be deprived of their money during that time. That, therefore, was in favour of the company. But it would have been most unjust to give them that power and not to give some compensation to the owner of the mine, who has had the land, but not the mines, taken from him, and thus is prevented from working the mines; and it was necessary to guard him also. Therefore the House of Lords came to the conclusion that the Legislature had guarded him by saying that, if the railway company take

the land without the minerals, the mine owner may get in all the minerals. But that would be too much against the interests of the railway company, because, if so, the company would be liable to have the railway let down. Protection is, therefore, given to the company to counteract this right of the owner of the minerals; and not only the owner of the minerals, but whoever is entitled to work them, shall not work them even in the ordinary way, unless he has given the company thirty days' notice of his intention to do so, whether they have entered into any contract or not. The railway company are also given an option as against a person who has no other relation to them except that he is the owner of mines, and they may send a surveyor into the mines to advise whether it will be to their interest, for the purposes of support to the railway, to prevent the owner working the mines which he has a right to work, and they have a right to purchase compulsorily the whole or any part of the minerals. That is the power given to the railway company. Thereupon the House of Lords said that, looking at these powers, given first to the railway company, secondly to the owner of mines, and back again to the railway company, they had come to the conclusion that, if all that the company do is to exercise the option of making the first purchase, the minerals may, as against the company, be got to the utmost extent without regard to whether the so getting them will let down the railway or not; for if that happens it is the fault of the railway company in not exercising their rights. That appears from the judgment of every one of their Lordships in *Bennett's Case* (2). The Lord Chancellor says, "This section appears to me to leave the mine owner to work his mines exactly as he would if the surface belonged to him." Therefore, it follows from that, that he may work them so as to let down the surface. So Lord Cranworth says:—"It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface; and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered—nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all." That is, in other words, that the mines may be worked as against the railway company just as if they were in the hands of a person who was also the owner of the surface. Lord Westbury also remarks that the relation between the railway company and the mine owner is one so clearly defined, so useful to the railway company, and at the same time so fair and just to the mine owner, that he is astonished that any one could have any other view. To my mind that case has put this interpretation upon the statute: that it determines the rights of the railway company with regard to the owner of mines, and that, by determining that, it necessarily determines the converse right of the railway company; and that where a company have exercised their option of only buying the land and not the mines, under the Lands Clauses Consolidation Act as limited by the Railways Clauses Consolidation Act—where they do that and nothing more, the only right conveyed to them by the conveyance made under and by virtue of the statute, and to be interpreted by the statute, is that the mines may be worked against them to the utmost extent, even though such working may let down the railway, provided they are worked in the usual way. That is the right of the railway company, and the right of any one who has the mines as against them. If that be all the right of the company, then the defect of the plaintiff's case in this action is a defect in the plaintiff's right, and it is immaterial what is the right of the defendant as between him and any one but the company. It may be that he has been wrong as regards his lessor, but he has not interfered with

the rights of the plaintiff, and so this action cannot be maintained. In my view this case must be decided in favour of the defendant, upon these grounds: that the plaintiff can have no greater right than the railway company; and that, whatever the defendant has done with these mines, he has not interfered with any right of the plaintiff. I therefore prefer the judgment of Manisty, J.

BOWEN, L.J.—This is a very intricate matter, because, in the first place, the subject-matter is the right to support—an obscure right, even when it is created by contract; and it is also necessary to consider the effect on that right of certain sections of an Act of Parliament which do not deal with it in express terms. In this instance certain minerals were let in 1865 by the owner of the land to the defendant. A railway company subsequently served a notice to treat upon the landowner, and under their powers took the land which he had not demised. Part of this became superfluous land. The plaintiff became the ultimate purchaser of this superfluous land, and now claims under the railway company against the defendant, the lessee of the original lessor, for letting down the surface. The answer put forward by the defendant is that the plaintiff has no right to sue, because he could only claim under the railway company, and the effect of the Railways Clauses Consolidation Act upon the rights of the parties was to liberate the defendant from the previous liability to give a right to support. We have to consider whether that is a good answer. The learned Judge at the trial thought it was not. In order to make my view clear, I must begin by keeping distinct the different ways in which people acquire or possess interests in the surface of land. *Prima facie* every owner of land possesses everything between the sky and the centre of the earth, and he is the owner of all. But there are certain rights of support which follow as the natural incident of property when nothing is known of the origin of the rights between himself and his neighbour. He has a proprietary right to subjacent support. Supposing that land is found to be severed so that a portion above belongs to one person and a portion below to another, and nothing is known as to how that came about, the same sort of proprietary incident attaches, and *prima facie* the land above is entitled, not only to the support of the adjacent soil, but also of the soil below, as an incident of property. That, however, is where the origin of the severance is not known. When the origin is known, the rights of the parties entirely depend upon the deed, instrument, Act of Parliament or award which effects the severance or creates the right. It must be so, because the owner of the whole may do exactly what he likes with his own; he may carve it out exactly as he likes, and may grant the minerals, either reserving support to the surface, or so as to let down the surface; he may demise the minerals so as to entitle himself by reservation to a right to support of the surface; he may demise the minerals so as to give the lessee, not only a right to take them, but to destroy the surface. Passing to the special demise in this case, the words must be looked at so as to see how far the demise goes and how far the right of support is preserved. The lessor may demise all the minerals so as to make the lessee the owner of every inch, or he may also reserve to himself, by way of right arising from implied covenant or re-grant, a right to support, but still leaving the lessee owner of the mine; or he may demise only so much of the minerals as may be won without injury to the surface. Speaking generally, when nothing appears from the mere words of demise as to whether a right of support is reserved, I should say the true effect of the general words of demise would be to vest in the lessee the whole of the mineral stratum, preserving to the owner a right to support, in the nature of an implied covenant or re-grant. That seems to me to be so in the demise from Penson to Clayton, and I think the lessee under this demise became the occupier of the whole of the coal, and this may become important afterwards when dealing with the sections. What I have said is really consistent with, and is, in fact, justified by, the language of Lord Wensleydale, in *Rowbotham* v. *Wilson* (4), cited by Mr. Justice Blackburn in *Smith* v. *Darby* (3), which I read because part of Mr. Matthews'

argument ignored it:—"There is no doubt that *prima facie* the owner of the surface is entitled to the surface itself and all below it, *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or, it may be, from the Crown, as suggested by Lord Campbell in the case of *Humphries* v. *Brogden* (7). The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (*Touchstone*, 5 cap., p. 89) in illustration of the maxim, '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that by the grant of mines is granted the power to dig them. A similar presumption, *prima facie*, arises that the owner of mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case." Now, applying what I have said to the proprietorship of the surface of the land as distinguished from the proprietorship of the mines, too much stress cannot be laid upon what was pointed out by the Master of the Rolls, that when one uses the term "surface" as distinguished from "mines," one must not fall into the fallacy of supposing that that means "upon the surface." When I use the term "surface owner" as distinguished from the owner of the minerals I mean the owner of all except the minerals.

There are four classes of surface owners where there are minerals—first, the surface owner may be the same person as the owner of the minerals; secondly, the surface owner may be entitled to a right to support, not because there is a deed, but because nothing is known (except that he is the surface owner) as to how the stratum became severed; thirdly, the surface owner may have a right to support created by a document, in which case the extent of the right must vary according to the true construction of the document; fourthly, the surface owner may have no right to support at all, because he has given it away—as, for instance, in a mining lease, when the person who takes the mines takes the right to destroy the surface also.

Those being the classes of surface owners, the purchaser appears on the scene. First take the case of a railway company, not purchasing under their Act, but as an ordinary purchaser apart from their Act. It is clear that the company get from the surface owner only what the owner has to give, and what he intends to give. How is it known what he intends to give? The deed must be construed. Then, again, some deeds are silent, merely giving the land. In each case, assuming the deed is to be governed by the intention of the parties, the law gives a light by which to read it, for it is presumed that an instrument is intended to be effectual for the purpose for which it is created. To use the language of Lord Wensleydale, "*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*"

Now take each of the above classes of surface owners, and see how that helps one to know what passes by ordinary implication, where the words do not say anything definite. Take the case where the surface owner and the mineral owner are one and the same person, and thus has everything to give. What does the law imply that he gives? If the land was not sold to a railway company, the law would imply that he gave so much as was necessary for the natural enjoyment of it, for the support of the surface. But when a railway company buys for the purpose of a railway from such a person, the implication goes further, according to the case of *The Caledonian Railway Company* v. *Sprot* (8). The owner is taken to give, not merely the natural support to the land, but such support as is necessary to carry

(7) 12 Q.B. Rep. 739; 20 Law J. Rep. Q.B. 10.

(8) 2 Macq. Sc. App. 449.

out the object of the purchase. Take the second class—one apart from any Acts of Parliament—where a man has the surface, and, as a natural incident of property, has a right to support; if he passes the surface, it is to be presumed that he passes the right to support. He cannot give, at the expense of the owner of the mines, a right to support for the railway, but only a right to support of the surface. As to the third class, where the surface owner has a right to support created by a document, if the surface owner can, in virtue of his rights under the document, give the railway a right to support to the surface, he gives it because it is necessary to render the transaction effectual. If he can give more, he gives more. In the fourth class—namely, that of a surface owner who has the surface and no right to support—it is clear he cannot give the railway company anything but a mere right to the surface.

With regard to the third class, I must point out that the person who has a right to support created by deed between himself and the lessee of the mines, and who has transferred the surface to the railway company, transfers the right to support also, not because the covenant runs between vendor and vendee at law, but because the purchaser will be entitled to the benefit of whatever covenant, implied or express, existed between the lessor and the lessee, if it was the intention of the parties that he should have it.

Let us see how far the Act of Parliament alters the case. If the case was free from the Act, the railway company would get such a right to support as the landowners could give, if that was the intention of the parties. The first observation which arises upon the sections which we are approaching is, that they must not be treated as applying only to dealings between the railway company and one class of surface owners. It must be remembered that there are several classes of surface owners, that the sections in question are intended necessarily for the protection both of the railway company and of the surface owner, and that some surface owners cannot give the railway company protection at all. But for the language of Lord Westbury and of the Master of the Rolls, I should not myself have come to the conclusion that section 77, if it stood by itself, would in any way affect the right to support which passes, in any case which I have mentioned, from the surface owner to a railway company. The section says that "The company shall not be entitled to any mines of coal, ironstone, slate or other minerals under any land purchased by them." That is as wide as it can be, and means that the company shall not be deemed to be entitled to the mines merely because of the ordinary words of the conveyance from the surface owner, which otherwise would give the mines, if he had them to give.

Now, applying that to the various classes mentioned, how could those words, if they stood alone, take away any right to support which would have passed from the surface owner to the railway company? They are dealing with the mineral stratum, and not with the right to support. They can affect the right to support when by the demise or grant the right to support created as between the lessor and lessee of the mines was created by limiting the demise itself and reserving to the surface owner a certain portion of the mines, for the purpose of treating such portion as the natural support to the surface. In that particular class of cases, if there be such a document, the surface owner would have remained *pro tanto* the occupier of the mines and the mine owner, and thus section 77 would prevent the company from acquiring that particular right. Lord Westbury has in express terms said the contrary, and the Master of the Rolls is inclined to think so; but I should not have expressed such confidence in the view I take of section 77 had it not been for the view taken by Lord Selborne in *Dixon* v. *The Caledonian and Glasgow Railway Company* (5), where he said, "The first clause, section 70, says that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company a right to subjacent mines and minerals, unless the same shall have been expressly purchased. I need not more particularly refer to that; and I will only add that, as I understand that clause and the next, there would be nothing in those sections, if they stood alone, to deprive a railway company, pur-

chasing the surface from the owner of the land, of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favour of the landowner." He then goes on to say that the section there which corresponds to section 78 here does not make any difference. But then with reference to the section corresponding to section 79, he says (at p. 831) that it is a clause "which has the most important office of taking away that right to support, which, if there had been nothing said in that section, would have remained," that is, if not taken away by section 77.

That brings me to section 79, which I think is the cardinal section upon which this case hinges: sections 78 and 79 may be read together, and treat of the rights of owners of mines within forty yards of the railway, and they have been described in *Bennett's Case* (2) as forming a code, and they seem to me to be an enactment which sets free the hands of the mine owners within forty yards of the railway. I had some doubt as to what would be the effect upon land compulsorily purchased by a railway company which was beyond the distance of forty yards. I am not sure that it would be governed by *Bennett's Case* (2), upon the construction of the Act which I am about to mention. But that refined difficulty does not arise here, because the land in question is within that distance.

Now in *Bennett's Case* (2) the same person was the mine owner and the surface owner, and thus belonged to the first of the above classes, and he had sold the surface, but not the mines, to a railway company. He afterwards conveyed the reserved mines and minerals to Bennett, who gave the railway company notice under section 78 of his intention to work the mines, and asked for compensation. The question was as to what compensation he was entitled to, whether upon the basis that the original owner had parted to the railway company with the right of support to the surface, or with the right of support to the surface and the railway, or had parted with his right to nothing at all. The House of Lords decided that Bennett was to be compensated upon the basis that the original owner had parted with the right of support to nothing at all. That decision involves this, that section 79 applies in its widest terms to all mine owners who were, at the time of the purchase by the railway company, surface owners and mine owners also. In this case we are dealing, not with the first class, but with a different one. Why should not the same principle apply to a case in which before the conveyance to the railway company the minerals have been severed from the surface, either by some document which has been forgotten or by some demise which has been preserved? A distinction does exist, but does it make the difference in this case? This very point seems to have been in the mind of the Court in *Fletcher's Case* (6), which was affirmed by *Bennett's Case* (2). In that case Chief Justice Cockburn seems to have referred to this point, and to have expressed an opinion more in favour of the plaintiff than of the defendant. He says (at p. 698), "If indeed, prior to the conveyance, there was any separation of the surface soil from the minerals, the right of support would, no doubt, belong to the company, because if a landowner parts with the surface soil, he does so subject to the obligation of dealing with the substratum so as not to disturb the superincumbent soil. In such case, the landowners, having parted with the surface, and there being attached to the ownership of the soil the right to the support of the stratum below, would not be entitled to any compensation for the loss they may sustain in not working the minerals; but that is not the question which we have now to consider." Therefore that is an *obiter dictum* unfavourable to the defendant. Can it be supported? Take even the broadest case of all—that of a surface owner who has conveyed to a railway company, and of a mineral owner who is bound to support the land, by virtue, not of any deed, but because there is nothing to shew to the contrary. That is the second class. Approach section 79 to that case, and see if it is possible, without cutting down the words of the section, to cut down the rights of the mine owner. That section applies to every owner, lessee or occupier of any mines within forty yards of the railway, and to

every occupier of every mine, provided he is a mine owner.

I think upon the whole, although not without difficulty, that one must interpret this section in the broad way in which the Master of the Rolls has interpreted it. It has been objected that the surface may always be injured unless there is danger of injury to the works of the railway. That may be so; but that consideration does not seem to have prevented the House of Lords putting the construction upon the sections which they did put upon them in *Bennett's Case* (2). It was also objected that the effect of this construction is to release the hands of a mine owner who has covenanted with the original lessor not to let down the surface. There are only two answers to that. First, it does not follow that his hands are set free as regards his original lessor, for privity of covenant may still remain. It may be that in that way the original lessor may get some further compensation out of the sum which is awarded to the mine owner under the arbitration. But I will not express any final opinion as to that. The second answer is, that the mine owner does get that distinct proprietary advantage, because the Legislature has given it to him. It appears to me that the scope and the object of the Act are, that when a railway company approach a mine, they should have ample protection for their works, and the mine owner should have power (unless the railway company choose to avail themselves of the statutory means of protection)—the power which belongs to ordinary owners of land—to work the mines according to the usual manner of working such mines in the district. Therefore the answer to the plaintiff's claim is that he cannot sue, for he is not a lessor; and as between the railway company, under whom the plaintiff claims, and the mine owner, section 79 applies.

Appeal allowed.

Solicitors—A. S. Poyser, agent for H. A. Poyser, Wrexham, for plaintiff; Abbott, Jenkins & Co., agents for Lewis & Son, Wrexham, for defendant.

[IN THE COURT OF APPEAL.]

1883. June 4, 5. } SHAW *v.* BENSON AND OTHERS.*

Company—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4—*Unregistered Association of more than Twenty Members—Acquisition of Gain by Individual Members—Object of Association to carry on Business of Money-lending—Action on Promissory Note by Trustee.*

A mutual benefit society of more than twenty members, the object of whose business is, from a fund created by the contributions of its members, to lend money, not generally, but only to members of the association, upon approved security, carries on the business of money-lending which has for its object the acquisition of gain by the individual members thereof, within the meaning of 25 & 26 *Vict. c.* 89. *s.* 4; *and such an association, unless registered as a company under that Act, is illegal.*

The trustee of a society which is illegal under 25 & 26 *Vict. c.* 89. *s.* 4, *cannot maintain an action upon a promissory note given by a member of the society to secure a sum of money advanced to him under the rules of the society.*

Appeal from a judgment of Mathew, J.

Action to recover the balance remaining unpaid upon certain joint and several promissory notes for 500*l.* each, payable on demand, made by the defendants in favour of one Tetley, who indorsed the same to the plaintiff.

At the time when the notes were made Tetley was the chairman of a loan society called "The Thornhill Arms Commercial and Building Society," which was instituted in 1876, but was not registered, and consisted of more than twenty members. Its rules, so far as it is necessary to state them, were as follows:—

"Rule 2. The objects of this society are by certain monthly payments to form a fund, from which money may be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, real or leasehold, or to lend money to each other on approved personal security. The payments shall be at the rate of 1*l.* per month

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

for 100*l.* share, and in the same proportion for any number of shares or proportionate fractional parts of a share. The entrance fee shall be 2*s.* per share of 100*l.*, and in proportion for a half or quarter of a share. Five per cent. interest shall be charged on all moneys advanced by the society."

"Rule 3. The officers of the society shall consist of a president, a vice-president, treasurer, one steward and seven directors, who shall conduct the business of the society, and shall meet on the second Monday in each month. Five to form a quorum . . . . Officers to receive 5*s.* per month."

"Rule 4. This society shall remain open for the admission of new members, free from fines, for six months, after which time no new member shall be admitted without paying up the fines from the termination of the six months. All shares upon which only an entrance fee shall have been paid, at the end of six months shall be forfeited."

"Rule 5. Shares shall be sold by ticket, and the highest bidder shall be accepted as the purchaser. The amount bid for a share shall be deducted from such share whenever the purchaser draws it out. . . ."

"Rule 6. Upon all advances a fee at the rate of 2*s.* per 100*l.* shall be charged, which fee shall be equally divided amongst the officers and directors."

"Rule 7. A fine at the rate of a farthing per shilling per month shall be charged upon all moneys not paid into the society when due."

"Rule 9. The president shall open an account with one of the Huddersfield banks, on behalf and on account of the society, and have such advances from time to time as may be agreed upon by the officers and directors."

"Rule 15. Whenever the shares in the society cannot be disposed of by sale, the directors shall appoint a ballot for shares unadvanced, which shall be drawn in rotation out of a ballot-box. The names of the members whose shares are unpaid shall be placed in a book in rotation as drawn, and each shareholder shall take one share in such rotation, and give security according to these rules, or forfeit the sum of 10*s.* per share, or in the same proportion for fractional parts of a share. . . ."

"Rule 24. When each shareholder has received the amount of his share or shares, and all claims against the society are settled, the balance in hand (if any) shall be equally divided amongst the shareholders *pro rata* per share by way of drawback, but no shareholder in arrear shall be entitled to share in the drawback."

It appeared that the defendant Benson, and one Morton, whose executors are sued in this action, together with Brighouse and Bentley, were officers of a society called the Cherry Tree Building Society, and were indebted as such to two persons, Stoney and Armitage, in respect of certain moneys which had been borrowed by them, and for which they had given loan notes. It was proposed that they should become members of the Thornhill Arms Commercial and Building Society, and with the money borrowed from that society pay off the debt which they owed to Stoney and Armitage.

Benson, Morton, Brighouse and Bentley thereupon became members of the Thornhill Arms Club, and took shares to the amounts respectively required by them. No money passed between the parties, but Stoney and Armitage were credited in the books of the society with the amount of the debt owing to them, and received loan notes, with interest at five per cent., for their debt. The loan notes belonging to the Cherry Tree Building Society were delivered up and destroyed, and the promissory notes now sued upon, together with certain others, were given as security for the amounts of the Thornhill Arms Club loan notes.

The action was tried by Mathew, J., without a jury, at the Leeds Summer Assizes, 1882, and judgment was given for the defendants, upon the authority of *Jennings* v. *Hammond* (1), that the Thornhill Arms Society was an association having for its object the acquisition of gain, within the meaning of the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4 (2), and

(1) 51 Law J. Rep. Q.B. 493; Law Rep. 9 Q.B. D. 225.

(2) 25 & 26 Vict. c. 89. s. 4: "No company, association or partnership, consisting of more than twenty persons, shall be formed, after the commencement of this Act, for the purpose of carrying on any other business"—that is, any business other than banking—"that has for its object the acquisition of gain by the

not being registered was therefore an illegal association.

The plaintiff appealed.

Wills, Q.C. (with him *Davey, Q.C.*, and *E. Wilberforce*), for the plaintiff.—The plaintiff is entitled to recover, because, even assuming that the society of which he is the president is an illegal association, inasmuch as it was not incorporated or registered under the Companies Act, 1862, still he does not require any aid from any illegal transaction to establish his case, and therefore his claim is not affected by any illegality which may exist in connection with the management of this club—*Simpson* v. *Bloss* (3). The case comes within the authority of *In re Coltman; Coltman* v. *Coltman* (4), where it was held that the borrowers of money cannot afterwards say that they are relieved from liability because the lenders may not have had authority to lend it.

[He was then stopped by the Court.]

Charles, Q.C., and *J. Forbes, Q.C.* (with them *C. Dodd*), for the defendants.—The loan for which the promissory notes were given had its origin in an illegal transaction. The club could not legally borrow or lend money; consequently the notes sued upon were given for an illegal consideration—*Hammond* v. *Jennings* (1) and *In re The Padstow Total Loss and Collision Assurance Association* (5).

This was an illegal association within the meaning of the Companies Act, 1862. The object of the society, as disclosed by the rules, was to lend money at a profit, which was made by a charge of interest upon the loan. Further, profit was made by the levying of fines, and, if there were no borrowers, by putting the shares up to auction, and knocking them down to the highest bidder—see rules 7 and 15. This society was therefore an association consisting of more than twenty persons, within the language of section 4, which was formed for the purpose of carrying on business that has for its object the acquisition of gain. The association was illegal, and in contravention of section 4; everything which was done in furtherance of the carrying on of the business of the association was illegal; the promissory notes sued upon were given for the purpose of carrying on that business, and are therefore illegal. *In re The South Wales Atlantic Steamship Company* (6), *Rigby* v. *Connol* (7) and *In re Dale; ex parte Monkhouse* (8) were also referred to.

Wills, Q.C., and *Wilberforce*, in reply.—The question is, whether, assuming this society to be an illegal association, the money can be recovered. The action is brought upon a promissory note, which is in writing, and expresses the parties between whom the contract is made. No doubt it may be shewn *aliunde* that that is not the real contract; but there is no evidence here to shew that it is not the real contract. This case is within the principles laid down in *Simpson* v. *Bloss* (3) and *Fivaz* v. *Nicholls* (9). The real question is, whether the plaintiff can make out his case without going into the nature of the society. There is nothing illegal in the loan itself or in the promise to repay it; nor is there anything illegal in the purpose for which the money which is borrowed is to be applied—*Ex parte Coltman; Coltman* v. *Coltman* (4). If the purpose of the transaction is illegal, then the illegality will taint the whole of the transaction. But here the purpose for which the money was lent was to pay off a just debt owed by the borrower. The only illegality which can be imported into this case is that the money was borrowed from a society consisting of more than twenty persons; but the fact that the money comes from an illegal source cannot relieve the defendants from their liability to repay it. When the money has come into the hands of the borrower, the illegality (if

company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Act . . . ."

(3) 7 Taunt. 246.

(4) 51 Law J. Rep. Chanc. 3; Law Rep. 19 Ch. D. 64.

(5) 51 Law J. Rep. Chanc. 344; Law Rep. 20 Ch. D. 137.

(6) 46 Law J. Rep. Chanc. 177; Law Rep. 2 Ch. D. 763.

(7) 49 Law J. Rep. Chanc. 328; Law Rep. 4 Ch. D. 482.

(8) 45 Law J. Rep. Bankr. 71; Law Rep. 1 Ch. D. 287.

(9) 2 Com. B. Rep. 501; 15 Law J. Rep. C.P. 125.

any) is stopped. The lending of money is not in itself illegal.

[BRETT, M.R.—The point put against the plaintiff is that the borrowing and lending of money are both a part of the mode of carrying on the business of an illegal society.]

This is not a society which requires to be registered; it is in the nature of a savings bank, and is a means of enabling its members to save; it is not instituted for the purpose of carrying on a business the object of which is the acquisition of gain—*Smith* v. *Anderson* (10). It is wrong to say that the society makes a profit by putting the shares up to auction; that is merely a subsidiary matter, and is not the object of the society—*The Queen* v. *Whitmarsh* (11). It has been held in the case of *Wigfield* v. *Potter* (12) that a money club does not require to be registered under the Companies Act, 1862, inasmuch as the object for which it is formed is not the acquisition of gain within the meaning of section 4. *Bear* v. *Bromley* (13) and *Moore* v. *Rawlings* (14) were also cited.

BRETT, M.R.—In this case the first point is, whether this society is an association within the meaning of section 4 of the Companies Act, 1862, which ought to have been registered. If the society is within that section, inasmuch as it ought to have been registered but has not been registered, it is a prohibited society, and in that sense is an illegal association. In order to see whether it is within that section the question must be whether it fulfils all the descriptions of a society mentioned in that section. The society is an association of more than twenty persons, and so far it comes within the description. But is it formed for the purpose of carrying on any business, other than the business of banking, that has for its object the acquisition of gain? That must depend upon the subject-matter of the business of the society. The object of the society is to form a fund from which money may be advanced to enable shareholders to build or purchase a dwelling-house or other buildings real or leasehold. So far, therefore, its object is to form a fund from which money may be lent in order to be spent in a particular way: the money is only to be lent to shareholders or to each other upon approved personal security. The society is therefore formed to lend money. If I lend money to a person upon a particular occasion, although he is to pay interest until he pays back the sum lent, I am not carrying on the business of money-lending. But if I form a fund of a thousand pounds, and am willing to lend it to a person or any number of persons, and as I get it back will lend it to other people upon interest, I am lending money, so long as I choose to carry on that mode of earning my livelihood, by successive operations for the purpose of gaining interest. That becomes a business, because it is done, not once, but successively, and with the intention of carrying it on so long as money may be gained by that operation, and is the business of money-lending. So far as this association is concerned, it is formed for the purpose of lending money, not once, but by successive operations. It seems to me, therefore, that the association is formed for the purpose of carrying on the business of money-lending. But that is not the whole of the description of carrying on a business which has for its object the acquisition of gain; it must have for its object the acquisition of gain by a company, association or partnership. Gain does not come to a company. If a company is treated as a concrete thing, I do not see that it gains anything. Then the section says, "or by the individual members thereof." It may be said, and in one sense truly, that gain may not be made by some of the members. It is said that it must be made by all of the members. But if it is said that gain must be acquired by every member, it follows that no mutual association can ever be within the statute. That, however, was held not to be the meaning of the section in the case of *In re The Pad-*

(10) 50 Law J. Rep. Chanc. 39; Law Rep. 15 Ch. D. 247, 278.

(11) 15 Q.B. Rep. 600; 19 Law J. Rep. Q.B. 469.

(12) 45 Law Times, N.S. 612.

(13) 18 Q.B. Rep. 271; 21 Law J. Rep. Q.B. 354.

(14) 2 Com. B. Rep. N.S. 289; 28 Law J. Rep. C.P. 247.

stow Total Loss and Collision Assurance Association (5), where a mutual association of more than twenty members was formed to insure ships, not generally, but ships of the individual members; and that, it was held, was not sufficient to take the case out of the statute. *The Padstow Association Case* (5) is a binding authority to shew that the mere fact of the members dealing among themselves does not prevent the statute from applying; and I think that it also shews that if each member might by the constitution of the association acquire gain, the association is one which comes within the statute. The association, therefore, must be doing something which amounts to a business, and which business taken as a whole must be producing gain. In this case the members may be divided into borrowing and lending members. The gain which is obtained by the borrowing members I confess I do not quite appreciate. It was said by Mr. Forbes that a member could borrow money at five per cent. instead of at seven per cent. interest; but a lending member, to my mind, clearly gains the interest upon the money which he lends. Then each member of this society might be, not a borrowing, but a lending member, who gets a share of the gain acquired by the society which is carrying on the business of money-lending. If that be so, it is a prohibited society within the meaning of the statute, unless it is registered; it has not been registered, and is therefore an illegal society.

Then arises the second question, whether, the society being illegal, the plaintiff can sue as trustee. If the society cannot sue I do not think that the plaintiff can sue, for he can be in no better position than the society of which he is the trustee. This depends upon the question whether the contract upon which he is suing is an illegal contract or not. It was argued that the mere fact of the plaintiff being the trustee of an illegal society would prevent him from recovering on behalf of the society upon the contract of loan of money which the defendants have had. But I am unable to agree to that proposition. If the objection had been based merely upon the fact of the society being illegal, I should not have thought that that fact would have made the contract itself illegal. But if the contract is illegal, it could not be enforced. The question therefore is, whether the contract is illegal. A contract merely to lend money is not in itself illegal. But the contract here is a contract by this society to lend money according to its rules to the person to whom the rules allow it to be lent; and it is lent upon the terms that it is to be repaid according to the rules of the society. It is not therefore simply a loan of money which is to be repaid by the borrower; but it is a loan which is made under, by and according to the rules. The rules therefore are made a part of the contract, but they are the rules of a prohibited society. That, to my mind, makes this contract an illegal contract. In my opinion, therefore, the plaintiff cannot recover. The case is brought within the decision in *Jennings* v. *Hammond* (1), which I think was rightly decided.

LINDLEY, L.J.—I do not see my way to differ from the decision of Mr. Justice Mathew, which proceeded upon the authority of the case of *Jennings* v. *Hammond* (1). It is impossible to look at the rules of the society which state the object for which it was constituted and not see that the object of the society is what the rules state it to be—namely, to turn the members into a money-lending society—and it is known how that is worked out in practice. It is extremely difficult to say that the society is not formed for the purpose of carrying on a business that has for its object the acquisition of gain. Then it is said that it was not formed for the purpose of acquiring gain within the meaning of section 4. The meaning of "acquisition of gain by the individual members thereof" turns upon the mode in which that language has been construed in the cases. The present case is governed in principle by the decision in the *Padstow Case* (5), and it would be splitting straws to attempt to draw any distinction between the two cases. Next, the action is in form brought upon a promissory note. There is nothing illegal in that; but the plaintiff is the trustee of a prohibited society, and one which is prevented from doing that which the law

says it shall not do; and, as in the case of *Jennings* v. *Hammond* (1), I do not see how that difficulty is to be got over. The society here is attempting to do the very thing which it was formed to do, but which the Act of Parliament says that it shall not do. The appeal must therefore be dismissed.

FRY, L.J.—I am entirely of the same opinion. The first enquiry is, whether this is an association which requires to be registered, within the meaning of section 4. An association within that section if not registered is illegal. The constitution of this company results in this, that some of its members may become borrowing members of the fund which is formed by the contributions of the members. Some of these members would become borrowing members at an early day and others at a late day. The first member who receives 100*l.* from the association would pay 119*l.* in all, and would get the use of 100*l.* for nearly seven years, whereas the last member would receive 100*l.* in return for 84*l.* which he has paid as monthly contributions, and not have the use of the money. The one member gains the use of the money upon reasonable terms, whilst the other gains the interest which is paid. That seems to me to be the result of the complicated machinery of the society. It seems to me that there is "gain" within the meaning of the word used in section 4, and that it is plain that a member who does not become a borrowing member until a late period in the history of the association has derived gain by the storing up of the interest which is paid by a borrowing member. It would appear to me to be a serious question whether gain can be said to have been received by the association, and I agree that it does not appear that the association has gained anything. That point, however, has been determined by the decision in the *Padstow Case* (5). It is therefore obvious that the whole gain is that which results from the common contributions of the members, some of whom might not gain anything. But the decision of the Court of Appeal proceeded upon the principle that the acquisition of gain by each member was enough to bring the case within the words of the Act.

I observe that the Master of the Rolls in the *Padstow Case* (5) expresses the view that we ought so to construe the Act as fairly and properly to carry out its provisions without a too minute or hypercritical consideration of its terms. I entirely agree with that view. That case is conclusive upon the first point that this is an illegal association. If, therefore, this is an illegal association, it is plain that the business is an illegal business. This question has been the subject of decision in the case of *In re The South Wales Atlantic Steamship Company* (6), where the Court of Appeal held the business there was illegal because the association was illegal. If the business is illegal, it follows that every contract which is made for the purpose of carrying on that business must be illegal. The defendants here became members of this society for the purpose of borrowing money; and it is plain that that alone was a step in the carrying on of the business of the association. The transaction, being one which was entered into by the members for the purpose of carrying on the illegal business of the association, is therefore an illegal transaction. With regard to the other question, the action is in fact brought on behalf of the association to enforce a transaction which was carried on by an illegal association. Every step was an illegal one, and every member was joining in an illegal act. I think that the decision in the case of *Jennings* v. *Hammond* (1) was entirely correct, and this appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—Peace & Co., agents for Learoyd & Co., Huddersfield, for plaintiff; C. Fitch, agent for Edwin Sykes & Son, Huddersfield, for defendants Benson and others; Iliffe & Co., agents for Fisher & Preston, Huddersfield, for defendant Morton.

[IN THE COURT OF APPEAL.]

1883. June 29. } KEARSLEY *v.* PHILIPS AND OTHERS.*

Mortgagor and Mortgagee—Effect of Attornment by Mortgagor as Tenant to Mortgagee—Distress—Power for Mortgagee to Distrain—Seizure of Goods of Third Party without Notice.

An attornment in a mortgage-deed by the mortgagor as tenant to the mortgagee at a rent reserved creates a tenancy and rent with all its incident remedies, so that the mortgagee can in such a case distrain upon the goods of a third person, who has no notice of the mortgage, which may be on the mortgaged premises at the time of default in payment of rent by the mortgagor.

Appeal by the plaintiff from the judgment of Field, J., on a demurrer to a reply.

The statement of claim alleged that in December, 1881, and at the date of the distress levied by the defendants, J. King occupied certain premises as yearly tenant to James Kearsley, the brother of the plaintiff, and that he had in possession on those premises certain chattels, subject to an assignment made by him to the plaintiff by a duly registered bill of sale dated the 22nd of November, 1881. Under a proviso in the bill of sale, the plaintiff Robert Kearsley was at the date of the distress levied by the defendants the owner and entitled to the possession of the chattels comprised in the bill of sale, and also entitled to the possession of the premises.

On the 2nd of December, 1881, the defendants Mapleston & Son, as agents for the defendants Philips and Du Cane, who claimed to be mortgagees for a term of years of these premises under a mortgage made to them by James Kearsley in August, 1875, distrained the chattels upon the premises assigned to the plaintiff by the bill of sale.

At the time when the distress was made, no rent was due or alleged by the defendants to be due from King, the tenant of the premises.

The claim further alleged that the distress was excessive, that the defendants had not rendered any account to the plaintiff of the money produced by the sale of the goods, that the defendants Philips and Du Cane had turned King out of the premises and had let them to other tenants.

The statement of defence was as follows:

The defendants say that at the time of the committing the alleged trespass in the statement of claim mentioned the coachworks and premises in Derby Street, Cheetham, were mortgaged to the defendants Philips and Du Cane, to secure the sum of 6,000*l.* advanced by the said defendants to James Kearsley, the brother of the plaintiff, and interest thereon.

By the indenture of mortgage of the 23rd of August, 1875, the said James Kearsley demised the said coachworks and premises, together with all engines, fixed plant, shafting works, apparatus, boilers, and fixtures, in, upon or about the said premises, to the defendants Philips and Du Cane for the residue then unexpired, except the last day, of a term of 993 years, created by an indenture of lease to the said James Kearsley, dated the 31st day of January, 1875, and which term commenced from the 29th day of September, 1874; and by the said indenture of mortgage it was stipulated and declared that if the said James Kearsley made default in payment of the interest to the said defendants for the space of forty-two days, it should be lawful for the defendants to enter the said premises without the consent of the said James Kearsley, and to sell the said coachworks, fixed plant, fixtures and premises by public auction or private contract. Default was made by the said James Kearsley.

By the said indenture of mortgage the said James Kearsley attorned and became tenant to the said Philips and Du Cane at the yearly rent of 360*l.* per annum, to be paid by equal half-yearly payments; and it was further provided by the said indenture of mortgage that it should be lawful for the mortgagees to determine the said tenancy by giving to the said mortgagor or his assigns seven days' notice in that behalf.

Both before and on the 2nd of December, 1881, the said James Kearsley was in arrear with his rent to the said

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defendants Philips and Du Cane; and by their agents, Messrs. Mapleston & Son, they lawfully distrained the goods and chattels on the demised premises, which are the alleged trespasses complained of by the plaintiff.

The defendants Philips and Du Cane subsequently, by notice in writing in accordance with the proviso in the indenture of mortgage, determined the tenancy of the said James Kearsley, and re-entered and took possession of the said demised premises.

The statement of defence also denied the other allegations of the statement of claim.

Reply.

1. The plaintiff joins issue with the defendants upon their statement of defence, except so far as the same admits the allegations of the statement of claim.

2. In the alternative the plaintiff says that neither the plaintiff nor the said John King had any notice or knowledge of the said alleged indenture of the 23rd of August, 1875, or of the alleged contents or provisions thereof or of any of them.

3. In the month of November, 1881, the said James Kearsley was lawfully and in fact in possession of the said premises, and in receipt of the rents and profits thereof, and the defendants Philips and Du Cane never in any way interfered with or required the same. The said John King then became tenant of the said premises to the said James Kearsley, at the yearly rent of 435*l*. The plaintiff relies upon the 5th sub-section of the 25th section of the Judicature Act, 1873.

4. The said James Kearsley was not at the time of the alleged attornment in possession or occupation of the said premises or of any part thereof; nor had the said John King or the plaintiff, at any time previous to the commission by the defendants of the acts complained of, any notice whatever of any such alleged attornment or tenancy of the said James Kearsley to the defendants Philips and Du Cane or either of them.

Rejoinder.

The defendants Philips and Mapleston join issue upon the second, third and fourth paragraphs of the plaintiff's reply.

The defendant Alfred Richard Du Cane died on the 19th of October, 1882.

The defendants demur to paragraphs numbered 2, 3 and 4 of the plaintiff's reply, and say that the same are bad in law, on the ground that want of notice to the plaintiff of the 23rd of August, 1875, cannot affect the rights of the mortgagees Philips and Du Cane under their mortgage-deed, and also upon the further ground that the sub-letting by the mortgagor Kearsley to the said King did not destroy the privity of contract between the defendants Philips and Du Cane as mortgagees, and the said Kearsley as mortgagor; and also upon the further ground that want of notice of the attornment clause in the mortgage-deed to the plaintiff does not and cannot affect the rights of the defendants Philips and Du Cane under the indenture of the 23rd of August, 1875, and on other grounds sufficient in law to sustain their demurrer.

Field, J., gave judgment for the defendants.

The plaintiff appealed.

Ambrose, Q.C., and *Bigham*, for the plaintiff.—It is admitted that in an ordinary tenancy, where the tenant is actually tenant for all purposes, the landlord can distrain upon, with certain recognised exceptions, whatever he may find upon the premises; but there has always been a disposition to protect the interests of third parties—*Evans* v. *Elliot* (1). In this case the mortgagees never interfered, and the mortgagor demised the premises and received the rent; the tenant, moreover, never had any notice of the mortgage—*Trent* v. *Hunt* (2) and *Snell* v. *Finch* (3).

A mortgagor is in equity owner of the premises; the mortgagee is only owner of a sum of money charged on them. The relationship of landlord and tenant only exists, in the case of such an attornment as this, by a kind of legal fiction, the result of which is, no doubt, to create an estoppel between the mortgagor and mortgagee, but which does not really exist and

(1) 9 Ad. & E. 342; 8 Law J. Rep. Q.B. 51.

(2) 9 Exch. Rep. 14; 22 Law J. Rep. Exch. 318.

(3) 13 Com. B. Rep. N.S. 651; 32 Law J. Rep. C.P. 117.

so cannot affect third parties. In *Morton* v. *Woods* (4), the parties were excluded by that estoppel: that is not so here; and in *Ex parte Punnett* (5), James, L.J., speaks of "the fiction of a tenancy."

[BRETT, M.R.—In the note to *Keech* v. *Hall* (6) it is said that "a mortgage-deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent," and then that this "creates a rent properly so called with all its incident remedies."]

No case has decided that such a tenancy has all the incidents of a tenancy at law with regard to the goods of third parties.

[BRETT, M.R.—*Anderson* v. *The Midland Railway Company* (7) goes to a considerable length in that direction, and seems to shew that the Court there considered there was created the relation of landlord and tenant with all its incidents.]

Further, the replication shews that James Kearsley was not in possession at the time when the alleged attornment was made, and therefore he could not attorn.

[FRY, L.J.—Why not by deed? Besides, he was in possession of the rents and profits.]

Smyly, for the defendants, was not called on, but referred to *Pinhorn* v. *Souster* (8).

BRETT, M.R.—I am of opinion that the judgment of Mr. Justice Field was right to its full extent. In this case James Kearsley was the possessor of these premises for a term of 993 years, created by a lease beginning on the 29th of September, 1874. He on the 23rd of August, 1875, demised them by way of mortgage to the defendants Philips and Du Cane for the residue then unexpired, except the last day, of that term; and he, by a clause in that deed, attorned and became tenant to these defendants at a yearly rent, to be paid half-yearly. After the execution of that mortgage, James Kearsley let the same premises in 1881 to King, as a yearly tenant; and some goods on the premises which belonged to the plaintiff Robert Kearsley have been distrained by the defendants on default made by James Kearsley in the payment of the rent to the defendants.

It is not denied that the mortgagor could so mortgage the premises; but the question is, what effect the deed made between the mortgagor and the mortgagees has upon the rights of a third party who had no notice of the mortgage. I am of opinion that the note to *Keech* v. *Hall* (6) is correct in its terms, and that the provision that a mortgagor shall be tenant to a mortgagee at a rent "creates a rent properly so called, with all its incident remedies."

In the case now before us the mortgagor let the premises after the mortgage to a tenant. The goods of the tenant passed to the plaintiff under a bill of sale; but that fact does not affect this case, for the plaintiff was an absolute stranger with regard to the mortgagor and mortgagees. It is not denied that if a real relation of landlord and tenant existed at all it must have all the incidents of a tenancy properly so called, and then that the goods of the plaintiff were liable to distress.

The question is, then, whether the mortgagee has, besides the right to rent, all the incidents of rent, and all the remedies for the recovery of rent. I think that the reason of the decision in *Morton* v. *Woods* (4) shews that this tenancy must be treated at law as though the ordinary relation of landlord and tenant existed. The case of *Anderson* v. *The Midland Railway Company* (7) carries the case even farther, for the Judges there applied that relation in the case of an agreement for a lease to a statute passed in express terms to deal with the relation of landlord and tenant. That goes to shew that the relation of landlord and tenant created by such a mortgage-deed as this is in fact the same real relation as that between an ordinary landlord and tenant; that it is acknowledged to be so both at equity and common law; and therefore that all the incidents of a tenancy apply to such a relation as that created by a mortgage-deed such as this. This appeal must therefore be dismissed; but, as there has been an application for leave to amend, and that

(4) 37 Law J. Rep. Q.B. 242; Law Rep. 4 Q.B. 293.
(5) 50 Law J. Rep. Chanc. 212; Law Rep. 16 Ch. D. 226.
(6) 1 Sm. L.C. 8th ed. p. 574, at p. 583.
(7) 3 E. & E. 614; 30 Law J. Rep. Q.B. 94.
(8) 8 Exch. Rep. 763.

application has not been opposed, leave to amend will be given, on payment of costs.

LINDLEY, L.J.—I am of the same opinion. I think that the right of distress existed in this case. The dates in this case are not unimportant. The mortgage by James Kearsley to the defendants Philips and Du Cane was made in August, 1875, and King became tenant to the mortgagor in 1881. I consider King to be, for the purposes of the distress, a stranger; and the question is whether the mortgagees could distrain—that is, whether the mortgagor was tenant at a fixed rent to the mortgagees.

I think that the question is really concluded by the cases of *Jolly* v. *Arbuthnot* (9), *Morton* v. *Woods* (4), *Anderson* v. *The Midland Railway Company* (7), and *Pinhorn* v. *Souster* (8). In this last case Baron Parke said:—"We disposed of every point except one, and upon that we took time to consider. The action was for a distress upon the plaintiff's goods on the premises of one Quested, who was both mortgagor and tenant at will under a deed. That deed contained a clause which we held to create a tenancy at will." I think that in the case now before the Court there was a tenancy by attornment, that rent was created, and therefore that the appeal fails.

FRY, L.J.—I agree that this appeal must be dismissed. It seems to me that the question of attornment is immaterial when it can be seen that there is a real tenancy created; but if it were material, then I do not assent to the argument that such an attornment as this is not valid, because the mortgagor was not at the time in actual possession of the premises.

Appeal dismissed.

Solicitors—Pritchard & Englefield, agents for Storer & Lloyd, Manchester, for plaintiff; Johnson & Weatheralls, agents for Wigglesworth & Rogerson, for defendants.

(9) 4 De Gex & J. 224; 28 Law J. Rep. Chanc. 547.

[IN THE COURT OF APPEAL.]

1883. June 7, 8. } WEBB *v.* STENTON AND OTHERS.*

Attachment of Debts—Garnishee Order—Debt owing or accruing—Interest arising from Trust Fund—Order XLV. rule 2.

The income arising from a trust fund and payable half yearly to the cestui que trust is not a debt "owing or accruing" within the meaning of Order XLV. rule 2, *and cannot be attached before it has actually come into the hands of the trustees.*

Jones *v.* Thompson (27 Law J. Rep. Q.B. 234) *and* Tapp *v.* Jones (44 Law J. Rep. Q.B. 127) *followed.*

In re Cowan's Estate (49 Law J. Rep. Chanc. 402) *and* Chatterton *v.* Watney (50 Law J. Rep. Chanc. 227) *commented on.*

Appeal from a judgment of the Queen's Bench Division upon a Special Case stated in the matter of a garnishee order.

The plaintiff in October, 1878, had obtained judgment against one Hatton for debt and costs amounting to 60*l.* 15*s.* 5*d.*

On the 11th of November, 1882, a garnishee order was made by Field, J., at chambers, attaching all debts owing or accruing from the defendants to the judgment debtor. An issue was subsequently ordered to be tried, and the question raised thereby was ordered to be disposed of by way of Special Case, in which the following facts were stated:—

The judgment debtor, Hatton, had become entitled in August, 1882, under a will, for his life, to a share in the income arising from the trust fund under the will, which share amounted to about 85*l.* a year, payable half-yearly in February and August.

By a mortgage dated the 31st of October, 1882, the judgment debtor had assigned his interest under the will to one of the defendants to secure repayment of a sum of 300*l.* and interest.

One payment of 60*l.* had been made to the judgment debtor on account of his share of income due to him under the will.

The question for the Court was whether the interest to which the judgment debtor became entitled under the will was attach-

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

able under Order XLV. rule 2, on the 11th of November, 1882.

The trustees of the will were made defendants in the issue.

The Divisional Court (Cave, J., and Day, J.) refused to grant the order, being of opinion that there was no debt owing or accruing from the defendants to the judgment debtor at the time when the order was asked for.

The plaintiff appealed.

Lumley Smith, Q.C., and *E. J. Castle*, for the plaintiff.—Rule 2 of Order XLV. expressly provides that all debts owing or accruing from a person who is indebted to the judgment debtor are attachable to answer the judgment debt. That rule is similar to section 61 of the Common Law Procedure Act, 1854, which applied only to a legal debt; but since the Judicature Act, the word "debt" must be enlarged so as to include all debts which are recoverable both in equity and at common law. Under Order III. rule 6, a writ may be specially indorsed in all actions where the claim is in respect of a debt or liquidated demand, bill, cheque or note, or on a trust.

[FRY, L.J.—The words "or on a trust" seem to be contrasted with the word "debt." That rule does not shew that a sum payable by a trustee is a debt.]

The words are not in contradistinction to each other, so that a *cestui que trust* can now issue a specially indorsed writ against a trustee for a sum due to him.

[LINDLEY, L.J.—*Horsley* v. *Cox* (1) shews that before the Judicature Act a judgment creditor could not obtain a charge in equity on an equitable debt.

In *Dundas* v. *Wilson* (2) it was decided by Quain, J., at chambers, that an equitable as well as a legal debt could now be attached, and that the debt need not be due. That decision has been continually acted upon at chambers. The word "debt" is intended to apply to everything which a person could recover. There is no definition of the word "debt," and it must be taken to apply to all sums recoverable by proceedings at common law or in equity. The interest of the judgment debtor is also apportionable. In *Nash* v. *Pease* (3), where the judgment debtor was entitled to an annuity for the maintenance of herself and son, it was held that the annuity could be attached in the hands of the trustees, subject to an enquiry as to the sum to be apportioned for the maintenance of the son. The forms of order given in *Seton on Decrees* (4) shew that sums accruing due are now attachable. The fact that the sum of money is not due at the date when the order to attach is asked for will not affect this question, for an order to pay could be made afterwards as a matter of course. The case of *Tapp* v. *Jones* (5) is in point, and shews that an order may be made for the payment of an accruing debt to a judgment creditor when it shall become payable by the garnishee to the judgment debtor. That decision was approved of by Hall, V.C., in the case of *In re Cowan's Estate* (6). The requirements of Order XLV. rule 2, will be satisfied if there is an "indebtedness"; it is not necessary that the debt should be actually due. *Wilson* v. *Rhodes* (7), and the Judicature Act, 1875, App. H, forms No. 37 and 38, were also referred to.

Charles, Q.C., and *Vernon Smith*, for the garnishees.—There was nothing due at the time when the garnishee order was made which can be described as "a debt." The moment a man is indebted to another the Court can attach accruing debts. *Jones* v. *Thompson* (8) shews that an accruing debt is an existing debt due from the garnishee to the judgment debtor, although the time of payment may be postponed. There must be an actual obligation on the part of the garnishee to pay the debt at some time or other. In *Hall* v. *Pritchett* (9) it was held that the accruing instalments of the salary of a medical officer could not be attached, because there was not any actual debt due. It does not

(1) 38 Law J. Rep. Chanc. 285; Law Rep. 4 Ch. App. 92.
(2) Weekly Notes, 1875, p. 232.
(3) 47 Law J. Rep. Q.B. 766.
(4) Pp. 311, 1658 (4th ed.).
(5) 44 Law J. Rep. Q.B. 127; Law Rep. 10 Q.B. 591.
(6) 49 Law J. Rep. Chanc. 402; Law Rep. 14 Ch. D. 638, 643.
(7) Law Rep. 8 Ch. D. 777.
(8) E. B. & E. 63; 27 Law J. Rep. Q.B. 234.
(9) 47 Law J. Rep. Q.B. 15; Law Rep. 3 Q.B. D. 215.

follow that the judgment creditor would be without any remedy if this order is not made, for possibly he might obtain equitable execution by the appointment of a receiver.

Castle replied.

BRETT, M.R.—It seems to me upon the statement in the Special Case that there was not at the time when the present order was asked anything that could be called a debt, for there was not any money—the proceeds of this trust fund—in the hands of the trustees. It was admitted that if things went on well money would come into their hands at the next half-year from the proceeds of the property, and that a share of that money would be payable by them to the *cestui que trust*. The question is, whether the judgment creditor can, under Order XLV. rule 2, obtain a garnishee order to attach anything in the hands of the trustees. Upon the plain words of that rule it seems to me that no order can be made, unless some third person at the time when the order is asked for is indebted to the judgment debtor. But where such a person is indebted, then an order may be made attaching all debts owing or accruing from him to the judgment debtor. The order may be made in respect of a debt due from such third person and payable *in præsenti*; so also in respect of a debt *debitum in præsenti, solvendum in futuro*, for that is an indebtedness, and there is therefore a debt, although it is not payable until some future time, in respect of which an order to attach could be made, because it is a debt which satisfies the words of the rule that the garnishee "is indebted." Then the rule says that all debts "owing or accruing" may be attached. I should think that, if there is not clearly a debt payable *in præsenti*, but an accruing debt within the meaning of this rule—a debt which exists at the time when the order is asked for, although it is not payable *in præsenti*—an order might be made to attach it. The Special Case seems to me to shew that here there is no debt payable *in præsenti*.

The question, therefore, comes to be, whether that which is sought to be attached is an accruing debt within the meaning of Order XLV. rule 2. If it is, I agree that the order ought to be made, even though no part of the money so sought to be attached is payable *in præsenti*. The duty is therefore imposed upon us of saying what is the meaning of the words "accruing debt" in this rule. Those words cannot mean any debt which may at any future time arise between the judgment debtor and the third person whose name is brought forward, where there is no contract or anything which can create any legal or equitable relation between them, because it is possible that such third person may not become debtor to the judgment debtor. The meaning of "accruing debt" must be something short of that. I cannot say that it may be a future debt—that is, a debt which there is some probability from the circumstances may arise. It must be something, therefore, which the law recognises as a debt. The meaning of "accruing debt" in section 61 of the Common Law Procedure Act, 1854, which is to the same effect as Order XLV. rule 2, was dealt with in *Jones* v. *Thompson* (8), where Mr. Justice Crompton said:—"I myself at chambers have always acted on the supposition that the garnishee clauses apply only to cases in which there is an existing debt, though it may be only accruing. On that principle I have refused to make orders attaching rent before it became due, and instalments of an annuity not yet due, because they were not debts." So also Mr. Justice Wightman said, "Mr. Prentice relies on the words 'or accruing'; but I think that these words are intended to apply to those cases in which there is *debitum in præsenti, solvendum in futuro*. I think that to bring the case within the statute there must be a debt, though it need not be yet due;" and Mr. Justice Crompton, "There must under this Act be a debt as much as in bankruptcy. I do not agree that the use of the word 'accruing' makes a distinction on this point; there must be a debt, though it may not be yet due; and so there would be, therefore, if there were a bankruptcy proveable under rebate (10). I have always acted on the principle that it is not enough to shew that it is very probable that there soon will be a debt, but that it must be

(10) *Sic* as reported in E. B. & E.

shewn that there is a debt, though it need not be yet due." Anything more clear and concise than that I cannot conceive; and if we were to construe "accruing debt" in any other sense, we must overrule the decision of the Queen's Bench in *Tapp* v. *Jones* (5), where Mr. Justice Blackburn said, "It is evident that the Legislature had in view both present debt and future debt, *debita in præsenti, solvenda in futuro*, for it speaks in the earlier part of the section of 'debts owing or accruing.'" It is to be observed that the expression "present debt" does not require any addition to the description; but "future debt" is construed by adding to the description the words "*debita in præsenti, solvenda in futuro*"; for debts owing and accruing are spoken of in the earlier part of section 61. The words "accruing debt" having, therefore, in 1875 been construed to be *debitum in præsenti, solvendum in futuro*, that is a debt which is known to the law. The law has always recognised two kinds of debt. First, a debt payable at the time; and, secondly, a debt due at the time, but *solvendum in futuro*. Unless, therefore, some interpretation can be put upon Order XLV. rule 2, which shews that a new kind of debt has been invented which was not known to law, then accruing debt can only be what the Judges have stated it to be. Can it be said that this rule was intended to invent a new kind of debt? It is to be borne in mind that Order XLV. rule 2, was drawn in imitation of section 61 of the Common Law Procedure Act, 1854; and after the decision upon that section, it is clear that the same construction is to be put upon rule 2 as was put upon section 61 by the decision in *Tapp* v. *Jones* (5). It seems to me, therefore, that the meaning of "accruing debt" is a debt *debitum in præsenti, solvendum in futuro*, and it goes no further. It does not comprise a probable debt—that is, anything which may probably soon become a debt. That is the interpretation which I put upon Order XLV. rule 2. Then comes the question whether there are any cases in contradiction to that. I am not at all inclined to say that the order which was made by Vice-Chancellor Hall in the case of *In re Cowan's Estate* (6) was not a right order, because it seems to me that there was an existing debt in that case; and it does not, in my opinion, signify whether it was a legal or an equitable debt, if there was a debt. An order to attach an existing debt is good. But the order is not void because it attempts to include something which does not exist and which cannot be attached by it. The only effect of such an order would be that the parties would be attempting to put it into effect against something which it does not cover. I cannot help seeing, so far as I understand that decision, that Vice-Chancellor Hall came to the conclusion that something might be an accruing debt within the meaning of the rule which was neither a legal nor an equitable debt, payable *in præsenti*, or *debitum in præsenti, solvendum in futuro*. If that be so, I do not agree with him, and I differ from anything in that case which attempts to go beyond what I have stated. Then as to the form of the order in *Seton on Decrees* (4), which was pointed out to us, and which it was stated had had the concurrence of the Master of the Rolls (Sir G. Jessel), it seems to me to be impossible to say what were the facts before him when he acquiesced in that form, if he did do so. The form of the order *nisi* and that of the order absolute differ, but I will not attempt to go into that difference.

The only question then is, whether it can be said that that which was attempted to be attached here was an accruing debt within the meaning of Order XLV. rule 2. It is obvious that it is not. The sum of money was to be paid out of the proceeds of property when they came into the hands of the trustees; and it cannot, in any legal or equitable sense, be said that it is a present debt.

The trustees were not liable for it in any way, either *in præsenti* or *in futuro*. No proceeds may ever come into the hands of the trustees; for the trustees may die or cease to act. There are therefore contingencies upon which no debt may ever arise. All that can be said is that it is probable that money will soon—that is, at the end of the half-year—come into the hands of the trustees; and when it does come into their hands, I apprehend that it can then be treated as an equitable debt.

But until that happens there is no debt existing between them and the *cestui que trust*. I cannot fail to see that the interpretation which I have put upon this rule would prevent the attachment of a debt to arise upon the fulfilment of a condition, because in such a case there is no present debt, and no debt, until the condition has been fulfilled, either payable *in præsenti* or *debitum in præsenti, solvendum in futuro*. In my opinion the plaintiff cannot, in any of the cases that I have described, obtain relief under Order XLV. rule 2. The appeal must therefore be dismissed.

LINDLEY, L.J.—I am of the same opinion. The question turns upon the true construction of Order XLV. rule 2, the language of which is substantially the same as that of section 61 of the Common Law Procedure Act, 1854. The important words of that rule are that the affidavit made by the judgment creditor or his solicitor must shew that some third person is indebted to the judgment debtor, and that the subject-matter to be attached is a debt owing or accruing from such third person.

Let us consider in what way a trustee is a debtor to a *cestui que trust*. I agree that the word "debt" in this rule includes what was a common law debt, and also an equitable debt—that is, an equitable sum of money accruing from the trustee to the *cestui qui trust*. The word "debt," therefore, here means a debt, whether equitable or not; and to that extent, no doubt, the attachment of debts is extended, if the debt answers the description of a sum of money "owing or accruing" to the judgment debtor. It seems to me, however, that a trustee is not a debtor to the *cestui que trust* until he has in his hands a sum of money which it is his duty to hand over. There would be no difficulty in attaching a sum of 1,000*l*. in the hands of a trustee, for that would be a debt. But the trustee of Consols is not a debtor to the *cestui que trust* so long as he has no dividends in his hands; because he may never receive them, as where there is a change of trustees before the dividends become due. The *cestui que trust* has a right to the dividends when due, and can enforce that right. But it cannot properly be said that a trustee is a debtor until the money has come into his hands, although there is no reason to suppose that the dividends will not be paid. But take a more difficult case, where the subject-matter of the trust is land, a share in a business or railway shares. Can it be said that the trustee is debtor to the *cestui que trust* as to the dividends before he has received them? It seems to me that it would be a straining of language to say that money of that kind can properly be described as a debt. If the trustee became bankrupt it is certain that the *cestui que trust* could not prove against the estate for the dividends which may become due. This strikes at the root of the whole question. Apart from authority, I understand any legal or equitable debt—but there must be a debt, and an accruing debt—to be a sum of money which is payable in the future by reason of an existing obligation. An accruing debt is therefore a debt which is not yet actually payable, but is represented by an existing obligation. That seems to me to be the view which was taken by the common law Courts in the cases of *Tapp* v. *Jones* (5) and *Jones* v. *Thompson* (8). With regard to what has been the practice, I cannot read the decision of Vice-Chancellor Hall, in the case of *In re Cowan's Estate* (6), without seeing that he was disposed to attach money which was coming to a trustee. But the Vice-Chancellor there had to deal with a somewhat different point; for there was a question of some standing in the Court of Chancery as to whether money in the possession of a receiver or official liquidator was an attachable debt, and the Vice-Chancellor decided that it was. The difficulty there was, that it was supposed to be a contempt of Court to interfere with the Court of Chancery; but the Vice-Chancellor said that he saw no objection to attach money in the hands of a receiver; and that decision is right. The question as to whether, under Order XLV. rule 2, moneys to become due can be attached by a *cestui que trust* was discussed; but the Vice-Chancellor seemed to assume rather than to consider that they could now be attached. To that extent it seems to me that the decision cannot be supported. That decision was also

followed in the case of *Chatterton* v. *Watney* (11), where the same Vice-Chancellor took what seems to me to be an important distinction. The question there was whether a mortgagee who would be entitled to the proceeds of sale of a mortgage security was such a debtor that the money coming to him from the sale could be attached; and it was held that the surplus proceeds of the sale could be attached.

Then as to the forms given in *Seton on Decrees* (4) to which we have been referred. Of course we do not know the circumstances under which the first order —the order *nisi*—was made; and it is to be observed that, in point of form, it seems to be unobjectionable. But, upon looking at the form of the order absolute, I am surprised to find that there is a complete departure from the form of the order *nisi*—namely, that the garnishee do pay, not "all debts due, owing or accruing" from him to the judgment debtor, but "any sum or sums of money," whether debts or not. Whether that is a slip, or an intentional extension, I know not; but with these observations I pass from these forms, which are very valuable. The result seems to be, therefore, that all debts, whether legal or equitable, which are owing or accruing may now be attached. But there must be a debt. Money which may or may not come into the hands of a trustee is not a debt. The money in this case is not a debt, and cannot therefore be attached. The decision of the Divisional Court was therefore right.

FRY, L.J.—I agree in the conclusions which have been arrived at by the other members of the Court. In my judgment the counsel for the appellant were right in their contention that the words "is indebted," in the earlier part of Order XLV. rule 2, and the words "debts owing or accruing," refer to the same subject-matter, and that if there is a debt owing and accruing, the garnishee is rightly described as "indebted." It appears to me to be plain that, in order to satisfy either of those expressions, there must be an actual present debt. I think, further, that the contention that the debt may be either legal or equitable is also quite correct. No doubt, under section 61 of the Common Law Procedure Act, 1854, the debt must be a legal debt, because the section is there dealing with the common law Courts, and the words "equitable debt" had no meaning except perhaps in an equitable plea. But when the same words were used in the Judicature Acts, the Legislature was dealing with the Courts both of common law and of equity, and with that new Court which was to exercise the jurisdiction of both those Courts. The word "debt" must therefore be taken to be co-extensive with the jurisdiction of both the Courts. I have no doubt that the word "debt" is satisfied where there is a present debt, whether payable *in præsenti* or *in futuro*; and that the words "all debts owing or accruing" mean the same thing, and describe a present debt, whether *solvendum in præsenti* or *solvendum in futuro*. The material question argued before us was whether the meaning goes further and comprises equitable debts which may hereafter arise. It is absurd to suppose that a debt which may hereafter arise can be attached, for it may never arise. Strong and explicit words would be required to lead to such a conclusion, which seems to me to be excluded by Order XLV. rule 2, and also by rule 3. It is impossible to speak of a debt in a man's hands when the debt does not exist. Then rule 4 is equally conclusive that this is the true construction; for it seems to me to be absurd to suppose that a man may be called upon to dispute a debt which does not exist. But that would be the meaning of that rule if the word "debt" in rule 2 included debts which do not exist. I cannot conceive that there has been any real difference of opinion between the Judges before whom the question has come as to the meaning of these words; but the decision of the Court of Queen's Bench in *Tapp* v. *Jones* (5) is certainly not in unison with the language used by Vice-Chancellor Hall in the case of *In re Cowan's Estate* (6) in describing these debts. I adopt, however, the construction which has been put upon the words "debts owing or accruing" by the Court of Queen's Bench in all of the cases which have been re-

(11) 50 Law J. Rep. Chanc. 227; Law Rep. 16 Ch. D. 378.

ferred to by the Master of the Rolls. The only enquiry is, whether it has been shewn in this case that there is no such debt—that is to say, that there is no debt payable. There is no question that there is no present debt, and it appears to me that there is not any debt payable *in futuro*. The trustees are not equitable debtors to the *cestui que trust* until there is money in their hands which they ought to pay to him, or until they have made themselves personally liable to pay by breach of trust or default in their duty as trustees. There is not any suggestion that they have money in their hands which is payable to the *cestui que trust*; on the contrary, the facts stated as to the income and advances made shew that he had been overpaid at the date of the order. It was contended that the liability of a trustee to pay amounts to a debt due at the present time if payable in the future; but there is no such liability until the trust money has reached the hands of the trustee, or he has made himself personally liable. It appears also to me that, in arriving at this conclusion, we are not laying down any rule which will produce a defect of justice. I think that the power which a judgment creditor has to obtain equitable execution is adequate to meet the case which has been pressed upon us as not having been provided for. The decision of the Divisional Court was perfectly right, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors—Cobbold & Woolley, for plaintiff; G. H. Carthew, agent for Stenton, Son & Metcalfe, Southwell, Notts, for defendants.

1882. Nov. 24. } THE QUEEN *v.* KAY.

Licensing Acts—Discretion of Justices as to Renewal of "Off" Licences—Beerdealers' Retail Licences Act, 1882 (45 & 46 *Vict. c.* 34), *s.* 1.

[For the report of the above case, see 52 Law J. Rep. M.C. 90.]

1883. March 17. } THE LEEDS AND COUNTY BANK *v.* WALKER.

*Bank of England Note—Alteration of Date and Number—Principal and Agent—Forged Note received as Solicitor—Paid away as Solicitor—Personal Liability—Notice of Infirmity in Note—*45 & 46 *Vict. c.* 61. *s.* 64.

The plaintiffs held certain acceptances of A's, and the defendant was acting as solicitor to A and to B. B agreed to take up A's acceptances; and the defendant cashed a cheque for B at B's bank, and received two 100*l. Bank of England notes. On the* 29*th of May, defendant sent a clerk to the plaintiffs with these two* 100*l. Bank of England notes, which were paid to them, the clerk receiving three acceptances of A's, and* 63*l.* 15*s. in cash. The defendant retained* 13*l.* 15*s., in payment of a bill of costs due from A to himself, and paid* 50*l. to B. On the* 7*th of June, one of the notes which the plaintiffs had paid away was brought back to them as having been refused by the Bank of England, and with the words "The No. and date of this note have been altered" written across it. On the* 22*nd of July, they demanded* 100*l. of the defendant, who then had notice that the note was bad. All parties had believed the two notes to be good*:—Held, *first, that the plaintiffs, in receiving the note from the defendant and handing him the acceptances, were not dealing with him merely as agent for A or B; secondly, that the rule as to the necessity of giving notice of the infirmity of a note or bill in order to enable a plaintiff to take advantage of such infirmity is not applicable to the case of a forged Bank of England note; and, thirdly, that the proviso in section* 64 *of the Bills of Exchange Act*, 1882, *does not apply to Bank of England notes; that the alteration in question was "apparent" within that proviso, since although the holder had not the means of detecting it, it would at once be obvious upon presentation at the Bank of England; that that Act has not a retrospective operation; and that, consequently (following* Suffell *v.* The Bank of England, 51 Law J. Rep. Q.B. 401; Law Rep. 9 Q.B. D. 555), *the Bank of England were entitled to refuse payment of the note, and the plaintiffs, having received*

a worthless document from the defendant, were entitled to recover the amount for which they had taken it as payment.

Forbes, Q.C., and *Cyril Dodd*, for the plaintiffs.

A. Wills, Q.C., and *Gainsford Bruce*, for the defendant.

Cur. adv. vult.

DENMAN, J.—This case came on to be tried before me without a jury at the last Leeds assizes. The facts were then stated and agreed to, and it was arranged that I should hear the case argued in London, which I did last week.

The facts, as admitted by counsel on both sides, were as follows:—In 1879 and 1880, the plaintiffs, who were a banking company carrying on business at Leeds, had a customer named Dickinson, a provision dealer at Leeds. In December, January and February, 1880, he paid in to his account three bills of exchange for 65*l.*, 40*l.* and 50*l.* respectively, accepted by one Wilson. These were credited by the plaintiffs to Dickinson's account. On the 30th of March, 1880, Wilson paid 20*l.* on account of the first of these bills, leaving 135*l.* still due from him as acceptor. On the 2nd of April, 1880, Dickinson filed a petition for liquidation. All the bills were dishonoured, and the bank applied to Wilson as acceptor for payment of the bills. A few days before the 29th of May, 1880, the defendant Walker, a solicitor, sent his clerk to the plaintiffs' bank and asked for a little time for Wilson to take up the dishonoured bills, stating through his clerk that he (Walker) was arranging for a loan for Wilson to take up his acceptances. On the 29th of May, 1880, the same clerk acting for the defendant, called at the plaintiffs' bank and gave the plaintiffs two 100*l.* Bank of England notes, which all parties believed to be good Bank of England notes; and received in exchange the three acceptances (on which Wilson was still liable for 135*l.*) and 63*l.* 15*s.* in cash. One of these notes had been altered both in number and in date. The plaintiffs, on the 29th of May, credited Dickinson's estate in liquidation with the 200*l.* which they supposed they had received. The entry in the plaintiff's book of estates in liquidation was "29th May, 1880. By Wilson 136*l.* 5*s.* 0*d.*," and another entry in their books of the same transaction was "Paid by re C. Wilson 136*l.* 5*s.* 0*d.*;" and on the 1st of June, 1880, they paid the altered note to a building society having an account with them, in exchange for a cheque. On the 7th of June the note in question was brought back as a bad note refused by the Bank of England, and with the words "The No. and date of this note have been altered" written across the face of it in red ink.

The plaintiffs saw on the note a number which shewed that it had passed through the hands of other bankers; but finding an entry in their bank-note register of the 29th of May, 1880, "Note received from J. Walker," and having a customer of that name, they at first made enquiry in that direction; but owing to the absence of that J. Walker abroad some delay took place before they discovered that he was not the person who had brought the cheque to them.

On the 22nd of July they made a demand of the 100*l.* represented by the altered note on the defendant, who then had notice that the note was bad, but declined to make good the amount on the grounds to be mentioned presently. The history of the defendant's original possession of the note was as follows:—The defendant had another client, named Armistead, who was entitled to a sum of 700*l.* from the executors of his father's will. They drew a cheque for that sum on the 1st of October, 1879, on Messrs. Williams, Brown & Co., bankers at Leeds, payable to Butler & Co., solicitors, or order, who had indorsed it to Armistead. In April, 1880, that cheque had been given to Walker, the defendant, to be cashed; the defendant had presented it to Williams, Brown & Co., and received the note in question and the other 100*l.* note as part of the cash for the cheque. Armistead having agreed to lend Wilson 150*l.* to take up his acceptances at the plaintiffs' bank, the defendant then, as before mentioned, paid the note in question, and obtained the acceptances, which he had since kept in his safe. It was admitted by the plaintiffs' counsel on the trial, that

if the note had been a good one, the defendant would have held it merely for the purpose of carrying out the arrangement between Armistead and Wilson. It was also admitted by the defendant that out of the 63*l.* 15*s.* balance received by him from the plaintiffs' bank beyond the acceptances, he appropriated 13*l.* 15*s.* to payment to himself of a bill of costs due from Wilson to him, without any communication to Wilson, and that he paid the residue, 50*l.*, to Armistead on the 30th of June, 1880.

These being the admitted facts of the case, the plaintiffs' counsel contended that the plaintiffs had a right to recover back the amount of the note from the defendant Walker, and likened the case to that of *Jones* v. *Ryde* (1), in which it was held that where a person discounted with another a forged navy-bill, both parties being ignorant of the forgery, an action for money had and received would lie. *Gompertz* v. *Bartlett* (2) was also cited, in which the same principle was applied to the case of an unstamped bill of exchange purporting to be a foreign bill, but drawn in this country, and therefore unavailable for want of a stamp.

The general principle laid down in these cases was not disputed; but it was contended that the plaintiffs were not entitled to recover in the present case on several grounds. First, it was argued that the defendant was not liable, because the transaction in question was not one between the plaintiffs and the defendant; but that the defendant acted as the agent either of Wilson or Armistead in the matter; and that the plaintiffs dealt with him only in one or other of those capacities. I heard a very able argument on both sides as to whether the defendant acted as the agent of Wilson or of Armistead at the several stages of his dealings with the note in question—in originally taking it from Messrs. Williams & Brown, in taking it to the bank for Wilson, and in receiving the acceptances and money for it from the plaintiffs; but, whatever might be the true solution of several of the questions raised, I am of opinion that in the present case there is no evidence which would justify me in holding that the bank dealt with the defendant in the capacity merely of Wilson's agent, of whom they knew nothing except that he was the acceptor of the bills, still less that they dealt with him as Armistead's agent, of whom they knew nothing. All that concerned them was to have cash for the amount of the acceptances, and on the receipt of what they believed to be two Bank of England notes for 100*l.* each, they gave up the acceptances, and cash to the amount of 63*l.* 15*s.* for the balance of the nominal amount of the two notes. I think it is clear that they could not have sued Wilson upon the discovery of the badness of the note, nor Armistead. That particular note for 100*l.* which was afterwards discovered to be altered was never so appropriated to Wilson that the defendant might not have paid the money to the plaintiffs in any other shape. There was no privity as regards that particular note between the bank and any other person but the defendant. I think, therefore, that if anybody is liable to the plaintiffs it is the defendant.

But it was contended, further, that the defendant was not liable, because the bank were guilty of laches in not sooner giving notice to the defendant of the badness of the note; and several cases were cited by Mr. Wills in which parties have been held not entitled to recover in actions on bills and notes on this account. The case of *Camidge* v. *Allenby* (3) was relied upon; but I think that case is clearly distinguishable from the present. There the instruments in question were promissory notes of a bank which had stopped payment on the morning on which the notes were taken. They were kept for some days without notice of the insolvency of the bankers, and the Court held that, inasmuch "as they were, in point of law, promissory notes," and "operated as payment" (see *per* Holroyd, J., p. 384), notice was requisite. In the judgment of Mr. Justice Littledale (at p. 385), this is clearly stated as the ground of the decision:—"If they were taken as money absolutely and without any condition, then the plaintiff took them for whatever they might be worth. It would be other-

(1) 5 Taunt. 484.

(2) 2 E. & B. 849; 23 Law J. Rep. Q.B. 65.

(3) 6 B. & C. 373.

wise if they were forged, for then they would not be what they purported to be; but here they were what they purported to be."

In the present case it was admitted that the note in question, having been altered in a material part for some fraudulent purpose, was in law a forgery, and that, subject to any alteration in the law created by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), or to the effect of that Act upon the decision of the Court of Appeal in *Suffell* v. *The Bank of England* (4), it was an instrument upon which no action could be brought against the Bank of England. Other cases were relied upon by the defendant as to the necessity of giving notice of the infirmity of the note or bill, in order to enable a plaintiff to take advantage of such infirmity; but I think none of them were applicable to the case of a forged Bank of England note, upon which no other person can be liable except the bank itself, and in the case of which there is nothing to prevent the person sued for the money paid in error from suing the person to whom he may have given cash in error, and so on *ad infinitum*, subject only to the Statute of Limitations. *Smith* v. *Mercer* (5) was decided on grounds wholly inapplicable to the case of a forged Bank of England note. Mr. Justice Dallas concluded his judgment thus:—"The ground on which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the plaintiffs were not authorised to do"; and Mr. Justice Heath and Chief Justice Gibb give similar reasons for their judgments. Mr. Justice Chambre dissented from the majority, thinking that the case fell within the general law, which is thus stated by Mr. Justice Heath, at p. 86 of his judgment:—"That money paid without consideration upon an instrument which proves to be of no value may be recovered back." *Cocks* v. *Masterman* (6), again, was decided solely on the ground that the neglect to give notice of the forgery on the day on which the bill became due might deprive the holder of his right to take steps against the parties to the bill on the day on which it becomes due—a ground wholly inapplicable to the case of a Bank of England note, on which the bank alone is liable (if any one is), but which, if forged, is a mere nullity, unless made available for any purpose by the statute to be now referred to.

That statute is the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61); and it is contended that that Act has virtually overruled the decision of the Court of Appeal in *Suffell* v. *The Bank of England* (4), and that, notwithstanding the refusal of the bank to honour the note in question in June, 1880, it must now be held that at that time they were in law bound to pay the 100*l.*, and that the plaintiffs, not having insisted on their rights in that respect, are either not entitled to recover as upon a failure of consideration, or, at all events, only entitled to recover nominal damages.

Section 64 of the Act was as follows:—"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except against the party who has himself made . . . the alteration . . .: provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

I think there are several answers to this ground of defence. In the first place, the statute in question, by section 2, contains a definition of the words "bill" and "note." The former means "bill of exchange," the latter "promissory note." The Act then contains several provisions relating wholly to "bills"—sections 3 to 72 inclusive. These constitute part 2 of the Act. Then follow ten clauses wholly relating to cheques on bankers. These constitute part 3 of the Act. Then follow the provisions of part 4 (sections 83 to 89), headed "Promissory Notes," and by section 89 it is provided that the provisions of the Act relating to bills apply, with the necessary modifications, to promissory

(4) 51 Law J. Rep. Q.B. 401; Law Rep. 9 Q.B. D. 555.
(5) 6 Taunt. 76.
(6) 9 B. & C. 902.

notes. It appears to me that this clause was never intended to cover, and has not the effect of covering, such a document as a Bank of England note, altered fraudulently, so as to fall within the decision of *Suffell* v. *The Bank of England* (4). Bank of England notes differ in many respects from ordinary promissory notes. They are payable, without indorsement, to any holder who may present them. They are a legal tender for the amounts represented by them. I think that one "necessary modification," in applying section 64 of the Act to promissory notes, is a modification amounting to an exclusion of Bank of England notes altogether from the operation of section 64 of the Act. But, even if this be not so, section 64 only applies where the alteration is not "apparent." In the present case I think it was apparent. By the word "apparent" I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point out to the holder that it is not what it was—that is to say, that it has been materially and fraudulently altered—I think the alteration is an "apparent" one, even if it is not an obvious one to all mankind. But I am further of opinion that, in the absence of anything in the Act to shew that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to the note in question as it existed in 1880, and down to the time when the present action was brought—namely, the 21st of July, 1882. The Act itself was not passed till the 18th of August in the same year. The defendant had then for two years had the acceptances given up by the plaintiffs in his possession; he had paid over 50*l.* to Armistead, of which the plaintiffs knew nothing, and had appropriated 13*l.* 15*s.* to his own bill of costs. At the time when the plaintiffs might have sued the Bank of England on the note, the law must be taken to have been as laid down in the case of *Suffell* v. *The Bank of England* (4), unless the 45 & 46 Vict. c. 61. s. 64, is to be taken to be equivalent to a declaratory enactment amounting to a declaration that that decision at the time was wrong. I do not find words strong enough to have any such operation. The general principle is clear, that statutes do not have a retrospective operation—see *Maxwell on the Interpretation of Statutes*, p. 90. I see no reason for giving section 64 any such operation in the present case. The case of *Steele* v. *McKinlay* (7) is no authority for so construing that section, for there were words in the Act there in question expressly putting a construction on the words of a prior Act after a recital that doubts had arisen and that it was expedient that the meaning of the prior enactment should be declared. The case of *Quilter* v. *Mapleson* (8) was also relied upon for the defendant; but that case was decided solely upon the words of a statute entirely different from that in question, and involved no necessity of giving a retrospective operation to its words; on the contrary, they were held to operate prospectively as regards the particular question which arose upon the appeal, which was in the nature of a re-hearing in that case.

I am of opinion that the law, as laid down in *Suffell* v. *The Bank of England* (4) by the Court of Appeal, is that which I must hold to be applicable to the present question, and that the plaintiffs, having received the note in question from the defendant, received a worthless document, upon which nobody could be sued, and upon which no other party than the Bank of England could possibly have been held liable, and upon which the defendant may now recover back the amount he has paid upon it as soon as he has paid it to the plaintiffs.

On these grounds I think the plaintiffs are entitled to judgment, and I give judgment for them for 100*l.*, with costs.

Judgment for the plaintiffs.

Solicitors—Nelson, Barr & Nelson, for plaintiffs; Paterson, Snow & Bloxam, agents for Joseph Walker, Leeds, for defendant.

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(7) Law Rep. 5 App. Cas. 754 (Scotch).
(8) *Ante*, p. 44; Law Rep. 9 Q.B. D. 672.

1883. April 23, 25, 26. } THE QUEEN *v.* THE OVERSEERS OF THE PARISH OF TONBRIDGE.

Burial—Power to appoint Burial Board—District having Separate Burial Ground—Part of Area already under a Burial Board—18 *&* 19 *Vict. c.* 128. *ss.* 11 *and* 12.

A meeting, in the nature of a vestry, of an ecclesiastical district, not separately maintaining its own poor, but having at the time of the passing of 18 *&* 19 *Vict. c.* 128, *a separate burial ground, passed, under section* 12 *of that Act, resolutions for appointing a burial board. The district formed part of an area for which a burial board already existed*:—Held, *that the appointment was bad.*

A mandamus having (on June 24, 1882) been ordered to issue, commanding the overseers of the parish of Tonbridge, in Kent, to put in force the Burial Acts, 1852, 1853, 1855, and 1857, especially the Act of 1855, s. 13, and levy and pay to the clerk of the burial board of Southborough in the said parish 292*l.* 10*s.*, expenses of the board, according to a certificate of the board dated April 24, 1882, a Case, in substance as follows, was stated, under a direction inserted by consent in the order for the mandamus, for the purpose of determining, without return to the mandamus, whether the inhabitants of Southborough had the power they had assumed of constituting a burial board.

1. The parish of Tonbridge is a parish maintaining its own poor, and is made up of the ecclesiastical districts of Tonbridge, Tonbridge Wells, St. Peter's Southborough, St. Thomas's Southborough, St. Stephen's and Hildenborough, none of which has ever separately maintained its own poor, all contributing to a common poor rate levied by the parish overseers throughout the parish.

2–5. In 1831 a district was assigned, under 1 & 2 Will. 4. c. 38, and other statutes, to the new church of St. Peter, then lately built upon land given by the lord of the manor of Southborough, and the church, with a burial ground for the district, was duly consecrated; and in 1866 the burial ground was enlarged by a further grant of land from the lord of the manor, and the expense of laying out the land was defrayed by a voluntary rate levied upon all the inhabitants of the district. In 1871 a district was assigned under 59 Geo. 3. c. 134, and other statutes, to a new church of St. Thomas, within the aforesaid district of St. Peter. The burial ground aforesaid has always been the separate burial ground of the original district of St. Peter, and has been used exclusively by the inhabitants thereof; and since the district of St. Thomas has been formed out of the district of St. Peter the two districts have had it exclusively for their joint use. Since the formation of the district of St. Thomas the inhabitants of the two districts have been accustomed to meet in meetings, in the nature of a vestry, for purposes common to them both, such meetings being summoned by the churchwardens of the district of St. Peter.

6–9. In 1855, subsequently to the passing of the Burial Act, 1855, a meeting of the inhabitants of the parish of Tonbridge was held (in pursuance of a notice affixed to all the churches in the parish, excepting those within the ecclesiastical district of Tonbridge Wells), at which resolutions were duly passed for the formation of a burial board for such part of the parish of Tonbridge as was not in the Tonbridge Wells ecclesiastical district. The inhabitants of the Southborough district, as a body, were opposed to those resolutions. The burial board so constituted established a cemetery about the centre of the parish of Tonbridge, but at the end of the town furthest from Southborough, being about three and a quarter miles distant from the church of St. Peter; and the inhabitants of Southborough were rated for the expenses incidental to the establishment of the cemetery, and have ever since been rated for the expenses incidental to the maintenance thereof, although they have continued to use the St. Peter's burial ground. In 1858 the legality of the constitution of the Tonbridge Burial Board was called in question; but the Court of Queen's Bench decided, in the case of *Viner* v. *The Tonbridge Over-*

seers (1), that it was legally constituted. In 1878 the Tonbridge Burial Board found it necessary to enlarge the cemetery, and for this purpose a meeting of the inhabitants of the parish of Tonbridge was held (in pursuance of a notice affixed to all the churches in the parish, excepting those within the ecclesiastical district of Tonbridge Wells), and resolutions were duly passed thereat empowering the board to enlarge the cemetery, and to raise a sum sufficient for that purpose upon the security of the future poor rates of such portion of the parish as was not in the ecclesiastical district of Tonbridge Wells. The inhabitants of the Southborough districts, as a body, were opposed to those resolutions.

10-11. Subsequently to the last-mentioned meeting it was found necessary by the inhabitants of the districts of St. Peter and St. Thomas that the burial ground at Southborough aforesaid, jointly used by them, should be enlarged; and accordingly the churchwardens of St. Peter's district summoned a meeting, in the nature of a vestry, for the 3rd of February, 1879, by notices affixed to all the churches and chapels in those two districts. The inhabitants of the other districts under the Tonbridge Burial Board were not consulted, nor was any notice of the meeting or its purposes given to any of the parishioners residing outside Southborough. The meeting consisted exclusively of ratepayers from the two districts of St. Peter and St. Thomas, who thereupon appointed a burial board for those two districts, and vacancies therein have been filled up at similar meetings.

12. The burial board thus appointed for Southborough, having incurred expenses to the amount of 292*l.* 10*s.* in the enlargement of their burial ground, and otherwise in reference thereto, issued a certificate, dated the 24th of April, 1882, to the Tonbridge overseers for payment thereof, which (so far as material) was in the following terms—

"15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 18 & 19 Vict. c. 128.

"To the Overseers of the parish of Tunbridge.

"The Burial Board for the Southborough district. . . . hereby certifies to you . . . . that the sum of 292*l.* 10*s.* is required for the payment of its expenses, and hereby requires you to put in force the powers of the said Acts, and to levy and collect the said sum and pay the same to its clerk.

"And as the rateable value of the property within the ecclesiastical district of St. Thomas is 5,308*l.*, and that of the property within the residue of the district of Southborough is 16,996*l.*, the said sum of 292*l.* 10*s.* has been apportioned, should that be necessary, as follows—69*l.* 12*s.* 4*d.* to be raised within the district of St. Thomas, and 222*l.* 17*s.* 8*d.* within the residue of the said district."

13. The overseers decline to act upon the certificate, on the ground that the Southborough burial board has not been, and cannot be, legally constituted.

14. The Southborough burial board contend that they have been legally constituted under the Burial Act, 1855 (18 & 19 Vict. c. 128), sections 11 and 12 (2).

(1) 28 Law J. Rep. M.C. 251.

(2) Section 11: "Where a parish or place has been united with any other parish or place, parishes or places, for all or any ecclesiastical purposes, or where two or more parishes or places have heretofore had a church or a burial ground for their joint use, or where the inhabitants of several parishes or places have been accustomed to meet in one vestry for purposes common to such several parishes or places, it shall be lawful for the vestry, or any meeting in the nature of a vestry, of such several parishes or places in any of the cases aforesaid, and whether any one or more of such parishes or places do or do not separately maintain its own poor, to appoint a burial board and from time to time to supply vacancies therein, and to exercise the same powers of authorisation, approval and sanction in relation to such burial board and such other powers as under the said Acts and this Act are vested in the vestry of a parish or place separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground for the common use of such several parishes or places, and for facilitating interments and otherwise, as if such several parishes or places had been a parish separately maintaining its own poor; and the expenses of the burial board appointed under this provision shall be borne by the several parishes or places for which such board is appointed, and shall be apportioned among them by such burial board in proportion to the value of the property in such several parishes or places as rated to the relief of the poor, and the sums required by the burial

The Queen v. *Overseers of Tonbridge.*

15. [This paragraph set out the order of the 24th of June, 1882, already mentioned, directing the issue of a mandamus and the statement of a Special Case. The order contained by consent a clause directing that no objection be taken to the form of the mandamus.]

16. The question for the Court is whether the inhabitants of Southborough had or have any power to constitute a separate burial board for the districts of St. Thomas and St. Peter.

F. M. White, Q.C. (*W. F. A. Archibald* with him) (on April 23, 25), for the prosecutors;

Lumley Smith, Q.C. (*G. Candy* with him), for the defendants.

The arguments are sufficiently stated in the judgment delivered by

FIELD, J. (on April 26).—In this case, argued before my brother Mathew and myself, we have to construe some six statutes, passed at different periods, but having to be considered as one code, upon a subject-matter which is in itself a complicated one; and it is very difficult sometimes to arrive at the precise meaning of the Legislature.

The facts out of which the question arises are not especially complicated. There was the old parish of Tonbridge, maintaining its own poor; and it had six districts, not originally districts having any ecclesiastical or any secular or parochial organisation, but, from their characteristics, capable of coming into existence as such districts. First of all there was the town itself of Tonbridge, commercial and industrial; then there was the fashionable town of Tonbridge Wells; then between Tonbridge Wells and Tonbridge was the district Mr. White represents—namely, the district of Southborough; and there were also other divisions. Tonbridge Wells early acquired a separate ecclesiastical organisation; it became an ecclesiastical district, and it had a separate burial ground. In 1831 an ecclesiastical district came into existence known as St. Peter's Southborough; and this district had, like Tonbridge Wells, its separate burial ground. That was the state of facts in regard to the parish of Tonbridge and its districts when the first of the Acts we have to deal with was passed. In 1853 it was that the first Act which enabled non-metropolitan parishes to appoint burial boards was passed, originating in this way. In the metropolis a great many burial grounds having become overcharged and a scandal, and power having been given to the Secretary of State to close them, it became necessary to provide space for the interment of those who had formerly the right to be buried in those particular grounds; and for that purpose in 1852 an Act was passed, applicable solely to the metropolis. In 1853 the same legislation was applied to non-metropolitan parishes by extending to them certain sections of the Act of 1852. Then, after an Act going still further in the same direction, came the Act with which we have specially to deal—namely, 18 & 19 Vict. c. 128, passed in 1855. Immediately after the passing of that Act the inhabitants of Tonbridge, other than Tonbridge Wells, passed resolutions for appointing a burial board. Southborough, having already got St. Peter's with its burial ground, was opposed to the mother parish having a burial board; and in *Viner* v. *The Overseers of Tonbridge* (1) a ratepayer of Southborough questioned the legality of the Tonbridge burial board, contending that the mother parish *minus* the district of Tonbridge Wells was not an unit with the capacity of having a burial board, and adverting to the circumstances of South-

board in respect of the portion of such expenses to be borne by any such parish or place shall be paid out of the rates for the relief of the poor in such parish or place in like manner as if such burial board had been appointed for such parish or place alone."

Section 12: "The vestry, or meeting in the nature of a vestry, of any parish, township or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board and from time to time supply vacancies therein, and may exercise the same powers of authorisation, approval and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor, and the burial board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish township or other district had been a parish separately maintaining its own poor."

borough. But the Court decided in favour of the mother parish. The burial board so appointed, which had already purchased a burial ground, added to it afterwards. Money was of course borrowed for the purchase, and charged upon the rates, and the rates are probably still charged with the balance of the sum expended in forming a burial ground. The necessary offices were also acquired, and necessary officers and servants appointed; and, from the time of its establishment, down to the year 1881 the burial board so established acted as a burial board for the area for which it was appointed, including the district of Southborough—divided since 1871 into its two ecclesiastical districts of St. Peter's Southborough, and St. Thomas's Southborough, having (for St. Thomas's never had a separate burial ground) their one joint burial ground of St. Peter's. In 1879 the inhabitants of Southborough became desirous of appointing a burial board of their own; and upon the 3rd of February, 1879, a meeting in the nature of a vestry was held for St. Peter's and St. Thomas's, which passed a resolution to appoint a burial board, and placed the burial ground of St. Peter's under their control. The burial board afterwards enlarged it; and having, in respect of the enlargement and otherwise, incurred an expenditure of 292*l.* 10*s.* under the provisions, as they believed, of the Acts in question, certified that sum to the overseers of Tonbridge, and required the latter to make a rate upon the inhabitants of St. Peter's and St. Thomas's for the purpose of meeting those expenses. That the overseers of Tonbridge refused to do, saying that the alleged burial board for Southborough had no legal foundation. Upon that refusal a rule was moved for and obtained for a mandamus; and a Special Case was stated, upon which we have now to decide.

Mr. White, on behalf of the Southborough Burial Board, puts his case upon 18 & 19 Vict. c. 128. ss. 11 and 12 (2) with section 13 (3); or section 12 with section 13 it rather comes to now, because I understood him to admit that if Mr. Lumley Smith's argument prevails as to section 12, he cannot succeed by relying on section 11. The meeting of the inhabitants of Southborough, Mr. White says, was "a meeting in the nature of a vestry" of a "district not maintaining its own poor" (the two districts of St. Peter and St. Thomas being treated by him, not improperly I think, as one)—and a district within the words "which has heretofore had a separate burial ground." And in his favour it is to be remembered that Southborough had its separate burial ground, and the people who lived in St. Thomas's never lost their right of interment in that burial ground; and, although Southborough has been divided into two ecclesiastical districts, yet it may well be within the language of that section. Upon that Mr. White maintains his stand. He says his case comes exactly within section 12. On the other hand Mr. Lumley Smith says, "It may be that you come within those words, but not within the intention of the Act, and in order to find out the intention of the Act you must look at the legislation as a whole." I think that that is a very sound proposition; it will never do to take a particular clause out of one particular Act of Parliament, and endeavour to infer the intention of the Legislature without looking to the system generally. Mr. Lumley Smith argued that whereas until this Act was passed the unit of legislation was a parish separately maintaining its own poor, this applied to a district not separately maintaining its own poor, if it theretofore had a separate burial ground; and that the gist of the provisions which thus extended the previous legislation lay

(3) Section 13: "Where any district (whether a parish or township or other subdivision) not separately maintaining its own poor, but forming part of a parish maintaining its own poor, or of an incorporation or other union maintaining the poor of the places comprised therein by means of a common rate, shall have a burial board, or shall form part of a place or union of places not co-extensive with the area rated for the relief of the poor, and having one burial board, it shall be lawful for such respective burial board to issue their certificate to the overseers of such parish, or the overseers or other persons authorised to make and collect, or cause to be collected, such common rate (as the case may be) for payment of the sums required for the expenses of such burial board. . . ."

in that extension, and those provisions were not to be read as going further, and as authorising the appointment of a burial board for a district forming part of a mother parish already having a burial board. Mr. White, in answer to that, sought to confirm his argument from the language of section 12 by saying that the next of these Acts of Parliament—namely, 20 & 21 Vict. c. 81. s. 5—made it clear that his case was within the intention of the Legislature. Mr. Lumley Smith met Mr. White upon his own ground by referring also to that Act. I will take the sections referred to in their order. Previous legislation having enabled several parishes to concur in having one burial board, and it being seen that after the union had taken place the parties to it might not like to continue united, 20 & 21 Vict. c. 81. s. 2, says, "Where the vestries of two or more parishes have agreed to provide one burial ground for the common use of such parishes, such vestries may at any time before such burial ground has been provided determine the union." That provision, it will be observed, contains the important qualification, "at any time before such burial ground has been provided"; and Mr. Lumley Smith points to those words as supporting his argument, that when once a burial board has been appointed for an area comprising a district which seeks to appoint a burial board, section 12 of 18 & 19 Vict. c. 128, does not apply. He says, "It is true that no words to that effect are found; but it is not necessary that any such words should be found, because when once a union has been effected, and a burial board has been appointed, express legislation is required to get rid of it, and the Legislature never could have intended to have burial boards exercising similar jurisdiction over the same area of rateable property." He contends that if 18 & 19 Vict. c. 128. s. 12, under which the Southborough Burial Board seek to justify their existence, is to be read as Mr. White asks us to read it, we must read into it some such provision for determining the union, and declaring how liabilities already incurred shall be defrayed, as is contained in 20 & 21 Vict. c. 81. s. 2, which goes on to say, "and upon that union being so determined, all the provisions of the said Act and this Act shall be applicable with regard to such parishes, and the respective burial boards thereof, as if the union had not been formed; save that any expenses already properly incurred by the joint burial board for such parishes shall be defrayed as provided by the said Acts." Now, as to Mr. White's section, namely section 5. That section says that, "The vestry, or meeting in the nature of a vestry, of any parish, new parish, township or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said Acts and this Act, if such parish, new parish, township or district, had had a separate burial ground before the passing of the said Act of the 18th and 19th years of her Majesty: Provided always, that all the powers of any other vestry or meeting and burial board, if any, shall then cease . . . . so far as relates to such parish, new parish, township or district as aforesaid . . . ." Mr. White says, section 5 shews that the Legislature did not feel very great difficulty in determining an existing burial board, and that we must read a similar proviso into 18 & 19 Vict. c. 128. s. 12. (I may here observe that section 5 contains no provision as to what is to be done with existing liabilities; and, if it is not to work injustice, there must, as was suggested by the learned Judges who decided *The Queen* v. *Walcot* (4), be read into the proviso some such words as that all prior liabilities may still be enforced, as if there had been no such determination of previous powers.) I think, however, that Mr. White, in contending that the proviso I have read from 20 & 21 Vict. c. 81. s. 5, is to be read into 18 & 19 Vict. c. 128. s. 12, asks us to go much farther than the rules of construction justify, and that there is more to be said for Mr. Lumley Smith's view, that if you take both those sections together you have this—that whereas the Legislature did not in 18 & 19 Vict. c. 128. s. 12, which is the enactment we have to deal with, provide for the determination

(4) 2 B. & S. 555, 571; 31 Law J. Rep. M.C. 217, 221.

of the powers of any other burial board, they do provide for it in section 5 in that subsequent Act, which we have not now to deal with; and nothing could have been easier for the Legislature, if they so intended, than to have so worded the later statute as to have expressly covered the earlier. Mr. Lumley Smith also cited section 9 of the same Act, which, after reciting the powers of appointing a burial board given by 18 & 19 Vict. c. 128. s. 11, says:—"Where any of the several parishes or places, under the circumstances provided for in the said enactment, separately maintains its own poor, or has a separate burial ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, of such several parishes or places, to appoint a burial board under the said enactment without the approval of one of her Majesty's principal Secretaries of State." And another Act was referred to in *The Queen* v. *Walcot* (4), namely, 23 & 24 Vict. c. 64, which contains the same principle, saying by section 4, "Where any parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry, or meeting in the nature of a vestry, for such entire parish or place to appoint a burial board without the approval of one of her Majesty's principal Secretaries of State." That was passed in 1860, and possibly was passed in consequence of the decision in *Viner* v. *The Overseers of Tonbridge* (1).

That being the state of the legislation upon the subject, the question is, are we to read the enactment we have to deal with in the sense that Mr. White puts upon it, or to take Mr. Lumley Smith's view, that it was not the intention of the Legislature by that enactment to authorise the appointment of a second board for a portion of a district already under the jurisdiction of a regularly appointed board, seeing that it would be making conflicting jurisdictions, and putting a double rateability upon the inhabitants of the new part?

Upon the whole, giving my best attention to the matter, and giving the best sense I can to the Acts of Parliament, I come to the conclusion (in which my brother Mathew concurs) that Mr. Lumley Smith's contention must prevail, and that the Southborough Burial Board is not a lawfully appointed board.

In the argument before us *The Queen* v. *Walcot* (4) was much referred to. Mr. White claimed the judgments as in his favour, and Mr. Lumley Smith claimed the reasoning as in his favour. The facts there were different from those before us, but the reasoning there is useful here. And it seems to me that all the Judges base their conclusions upon the existence of that proviso in section 5 of 20 & 21 Vict. c. 81, which says that where a burial board has been appointed under that section the power falls upon the new board so appointed. Lord Blackburn (then Mr. Justice Blackburn) there, in the second of the two cases, said that it was not to be supposed the Legislature meant two burial boards to have jurisdiction over the same district, and that the proviso (meaning the proviso to 20 & 21 Vict. c. 81. s. 5) went on to obviate this difficulty, by declaring that the powers of any other vestry or burial board were to cease and determine so far as related to the smaller area upon the appointment of a burial board for it.

As I said before, the facts are not the same here as there, but it seems to have been upon the existence of the proviso in section 5 that the view there taken by the Court turned.

For these reasons, therefore, the question submitted to us in the Special Case must be answered by saying that the inhabitants of Southborough had no power to constitute a separate burial board, and judgment must be for the defendants with costs.

MATHEW, J., concurred.

Judgment for the defendants accordingly, that no peremptory mandamus do issue.

Solicitors—Tilleard, Godden & Holme, for prosecutors; Thos. White & Sons, agents for Alleyne & Walker, Tonbridge, for defendants.

[IN THE COURT OF APPEAL.]

1883. May 29. } GILBEY (*executrix*) *v.* JEFFRIES.*

Bankruptcy—Scheme of Settlement—Annulling Adjudication — Discharge of Debtor—32 & 33 *Vict. c.* 71. *s.* 28.

Where, under section 28 *of the Bankruptcy Act*, 1869, *the creditors of a bankrupt assent to a general scheme of settlement of the affairs of the bankrupt which is approved by the Court of Bankruptcy, the bankrupt is thereby discharged and released from his debts whether or not such scheme includes a condition that the order of adjudication is to be annulled; and such scheme is an answer to an action subsequently brought by one of the creditors for his debt.*

J. was adjudicated a bankrupt. The creditors assented to a general scheme of settlement of the affairs of J., upon the terms that if he assigned to the trustee under the bankruptcy all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. J. executed a deed of assignment, the scheme was approved by the Court, and the bankruptcy was annulled. One of the creditors subsequently brought an action against J. for his debt:—

Held, *that the scheme released J., and was an answer to the action.*

Appeal by the plaintiff from a judgment of Field, J., overruling a demurrer to certain paragraphs in a statement of defence. The case is reported *ante*, p. 116, where the pleadings demurred to are fully set out.

W. Graham, for the plaintiff. — The effect of section 28 of the Bankruptcy Act, 1869, is simply to make the general scheme of settlement of the affairs of the bankrupt binding upon all the creditors, as if they had all been parties to that arrangement with the debtor. There is no agreement here to take a composition, and it operates only as an assignment of the property of the debtor. Immediately the bankruptcy is annulled, the creditors can bring actions for their debts. Here there is no provision in the scheme for the release of the debtor from his debts, and consequently it cannot be pleaded in bar to the action. Under section 192 of the Bankruptcy Act, 1861, which is similar to section 28 of the Act of 1869, because it makes the deed binding upon all the creditors, it was held that a deed executed by a debtor for the benefit of his creditors, if it did not contain a clause of release, could not be pleaded in bar to an action—*Clarke* v. *Williams* (1). The effect of the annulling of the bankruptcy is to remit the bankrupt, in respect of his property, to his original position—*Bailey* v. *Johnson* (2); see section 81 of the Bankruptcy Act, 1869. There is nothing in the bankruptcy proceedings which would be an answer to the action until the bankrupt had obtained his discharge; it was no part of the present scheme that the bankrupt should obtain his discharge or be released from his debts. The bankrupt is not without a remedy, for he may still apply to the Court of Bankruptcy to stay the proceedings, and is therefore in the same position as if the proceedings in bankruptcy had continued. *West* v. *Baker* (3) was also cited.

J. L. Walton, for the defendant, was was not called upon.

BRETT, M.R.—I am of opinion, for the reasons given by Mr. Justice Field, that the plaintiff has disclosed upon the statement of claim a state of facts which shew that this action cannot be maintained. The statement of claim is therefore bad. The question here turns upon the proper construction of section 28 of the Bankruptcy Act, 1869, and is, whether under and by virtue of that section, where the creditors assent to any general scheme of settlement of the affairs of the bankrupt upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, such a resolution upon being passed and approved of by the Court of Bankruptcy is equivalent to the discharge of the bankrupt so that he is

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

(1) 3 Hurl. & C. 1001; 34 Law J. Rep. Exch. 188.

(2) 41 Law J. Rep. Exch. 211; Law Rep. 7 Exch. 263, 265.

(3) 45 Law J. Rep. Exch. 113; Law Rep. 1 Ex. D. 44.

released from his debts. In my opinion it is, first of all upon the true construction of the section, and secondly upon the ground which was pointed out by Mr. Justice Field—namely, that if it were not so, any scheme of settlement of the affairs of the bankrupt would give nothing at all to the bankrupt, but would leave him where he was before, and if this resolution had not been passed he would have been entitled to go on with the proceedings under the bankruptcy, and ultimately get his discharge. It was said that we are forced to come to the conclusion that the bankrupt has not obtained his discharge by the decision in *Clarke* v. *Williams* (1), even though the proceedings or the execution, if the action had gone on to judgment, would be stayed as a matter of course upon application to the Court of Bankruptcy. The case of *Clarke* v. *Williams* (1) has nothing to do with that; and, if it had, that would be a very good reason for the Legislature putting an end to such a state of things. The question here turns upon the true construction of section 28 of the Bankruptcy Act, 1869. That section provides that the trustee may, with the sanction of a special resolution of the creditors, "accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled." In other words, the trustee may accept a composition with the condition that the order of adjudication is to be annulled; but if he does accept the composition, the annulling of the order of adjudication does not entitle the creditors to sue, for they cannot sue after having accepted the composition. Then we come to the alternative course given by the section—that the trustee may assent to any general scheme of settlement of the affairs of the bankrupt upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled. How can that be a settlement of the affairs of the bankrupt which is no settlement at all? According to the argument urged on behalf of the plaintiff, nothing at all was settled, and the moment that is admitted, the argument is one which is contrary to the very words of the section, and is therefore fallacious. Upon the true construction of the section, it is palpable that the Legislature intended that where there has been such a settlement of the affairs of the bankrupt as in the present case, the bankrupt must be considered to have been discharged from the debts for which he would have been liable. The judgment of Mr. Justice Field, for the reasons there given, was therefore right.

LINDLEY, L.J. — I am of the same opinion. The effect of the resolution, which was referred to in paragraph 6*a* of the statement of claim, must be ascertained from section 28 of the Bankruptcy Act, 1869. The last words of that section are that the approval of the Court, that is, the Court of Bankruptcy, shall be conclusive as to the validity of any such composition or scheme, and it shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy. The obvious and plain meaning of those words is that the composition or scheme, when approved by the Court of Bankruptcy, is binding upon all the creditors. I am of opinion that the judgment of Mr. Justice Field, for the reasons there given, was right.

FRY, L.J.—I entirely agree. It appears to me that the arrangement was in substance one of accord and satisfaction, and that the bankrupt gave that satisfaction when he executed an assignment of his property to a trustee for the benefit of his creditors. I also think that the observation made by Mr. Justice Field—that if the resolution has no other effect than to assign the property, the debtor gains nothing at all, but loses—is one of very great force.

Appeal dismissed.

Solicitors—Haynes & Clifton, for plaintiff; E. J. Lewis, for defendant.

1883. June 9, 16. } HORSLEY *v.* PRICE.

Charter-Party—Construction—"At all Times of Tide"—"Always Afloat"—Demurrage.

A charter-party provided for delivery of cargo ex H. at S. "or so near thereto as she may safely get at all times of tide and always afloat":—Held, *that the lay days began to run on notice to the receivers that the vessel had arrived at the nearest place to S. to which she could get in the then state of tide.*

This was an action by the owner of the steamship *Halo* for demurrage against the charterers brought on a charter-party, dated London, July, 1882. The material parts of the instrument were as follows: "That the said ship or steamer, being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Ljusne (Soderhamn) (having liberty to take outward cargo from a loading port to any port or ports for owner's benefit), or so near thereunto as she may safely get, and there load, always afloat" . . . . "and being so loaded shall therewith proceed to Sharpness, or so near thereunto as she may safely get at all times of tide and always afloat, and deliver the same on being paid freight as follows:" . . . . "The cargo to be supplied to steamer as fast as she can take it on board, and to be discharged with all despatch as customary, or demurrage to be paid at the rate of thirty-five pounds sterling per day." . . . . "The cargo to be brought to and taken from alongside the vessel at the expense and risk of charterers." . . . . "If more than six days occupied in discharging, demurrage to be paid by receiver as above."

The charter-party was in printed form, with blanks filled up in writing for the special details of the contract, except for the place of discharge. London was printed and scored through, the word "Sharpness" being written in in lieu of London. The *Halo* took in her cargo and proceeded to the Severn. On the 5th of September, 1882, she arrived at "King's Roads," an open roadstead in the Severn, opposite the mouth of the Avon, where ships can lie at anchor, but there is no wharf; it is within the port of Bristol. Sharpness is a place sixteen or eighteen miles higher up the Severn, and is not within the port of Bristol, but within the port of Gloucester. King's Roads was the nearest place to Sharpness that the *Halo* could reach with her full cargo on board in the then state of the tides of the Severn at any time up to the 9th. In that state of things various communications took place between the persons acting for the ship and the charterers respectively, and the result of the evidence on this part of the case was, in his Lordship's opinion, that the ship's agents alleged that the voyage was complete, and offered to deliver the cargo at King's Roads, or, if the charterers would lighten the vessel by taking delivery of part, then to proceed to Sharpness with the remainder, and in either case to enter the ship at Bristol; but that the defendants' agents declined that offer, and refused to take delivery of any part of the cargo at King's Roads, or to recognise the ship at all until she arrived at Sharpness. Under those circumstances the ship was not entered at Bristol, as such entry would have been useless. She remained at King's Roads till the 9th, and on that day the tides just permitted her to go on to Sharpness "always afloat," and she arrived there that evening. On Monday, the 11th, she began the discharge of her cargo, which was completed on the 14th. The plaintiff claimed 105*l.*, three days' demurrage.

The action had been tried at Gloucester. It was now heard on further consideration upon the point whether on the construction of the charter-party the lay days began to run on the 5th or 9th of September.

Henry Matthews, Q.C., and *A. T. Lawrence*, for the plaintiff.—The vessel when she arrived at King's Roads had fulfilled the charter-party. "At all times of the tide" meant whether at spring or neap tide, and in the collocation of words implied that the ship was not bound to wait for higher tides to proceed further. The plaintiff by giving notice had done all that was necessary. The defendants, by refusing to receive except at Sharpness, had waived the performance of any acts (such as

entering at the port of Bristol) necessary to deliver—*Dahl* v. *Nelson* (1), *Capper* v. *Wallace* (2), *Shield* v. *Wilkins* (3), *Parker* v. *Winlow* (4), *Kay* v. *Field* (5), *Hudson* v. *Ede* (6), *In re The Alhambra* (7) and *Hotham* v. *The East India Company* (8).

The charterer is liable under his contract for the demurrage he has contracted to pay on his failing to discharge within the lay days, notwithstanding any accident that may cause his breach of contract—*Chitty on Contracts* (9).

Powell, Q.C., *Anstie, Q.C.*, and *H. D. Greene*, for the defendants.—The contract is to have a reasonable interpretation; and if there is any doubt, it is to be taken against the contractor the shipowner. The phrase "all times of tide" is to be read with "always afloat," and means that the ship is to be discharged at a place where she is always afloat; on the alternative construction the words taken literally would mean that the voyage was determined at the nearest point where the ship would ground at any low water, a construction so unreasonable that it is not contended for by the plaintiff. The risk of detention in the Channel by reason of the state of the tides before the ship gets to her destination is an ordinary risk to which the shipowner is liable, and the voyage did not terminate till the ship got up to Sharpness. King's Roads is in a different port, and the words of the charter-party imply that the voyage shall terminate within the ambit of the port in which Sharpness is. Even if the voyage could determine at King's Roads the shipowner did not do what he ought to have done before he could deliver—that is, enter the vessel at Bristol; he ought himself to have lightered, warehoused the cargo, and charged the charterers the expenses—*Bastifel* v. *Lloyd* (10), *Hilston* v. *Gibson* (11), *Schelizzi* v. *Derry* (12), *Metcalf* v. *The Britannia Ironworks* (13) and *Hayton* v. *Irwin* (14).

The charter-party being in common form printed, the written part was the important governing part, and therefore the place of discharge was essentially Sharpness—*Bunyon on Fire Insurance* (15), *Robertson* v. *French* (16) and *The Mercantile Marine Assurance Company* v. *Titherington* (17).

H. Matthews, Q.C., in reply.—The Master could not have himself discharged till after the expiration of the lay days—*Maclachlan on Shipping* (18).

NORTH, J., after stating the nature of the action, said:—This action is defended upon the footing that the voyage was not completed until the ship's arrival at Sharpness on the 9th, when the six lay days began to run; and that the cargo having been completely discharged within these six days, no demurrage is payable. A subordinate point is raised by the pleadings that the plaintiff never was ready and willing to deliver the cargo at King's Roads, inasmuch as no delivery could take place without the ship's being first entered at Bristol, which never was done; but as I find that the parties did offer to make such entry, and the defendants refused to accept, this defence fails. To adopt the language of Lord Mansfield in *Jones* v. *Barclay* (19), "the party to perform must shew that he was ready; but if the other party stops him, on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act." The principal question in this case is whether the voyage was terminated and the lay days began to run, and this depends upon the true

(1) 50 Law J. Rep. Chanc. 414; Law Rep. 12 Ch. D. 568; ibid. 6 App. Cas. 38.
(2) 49 Law J. Rep. Q.B. 350; Law Rep. 5 Q.B. D. 163.
(3) 19 Law J. Rep. Exch. 238; 5 Exch. Rep. 304.
(4) 7 E. & B. 942; 27 Law J. Rep. Q.B. 49.
(5) *Ante*, p. 17; Law Rep. 10 Q.B. D. 241.
(6) 37 Law J. Rep. Q.B. 166; Law Rep. 3 Q.B. 412.
(7) 50 Law J. Rep. P., D. & A. 36; Law Rep. 6 P. D. 68.
(8) 1 Term Rep. 638.
(9) 11th ed. p. 667.
(10) 1 Hurl. & C. 388; 31 Law J. Rep. Exch. 413.
(11) 8 Sess. Cas. 3rd ser. 443.
(12) 4 E. & B. 873; 24 Law J. Rep. Q.B. 193.
(13) 45 Law J. Rep. Q.B. 837; 46 ibid. Q.B. 443; Law Rep. 1 Q.B. D. 613; ibid. 2 Q.B. D. 423.
(14) Law Rep. 5 C.P. D. 130.
(15) p. 59.
(16) 4 East, 134.
(17) 5 B. & S. 765; 34 Law J. Rep. Q.B. 11.
(18) 2nd ed. p. 408.
(19) 2 Dougl. 684.

construction of the charter-party, and particularly on the words "at all times of tide." It appears from *Parker* v. *Winlow* (4), *Bastifel* v. *Lloyd* (10), and *Dahl* v. *Nelson* (1), that when the charter-party provides that a ship shall go to a harbour named, or as near thereto as she can safely get, the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named is such that it cannot be got rid of by the shipowner by reasonable means and within a reasonable time, having regard to the nature and the object of the voyage; and further, that if the cause of detention be the arrival of the vessel during the low tides, her having to wait for the tide to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned. No one could say that four days' waiting for such a purpose was not reasonable; and it was not disputed that if the words "at all times of the tide" had not been found in the charter-party, the plaintiff must have borne the risk of the delay at King's Roads, the lay days would not have commenced till the 9th, and the defendants would have been entitled to judgment. What, then, do the words mean? The defendants cannot say that they have not practically any meaning at all. Their contention is that they are not to be read in connection with the previous words "so near thereto as she may safely get," but with the succeeding words "and always afloat," and that the whole sentence thus read means simply that the ship is, during the progress of the voyage and while lying at the port of discharge, to be afloat at all times of the tide—that is to say, always. There are several reasons why I cannot adopt this construction. The words in common use to provide for this purpose are "always afloat," or "lie always afloat," and I have no recollection of having ever myself seen a charter-party containing the words "at all times of the tide," though the words "so near thereto as she may safely get and lie afloat at all times of the tide" are found in the Scotch case of *Hilston* v. *Gibson* (11); but in that case the words "and always" are not found; in the present case the usual phrase "always afloat" is found, and I am asked in effect to treat the words "at all times of the tide" as surplusage, adding nothing to the meaning of the contract.

This, in my opinion, I cannot do. They are not words of usual occurrence; they are, as pointed out by Baron Channell in *Bastifel* v. *Lloyd* (10), essentially words put in by the shipowner, and I must give them a meaning if possible. In the present case there is one reason which appears to me absolutely conclusive why I should not adopt the defendants' construction, which is this—the charter-party shews that the shipowner considered it quite as important that the vessel should be always afloat at the loading port as at the port of discharge. He provides for it in both places by the use of the words "always afloat;" but in speaking of the port of discharge, the words "at all times of the tide" are added; and the only conclusion I can come to is that they are intentionally introduced there for the purpose of making provision for something not otherwise provided for, and in contemplation of some event possibly arising at the ship's destination not anticipated at the loading port. I do not forget the argument that as the word "Sharpness" is written in the charter-party, and the words "or as near thereto as she may safely get" are printed, I must strike out the latter words and read the charter-party as providing for the port of arrival being Sharpness only. If this view were sustainable, I should have to do more, for I should have also to strike out the words "at all times of the tide and always afloat," and this certainly would simplify the construction of the document; but it is sufficient to say that I cannot strike out or reject any words, but must construe the document as it stands, and must give every portion of it some signification if possible. In my opinion, the words "at all times of the tide" were put in on purpose to make the contract different from what it would have been if they had not been inserted; in other words, to relieve the shipowner from a burden which the law would have thrown upon him in the absence of these words—namely, the risk

of delay upon arrival from the state of the tides in the river to which the charterer's convenience required the ship to go. It is obvious that every day's delay must be a considerable loss to the shipowner, and this charter-party seems to me expressly designed to relieve the owner at the charterer's expense from a chance of loss, to the existence of which he was possibly awakened by the decision in *Nelson* v. *Dahl* (1). The point which arose for decision in *Hilston* v. *Gibson* (11) and *Capper* v. *Wallace* (2)—namely, whether, and how far, it was incumbent upon the shipowner to discharge part of the cargo at King's Roads, and so, by lightening the vessel, enable her to proceed to Sharpness with the residue—does not arise here, for on the evidence I find that the plaintiff offered to adopt that course, and the defendants declined to consent to it, pointing out that it would not be of any use. It was said that a construction of the charter-party which enables the shipowner to end the voyage at a point short of Sharpness, when by a short and reasonable delay he would have been able to carry his whole cargo to that destination, is a hard and unreasonable one. But if it appears to me, as it does, the only one which gives a proper signification to the words used by the parties, I cannot reform the contract upon any such ground as suggested; and, further, any argument founded upon hardship is open to this rejoinder—that it is the interest of the shipowner to act reasonably towards charterers; and in the present case the plaintiff actually did more than he was bound to do, and, for their accommodation and to save them expense, did wait at King's Roads, and ultimately proceeded to Sharpness; and, in my opinion, he is only acting reasonably in claiming payment, as agreed, for the time so lost to him. This seems to me a far more appropriate and reasonable course for the shipowner to adopt than that which Mr. Anstie says was his only proper one —namely, to have himself discharged the cargo at King's Roads at the end of the lay days, and warehoused at Bristol, leaving the charterers to get it as they could, and then to have sued the charterers for damages from their refusal to take delivery at King's Roads. It was also argued by Mr. Anstie that the decisions in *Scholizzi* v. *Derry* (12) and *Metcalf* v. *The Britannia Ironworks* (13) shew that the words "as near thereunto as she can safely get" must be construed to mean a point within the ambit of the port named, as near to the port itself as she can safely get. It is not for me to say, after those decisions, that such a construction would be adding words to the charter-party not found there; but to make those cases analogous at all to this present I certainly should have to add words to those charter-parties which were not found there—namely, some such words as "in all states of the river," in the first case, and "at all seasons of the year," in the second. In the present case I cannot accede to the contention so urged; if I were to read the words "to Sharpness, or as near thereunto within the ambit of that port" (or "the port of Gloucester," if you will) "as she could safely get, at all times of the tide, and always afloat," I should be reading the charter-party *ut magis pereat quam valeat*; for it is not suggested that any such place exists, or that the ship ought to have gone, or could have gone, to any point above King's Roads short of Sharpness itself; and therefore, what I am asked to do is to exclude from this charter-party all the qualifying words following the word "Sharpness," and this I cannot do. I may add that in the case of *The Alhambra* (7), the contention that the words "within the ambit of the port" were to be read into a charter-party providing that a ship should go to a port, "or as near thereto as she could safely get," does not seem to have occurred to the Judges of the Court of Appeal or to the experienced counsel who argued that case.

I think I have now noticed all the arguments addressed to me on behalf of the defendants except one founded on the case of *Hayton* v. *Irwin* (14), and I am obliged to pass that over without comment, because, probably from my own fault, I was quite unable to follow it or see its application to the present case. Since this case was argued I have seen in *The Times* (20) a report of a somewhat similar case before my brother Cave, where the words "if sufficient water" were in-

(20) *Allen* v. *Coltart* (12th of June, 1883; Cave, J.)

troduced in collocation with a named dock, and am glad to see that his views were much the same as those to which I have come. Under these circumstances, there will be judgment for the plaintiff for 105*l.*, and the costs will follow the event.

Solicitors—Turnbull, Tilly & Monsir, agents for Turnbull & Tilly, West Hartlepool, for plaintiff; Harvey, Oliver & Capron, agents for Smith & Franklin, Gloucester, for defendants.

1883. Feb. 21.

ADAMS *v.* CLUTTERBUCK.

Conflict of Laws—Incorporeal Hereditament—Contract in England by Englishmen as to Sporting Rights over Land in Scotland—De facto Enjoyment of Right—Lex loci rei sitæ—Lex fori.

The provision of the English law that a right to an incorporeal hereditament can only be conveyed by deed is part of the lex loci and not of the lex fori, and a lease made in England by Englishmen of sporting rights over land in Scotland, which if made in Scotland would not require a deed, may be enforced in England, although it be not sealed. The lessee, who has had the actual enjoyment of the right conveyed, cannot set up the invalidity of the lease by reason of the want of a seal as a defence to an action for breach of a stipulation contained in it.

This was a demurrer to a rejoinder. The statement of claim alleged a tenancy by the defendant at an annual rent of a furnished lodge, and the exclusive right of shooting and sporting over certain moorlands in Scotland, under a lease for three years, which contained a stipulation that the defendant should at the end of his tenancy leave a sufficient head of game on the land. The statement of claim alleged a breach of this agreement, and the plaintiff claimed 1,200*l.* damages. The statement of defence contained a denial of any lease, and alleged that if there were any tenancy it was under an instrument in writing not under seal, which did not grant the right of shooting as appurtenant to the furnished lodge. The reply alleged that the right of shooting was over land in Scotland, and the nature of the right and mode of conveying it was governed by the law of Scotland, and not by the law of England, and that by the law of Scotland an instrument under seal was not necessary for the conveyance thereof; also that, possession having been taken under the instrument, it was in all respects binding and effectual. Rejoinder, that the instrument was made in England within the jurisdiction of the Court, and by and between the plaintiff and defendant, who were both Englishmen "then and now domiciled within the jurisdiction of the Court," and the law of Scotland did not govern or determine the nature of the right or the mode of conveying it, nor apply to it in any way.

The plaintiff demurred, on the ground that the Scotch and not the English law governs and determines the right of shooting over land in Scotland and the mode of conveying such right.

R. T. Reid, Q.C. (*J. Shortt* with him), for the plaintiff.—The *lex loci rei sitæ* applies. The general principle of the common law is that the laws of the place where real or immovable property is situate exclusively govern in respect of the rights of the parties, the modes of transfer, and the solemnities which should accompany them —*Story on the Conflict of Laws* (1). The same author in section 436, quoting *Erskine's Institutes*, says, "In the conveyance of an immovable subject, or of any right affecting heritage, the grantor must follow the solemnities established by the law, not of the country where he signs the deed, but of the State in which the heritage lies and from which it is impossible to move it." So also *Wharton on the Conflict of Laws* (2).

Having enjoyed the property, the defendant is liable, even if the lease is governed by the law of England and is void for want of a seal—*Woodfall's Landlord and Tenant* (3).

Jelf, Q.C., for the defendant.—If the

(1) 7th ed. s. 424, p. 533.
(2) Sections 274, 295 and 372.
(3) 11th ed. p. 117.

plaintiff comes to enforce this contract, he must support it by some evidence of the contract, and he cannot do that in an English Court unless the lease be stamped. An action will not lie in our Courts to enforce an oral agreement made abroad, which if made in England could not be sued on by reason of the Statute of Frauds —*Leroux* v. *Brown* (4).

The defendant is not sued as having had the right of sporting vested in him by the law of Scotland, and so having had the consideration *de facto* and *de jure*, but on a personal contract; and to enforce it the plaintiff must shew that the instrument conforms to the *lex fori*. The whole demise is bad—*Doe dem. Griffiths* v. *Lloyd* (5) and *Bird* v. *Higginson* (6). In *Doe dem. Rigge* v. *Bell* (7) the agreement was void by the Statute of Frauds.

Reid, in reply.—There is no authority for the proposition that the right to recover depends on the place where the contract is made. *Leroux* v. *Brown* (4) turned on points of procedure, which of course are governed by the *lex fori* and not on the rights in dispute.

CAVE, J.—I am of opinion that the plaintiff is entitled to judgment. The principal question is, whether the provision of the English law that a right of shooting cannot be conveyed otherwise than by an instrument under seal is a part of the *lex loci* or the *lex fori*. That provision regulates the transfer of interests in land, and unless it be complied with no valid grant can be made, so that nothing passes to the grantee. This result is effected whether the grantee sues in a Court of law or not. It is plainly, therefore, the *lex loci*, and not the *lex fori*. If it were reversed, and the seal were required by the Scotch law and not by the English, then, if it were the *lex fori*, a person who had granted a right of shooting in a mode giving no legal estate in Scotland could yet sue on the contract in England. This cannot be correct, and shews that it must be the *lex loci*. There is no decision to the contrary, and *Leroux* v. *Brown* (4) turns on the Statute of Frauds, the very language of which points to the *lex fori*, and not the *lex loci*.

I am also of opinion that the defence is bad. It has never been held that a man who has entered into a contract to do something on land after a certain number of years, and who has had actual possession and enjoyment of the land, has been held not liable to perform the contract, because his possession, under the instrument by which he *de facto* had the enjoyment of the property, was not *de jure*. The contrary is evidently pointed out in *Doe dem. Rigge* v. *Bell* (7) and *Woodfall's Landlord and Tenant* (3). Here the defendant, as is shewn by the pleadings, had the enjoyment of the shooting, and I think it would be wrong to hold him to be freed from the liability to comply with the agreement to leave a sufficient head of game on the estate because his enjoyment was only *de facto* and not *de jure*—only under an equitable and not under a legal title.

Demurrer allowed, with costs.

(4) 12 Com. B. Rep. 801; 22 Law J. Rep. C.P. 1.
(5) 3 Esp. 78.
(6) 2 Ad. & E. 696; 4 Law J. Rep. K.B. 124.
(7) 2 Sm. L.C. 101; 5 Term Rep. 471.

Solicitors—Spencer Whitehead, agent for Milward & Co., Birmingham, for plaintiff; Lancelot Drew, agent for W. O. Boyes, Barnet, for defendant.

1883. May 8. June 6. } SMITH (*appellant*) *v.* THE MAYOR, ALDERMEN AND BURGESSES OF BIRMINGHAM (*respondents*).

Waterworks Company—Water Rate, how calculated—"Annual Rent"—"Annual Value"—Waterworks Clauses Act, 1847 (10 *Vict. c.* 17), *s.* 68—*Empty Houses.*

[For the report of the above case, see 52 Law J. Rep. M.C. 81.]

1883. June 4, 5, 27. } JOLLIFFE *v.* BAKER.

Vendor and Purchaser—Sale of Real Property—Accidental Misstatement as to Extent of Property—Completion of Purchase—Right to Compensation—Fraud.

After the purchaser of real estate has taken a conveyance, and the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser.

In the conveyance to a purchaser the land sold was described as two parcels, each defined in the most particular manner by metes and bounds, and other details, and each "as containing by estimation one and a half acres or thereabouts." Subsequently to the conveyance the lands were measured, and the two parcels together amounted to only 2a. 1r. 12p.:—

Held, *that this misdescription as to quantity did not amount to a breach of any warranty, so as to entitle a purchaser to maintain an action for damages against the vendor.*

It is a question of fact whether the parcels have or have not, in truth and in fact, been estimated to contain the quantity stated or thereabouts, the answer to which will mainly depend on whether the error is so small as to lead to the assumption that it might have been so estimated, or so great as to make the estimate an irrational or impossible one.

This was an appeal on the part of the defendant from the decision of the County Court Judge of Hampshire. The facts and arguments are fully stated in the judgment of Williams, J.

Harris Lea appeared for the plaintiff.
Macaskie was for the defendant.

Cur. adv. vult.

The following judgments were delivered on June 27:—

WILLIAMS, J.—This is an appeal by the defendant against a decision of the County Court of Hampshire which was argued before my brothers Cave and Smith and myself during the present sittings.

The question arises between vendor and purchaser of real property; the plaintiff, the purchaser, seeking to recover compensation from the defendant, the vendor, after the completion of the contract, on account of an alleged misstatement as to the acreage of the property made in the contract of sale and repeated in the conveyance, but made in good faith and without any intention to deceive.

The appeal comes before us upon a Special Case stated by the Judge, from which the facts appear to be as follows:—

In June, 1881, the defendant advertised the property in question for sale, and in reply to a letter of enquiry from the plaintiff thus described it in a letter of the 1st of July, 1881:—

"The property is situate at Stroud Wood; it consists of cottage thatched, with four rooms, pigstye, cowpen, garden and capital meadow—in all three acres. It has been occupied by Charles Lee for the past thirty years, and the rental is 16*l.* a year. Price 275*l.*"

The plaintiff went and looked at the property, but it was never measured; and on the 28th of July, 1881, a contract in writing was entered into between the parties for the purchase at 270*l.* In this contract the property was described as "All that freehold cottage or tenement, garden and land, containing by estimation three acres or thereabouts." There were provisions for delivery of abstract of title, and making requisitions and objections, as follows:—"The purchaser shall make his objections and requisitions (if any) in respect of the title and all matters appearing upon the abstract or these presents, and send the same within fourteen days from the day of the delivery of the abstract, and in default of such objections and requisitions, and subject to such, shall be deemed to have accepted the title and to have waived all other objections and requisitions; and if he shall insist on any objection which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchaser at any time, and

notwithstanding any negotiation or litigation in respect of such objection, annul the sale, and the purchaser shall have no claim on the vendor for the expense of investigating the title or other expenses whatsoever, or for compensation."

The purchase was completed and the conveyance executed on the 25th of August, 1881, and the purchase-money was paid and possession taken on the same day. In the conveyance the property was described as "All that cottage or tenement, and piece or parcel of meadow land to the same adjoining, containing by estimation one and a half acres more or less, bounded on lands now or late of Dame Jane St. John Mildmay on the north part, and upon Stroud Wood on the east, south and west, and also all that piece or parcel of land, containing by estimation one and a half acres more or less, sometime since purchased of the (Enclosure) Commissioners adjoining to and now thrown with the said piece of meadow land."

The defendant had purchased the property in 1879 by the same description in every respect; he had never measured the land, and believed that the description as to acreage was correct, and he sold the property to the plaintiff in good faith, honestly believing the estimate to be correct.

In December, 1881, the plaintiff, in consequence of statements that had been made to him, measured the land, and found that it contained two acres, one rood, and twelve perches, instead of about three acres, and he applied to the defendant for compensation. The defendant refused to make compensation, and this action was brought to recover it.

The County Court Judge found that there was no fraud or deceit on the part of the defendant, but decided that, notwithstanding there was no fraud, yet as the actual quantity of land did not sufficiently answer the description in the contract and conveyance, the plaintiff was entitled to recover for the deficiency in quantity, and gave judgment for the plaintiff for 50*l.*

From this decision the defendant has appealed, and we have to determine whether it is correct.

Before considering the legal questions involved in the case, I will turn again for one moment to the facts. The land, the subject-matter of the sale, consisted of specific parcels defined by metes and bounds, and there was no mistake or error as to the extent of the parcels of land sold, which were seen and examined by the purchaser before the sale. The purchase-money was an entire lump sum for the lot. The vendor undoubtedly represented the property in the treaty for the sale as being in all three acres, and in the formal contract and in the conveyance itself it is described as "containing by estimation three acres or thereabouts."

It was stated that the County Court Judge in the decision at which he arrived acted upon and followed the undoubtedly high authority of two opinions recently expressed by Lord Justice Fry in *Hart* v. *Swaine* (1) and Sir George Jessel in *In re Turner and Skelton* (2), which were said to have laid down the proposition broadly—that a purchaser, even after completion and after conveyance, and in the absence of actual fraud, was entitled to claim compensation for errors and inaccuracies in the particulars of the land sold; and it was strenuously argued before us, that although the County Court Judge had negatived actual moral fraud, yet the case was one coming within the principle of legal fraud, entitling the purchaser to relief even after conveyance.

In direct opposition to these there were cited three decisions of Vice-Chancellor Malins, in the last of which he distinctly disputed the correctness of Sir George Jessel's decision, and declined to follow it, and it is in this conflict of the most recent authorities that we have to determine the question.

I propose at once to examine the conflicting authorities that have been cited to us. The first in order of date is *Hart* v. *Swaine* (1), decided in 1877 by the present Lord Justice Fry. It was an action by the purchaser against the vendor of real estate, to set aside, after conveyance, the sale of a piece of land sold as

(1) 47 Law J. Rep. Chanc. 5; Law Rep. 7 Ch. D. 42.

(2) 49 Law J. Rep. Chanc. 114; Law Rep. 13 Ch. D. 130.

freehold which afterwards was discovered to be copyhold. The defendant sold the land in question, about four acres, to the plaintiff in February, 1876, and conveyed it to him as freehold. It appeared that the defendant had bought the land, together with other land, in 1871 from one Chamberlain, who informed him that a portion of the land he was selling was copyhold. In fact, the copyhold portion had been an allotment under an Enclosure Act in respect of other copyhold land the property of the Chamberlains, and there was nothing in the abstract of title shewing that any of the land offered for sale was copyhold, and the defendant for his own convenience took a conveyance of the whole from Chamberlain as freehold. It appeared also that early in 1876, and before the defendant sold to the plaintiff, the defendant had put up the four acres for sale by public auction, and on that occasion a Mr. Smith publicly stated in the auction room that the land was copyhold and not freehold, and no sale was then effected. From this statement I collect that the defendant had then proposed to sell the property as freehold when Mr. Smith stated that it was copyhold, and that he afterwards sold the property to the plaintiff, asserting it to be, and selling it as, freehold. Lord Justice Fry set aside the sale, and ordered the defendant to repay the purchase-money with interest and expenses. This decision, if I may say so without appearing impertinent, is equally consistent with sound law as with sound sense; but the reasoning upon which it is founded is, if I may say so without presumption, unsatisfactory, and has proved misleading. At the conclusion of the case Lord Justice Fry said, "I see no evidence of actual fraud on the part of the defendant; he has only made a mistake. But as he has taken upon himself to assert that the land is freehold, am I at liberty to look into the state of his mind?" And further on he says, "the defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this, believing it to be true, the result appears to me to be that which is expressed in the judgment of Mr. Justice Maule in *Evans* v. *Edmonds* (3), where he says, 'I conceive, if a man having no knowledge whatever of the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made,' That is to say," continues Lord Justice Fry, "the defendant having taken upon himself, with a view to securing a benefit to himself, to assert that the property was freehold, has in the view of a Court of law committed a fraud." Having further cited the case of *Rawlins* v. *Wickham* (4), the Lord Justice concludes by saying, "It appears to me, therefore, that in this there has been a legal fraud committed by the defendant, which has resulted in the sale to the plaintiffs, and that I am bound by the authorities to give the plaintiffs the relief they ask."

In the first place it seems, looking to the facts of *Hart* v. *Swaine* (1), that it can scarcely be cited as an authority in support of the doctrine that the so-called legal fraud, without actual moral fraud, is a sufficient ground for setting aside a conveyance. There was in that case ample evidence of fraud in the common meaning of the term. The defendant, even if he did not believe his statement to be false, could not possibly have believed it to be true, in the sense that *secundum subjectam materiam* he might have known it, and in the sense which the plaintiff had a right to suppose from his statements that he did know it; and it is certainly unfortunate that the language of Mr. Justice Maule in *Evans* v. *Edmonds* (3) should have been cited as an authority for the proposition that there can be an actionable legal fraud in the absence of moral fraud, because *Evans* v. *Edmonds* (3) was a case of the most flagrant fraud and treachery to be

(3) 13 Com. B. Rep. 777; 22 Law J. Rep. C.P. 211.

(4) 3 De Gex & J. 316; 28 Law J. Rep. Chanc. 188.

found in our books. In that case the plaintiff, as trustee under a separation deed between the defendant and his wife, sued for arrears of an annuity which the defendant had covenanted to pay. The defendant, in a plea very inartificially drawn, pleaded that he was induced to enter into the deed by false and fraudulent misrepresentations of the plaintiff, to the effect that the wife was a chaste person, and that he (the plaintiff) was a virtuous person and fit to be trustee, whereas the plaintiff had treacherously and perfidiously seduced the wife and concealed the fact from the defendant, and fraudulently induced the defendant to enter into the separation deed in order that he might seduce away the wife and keep up his adulterous intercourse with her. At the trial the jury found the plea to be true, and gave their verdict for the defendant. The plaintiff then moved for judgment *non obstante veredicto*, upon the ground that the plea was bad, having omitted the necessary averment of the plaintiff's knowledge at the time of making the representation that the wife was unchaste. The only point was, whether the omission of this technical averment was cured and supplemented by the verdict, inasmuch as actual fraud, in fact, was necessarily involved in the finding of the jury. The objection after verdict was obviously frivolous and absurd, and the observations of Mr. Justice Maule in answering it were conceived in a vein of the keenest irony and satire, when he said that a person might make such a representation fraudulently, as the jury had found, consistently with his not knowing it at the time to be false, which was not averred.

Nor is the other case cited by Lord Justice Fry, namely, *Rawlins* v. *Wickham* (4), any better authority for this doctrine of legal as distinguished from moral fraud. In that case the plaintiff had entered into partnership with two persons named Bailey and Wickham as bankers, and paid 2,300*l.* for his share, upon the faith of a statement of accounts and balance-sheet handed to him by both of them, shewing the bank to be in a solvent condition. The plaintiff, discovering afterwards that the accounts and balance-sheet were false, brought an action at law against them both for damages for false and fraudulent misrepresentation. During the pendency of this action Wickham died. The plaintiff proceeded with his action against Bailey and recovered damages amounting to about 12,000*l.* Failing to obtain satisfaction from Bailey, he filed his bill against Wickham's executors and Bailey for a dissolution of the partnership, and claimed a return of his 2,300*l.*, and an indemnity. There was strong ground for believing that Wickham had no knowledge that the accounts were false, and this was urged as a ground why his estate should not be made responsible; a decree, however, was made dissolving the partnership, and directing the money to be repaid out of Wickham's estate, Lord Justice Turner saying, "A representation was made by Wickham of a fact of the truth or falsehood of which he knew nothing. It has turned out that this representation was contrary to the fact. There was not, as I think, any moral fraud, but there was legal fraud, and the result is that the estate of Mr. Wickham must answer for the fraud." Whatever may have been the language of the judgment, I venture, with great deference, to say that that decision rests and may be supported upon the sound broad foundation of the well known principle of law, that every partner undertakes and engages for the fidelity of his copartners in the execution of matters within the scope of the authority conferred upon them; and all that could be decided in that case was that Wickham, even though an innocent partner, could not escape from the consequences of the fraudulent misrepresentation of his partner in a transaction which he had authorised him to carry out, and there was no necessity to resort to any doctrine of fraud.

The next in order of the alleged conflicting authorities were two decisions of Vice-Chancellor Malins, in which he decided that in the absence of fraud a purchaser cannot obtain compensation after conveyance for misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.

The first of these cases was *Manson* v. *Thacker* (5). It was an application by a purchaser of real property known as Nor-

(5) 47 Law J. Rep. Chanc. 312; Law Rep. 7 Ch. D. 620.

way Wharf, for compensation in respect of an underground culvert not disclosed by the particulars of sale, wherein the property was described as "available" as a building site for a warehouse, and by the 16th condition of which it was provided "that if any error or misstatement should appear to have been made in the particulars, such error or misstatement was not to annul the sale, or to entitle the purchaser to be discharged from his purchase, but compensation was to be made to or by the purchaser, as the case might be, and the amount was to be settled by a Judge at chambers." The contract was completed and conveyance executed in February, 1877, and in July following the purchaser discovered a culvert running underneath the land, and that he had no right to interfere with it. The mouth of the culvert was visible at low water. The Vice-Chancellor, assuming that the purchaser would have been entitled to compensation if he had come before completion, held that after the conveyance had been executed, and the purchase-money paid and possession taken, he was not entitled to claim compensation. He declined to follow the case of *Bos* v. *Helsham* (6), which I shall refer to hereafter, where the Court of Exchequer held that such a clause entitled the purchaser to compensation after the completion of the purchase; and he considered that in *Hart* v. *Swaine* (1) the whole transaction was vitiated by what he called legal fraud, by which, however, I understand him to have meant that which would have been treated as a fraud even in a Court of law.

The second case was *Besley* v. *Besley* (7). That was an action for the administration of the estate of one Besley, a typefounder, and a claim was made upon the estate under the following circumstances:—

In 1861 Besley sold his business to the claimants for 10,000*l.*, and, amongst other things, it was agreed that Besley should grant them an underlease of the premises for the residue of the term for which he held the same, except the last ten days, at 225*l.* a year. The purchase was completed, and by an underlease prepared by Besley's solicitor the premises were demised for twenty-three years less ten days. It was afterwards discovered that the term had only sixteen years to run instead of twenty-three, and that Besley had consequently granted the lease for seven years longer than he had power to do, and the claimants were obliged at the end of the sixteen years to pay a rent of 400*l.* a year. It was admitted that this was done by mistake. The Vice-Chancellor decided that the claim was inadmissible, stating that a purchaser must be wise in time, and is bound to look into the facts connected with the subject-matter of his purchase before the completion of the contract, and that after the execution of the conveyance, in the absence of fraud, he comes too late.

I next come to the undoubtedly great authority of Sir George Jessel on the other side, in the case of *In re Turner and Skelton* (2), which was an application under the Vendors and Purchasers Act, 1874, on the part of a purchaser seeking compensation from the vendor for an error as to the quantity of the land, not discovered until after the conveyance had been executed.

The facts were these:—By the contract the vendors agreed to sell and the purchaser to buy a piece of land described in the schedule as containing 6a. 2r. 10p. or thereabouts, for 500*l.*, and by the conditions of sale it was provided that if any error or misstatement should be found in the schedule it should not annul the sale, but compensation should be made in respect thereof. After the completion of the purchase and execution of the conveyance the purchaser discovered by measurement of the piece of land that it only contained 5a. 0r. 7p.

Sir George Jessel, in deciding in favour of the claim, said: "I will first consider what the law is where there is no special contract between vendor and purchaser as to compensation. There are cases in which a purchaser may lose his right to compensation by doing certain acts which shew an intention on his part to fulfil the contract and to waive any claim in respect of misdescription of the property," and he cites a passage from *Dart's Vendor and Purchaser* stating that a purchaser may lose his right to resist specific performance

(6) 36 Law J. Rep. Exch. 20; Law Rep. 2 Exch. 72.

(7) Law Rep. 9 Ch. D. 103.

and his right to compensation by certain conduct on his part, and proceeds: "No book can be produced to shew that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance—and on what principle should he do so? The theory is, that he has contracted to take compensation if there is any variation from the particulars. Why then should he lose it by taking a conveyance? The only reason that can be alleged is that everything is supposed to be settled between the parties; but why should that be an obstacle to the right of the purchaser when the defect is discovered afterwards? . . . As to the authorities, they are all, with one exception (*Manson* v. *Thacker* (5), the other way." And he cites *Cann* v. *Cann* (8), which he says was not distinguishable from the case before him, and *Bos* v. *Helsham* (6), in which the Court of Exchequer decided in the same way, and he proceeds to say: "With these authorities one would think that the law was settled; but Vice-Chancellor Malins has, in *Manson* v. *Thacker* (5), decided the other way. . . . . Considering then the judgment in *Cann* v. *Cann* (8) and the subsequent case of *Bos* v. *Helsham* (6), I should consider myself bound by authority, and I cannot imagine that Vice-Chancellor Malins intended to overrule the previous cases."

In the still more recent case of *Allen* v. *Richardson* (9) the same question again rose before Vice-Chancellor Malins, and that learned Judge, who was himself a very experienced conveyancer and learned real property lawyer, in adhering to his former opinion, said: "I can only say that I very much regret that I am obliged to take an entirely different view from that of a Judge who is entitled to so much respect as the Master of the Rolls. All I can say is, that I retain strongly my former opinion, and upon that opinion I shall act until it is overruled. Until I find it laid down by the Court of Appeal that a purchaser is to be allowed to be lax in the conduct of his business, that he is to be allowed to lie by carelessly and discover things after the completion of the purchase which he ought to have discovered before, I shall adhere to my own view, because I believe that such a rule would be detrimental to the best interests of persons possessed of property. . . . I entirely dissent from all that the Master of the Rolls appears to have said."

In order to test the correctness of these propositions of Sir George Jessel, I turn to the two authorities that he cites, and to the standard works of Mr. Dart and Lord St. Leonards upon vendors and purchasers.

In *Cann* v. *Cann* (8) the question arose in an administration suit. Certain premises had been put up for sale by auction under an order of the Court. The premises were represented by the vendors in the particulars as being then in the occupation of tenants at a rent of 55*l.* a year. One of the conditions of sale provided that if there should appear any error or mistake whatever respecting the estate, it should not annul the sale, but a compensation should be given. Upon the faith of the representation as to the rent one Phipson became the purchaser; the purchase-money was paid to the credit of the cause, and the estate was conveyed to Phipson. After he was let into possession he discovered that the representation as to the rent was false, as the rent was only 40*l.* a year; he then presented a petition in the cause praying for compensation out of the fund in Court. Now here was a case in which, in the first place, there was a special contract for compensation between the parties; and secondly, there was a distinct and most material false representation and actionable fraud by the vendor; and thirdly, the petition was presented in relation to a purchase carried out under the order of the Court in an administration suit, the proceeds of the sale being still in the hands of the Court. Vice-Chancellor Shadwell said: "The question is whether, there having been a misrepresentation in respect to which the purchaser had a right of action, the circumstances of his having taken a conveyance has destroyed that right. The right of the petitioner is not at all affected by that circumstance; and as the Court would not have permitted him to bring an action for damages on account of the

(8) 3 Sim. 447.

(9) 49 Law J. Rep. Chanc. 137; Law Rep. 13 Ch. D. 524.

misrepresentation, I am of opinion he is entitled to be recouped out of the purchase-money."

Bos v. *Helsham* (6) was an action at law for compensation under a contract of sale containing the clause that if any error whatever should appear in the particulars of sale, it should not annul the sale, but in such case a reasonable compensation should be given. The defendants pleaded on equitable grounds that they had by deed conveyed the property according to the contract to the plaintiff, who accepted the conveyance and paid the purchase-money, and the purchase was then finally completed, and that after the completion the plaintiff discovered, and then for the first time gave notice of the alleged error. To this there was a demurrer. Chief Baron Kelly and the Court of Exchequer gave judgment for the plaintiff, upon the ground that by the terms of the special contract the defendant had agreed to make compensation for any errors in the particulars, and that there was no limitation of this to errors discovered before completion; and Baron Channell bases his judgment solely upon the interpretation of the express contract between the parties, considering that it was wholly beside the question to consider what would have been the rights of the parties in equity apart from express agreement. The attention of the learned Judges in that case does not appear to have been directed to the point that the compensation clause in such contracts is introduced into the conditions of sale for the benefit of the vendors, and to protect them against what would otherwise have been the right of the purchaser in equity to resist specific performance of the contract on the ground of inconsiderable errors and inaccuracies in the particulars—see *Whittemore* v. *Whittemore* (10). Nor was their attention called to the point that, so far as such conditions form part of any contract, they are entirely merged in and superseded by the formal deed of conveyance.

In *Dart's Vendor and Purchaser*, ch. xiv. par. 5, the rule is thus laid down: "With some few special exceptions, a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects either in the title to or quantity or quality of the estate which are not covered by the vendor's covenants." And in section 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of actual falsehood and fraud on the part of the vendor entitling the purchaser to a rescission of the contract, or where there is a total absence of the subject-matter of the intended contract; and he expressly says that a "bill filed after conveyance simply for compensation in respect of defects will be dismissed"; and Lord St. Leonards' book is to the same effect. This is how the modern authorities stand, and I own that if it had not been for the opinions attributed to Sir George Jessel and Lord Justice Fry in the cases referred to, I should have thought the rules applicable to the case tolerably clear. After the best consideration that I am able to give to these conflicting authorities, I am of opinion, in the first place, that it has been the established practice of the Court of Chancery that a bill for compensation properly so called, the purchaser retaining the property, could not be entertained after the completion of the contract and execution of the conveyance, and that the jurisdiction under which compensation was granted was exercised only as ancillary to specific performance, and was never exercised independently. The evidence of this is principally negative, but it was distinctly recognised and stated in the case of *Newham* v. *May* (11). In that case the purchaser of freehold houses filed his bill after conveyance, praying for compensation for the difference in value of the property by reason of the amount of rent having been misrepresented by the vendor. The bill was dismissed, Chief Baron Alexander stating it as his opinion that the remedy in such cases was by action at law for damages, and that the jurisdiction of equity in cases of compensation had grown up only as ancillary to and incidentally necessary to effectuate decrees of specific performance of contracts for the sale of real property.

A similar opinion was expressed by

(10) 38 Law J. Rep. Chanc. 17; Law Rep. 8 Eq. 603.

(11) 13 Price, 769.

Lord Eldon in *Todd* v. *Gee* (12), in which he followed the course of earlier authorities—see *Gwillim* v. *Stone* (13) and *Blore* v. *Sutton* (14).

This rule seems to me also to rest upon sound principles of law and equity, because, if it were otherwise, a purchaser might after conveyance and while still insisting upon retaining the estate ask for an abatement of the agreed purchase-money, which would be wholly contrary to every principle. If he came before conveyance he might, if misled even by an innocent error, fairly say to the vendor, "I have been misled and do not wish to have the estate, and if you insist upon my performing the contract and taking it, a fair abatement from the price ought to be made," in which case the vendor would be placed in a fair position, because if he was unwilling to part with his estate at the reduced price he might retain it; on the other hand, if the purchaser were entitled to insist upon retaining the estate, and at the same time claim an abatement of the price, the result would be that a vendor, on account of a perfectly innocent and unintentional error, might be compelled to part with his estate for a price that he never had and never would have agreed to, which appears to me contrary, not only to the express terms of the contract, but to every principle of law and justice. Nor can I reconcile Sir George Jessel's statement, "that the theory is that the purchaser has contracted to take compensation if there is any variation from the particulars," with his assertion that "the purchaser may lose this right to compensation by shewing an intention to fulfil the contract and waive any claim in respect of misdescription," because if his right rested upon contract simply, so as not to be affected by the purchaser completing and taking a conveyance, I am unable to understand how his intention to fulfil and to waive such claims could affect his actual rights under the contract. I am further of opinion, secondly, that after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser.

I will now apply these tests to the present case; and, first, was there any fraud practised upon the purchaser?—and to this I answer unhesitatingly that there was not.

The facts upon which this point rests are shortly these:—Upon the treaty for the sale, the vendor represented the quantity of land as being 3 acres, whereas it was only 2a. 1r. 12p., and consequently the representation was untrue in fact. This representation was qualified afterwards by the language both of the contract and the conveyance, and the County Court Judge acquits the vendor of fraud.

This, in my opinion, ought to be decisive upon the question in favour of the vendor; but it was strenuously and ably argued before us that this positive and untrue representation amounted to and constituted a legal fraud which entitles the purchaser to relief. It was contended that if a man takes upon himself to make a positive representation of fact in order for his own benefit to induce another person to act upon it, and the representation is acted upon, and it was at the time untrue in fact, that amounts to a fraud; and it was contended that that was exactly the present case, and that notwithstanding the finding of the County Court Judge negativing fraud, his decision could be supported, taking the admitted facts, upon the ground that there was here legal if not moral fraud.

It cannot be denied that for some years in the history of our jurisprudence great doubt hung over the question whether, in order to maintain the common law action of deceit, it was necessary to establish actual moral fraud on the part of the defendant. In 1840 the Court of Exchequer decided in *Cornfoot* v. *Fowke* (15) that an untrue representation, upon the faith of which an agreement was entered

(12) 17 Ves. 273.
(13) 3 Mer. 237.
(14) 14 Ves. 128.

(15) 6 Mee. & W. 358; 9 Law J. Rep. Exch. 297.

into to take a furnished house, must, in order to avoid the agreement, have been not only untrue but actually false and fraudulent on the part of the person making it.

On the other hand, in the year 1842 the Court of Queen's Bench in the case of *Fuller* v. *Wilson* (16) entirely dissented from the opinion of the Court of Exchequer, and decided, in an action brought by a purchaser of a house against the vendor for misrepresentation as to the house being free from rates and taxes, that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain that was sufficient. The controversy between the two Courts continued for several years, until the point was decided in the Exchequer Chamber in 1845 in the case of *Ormrod* v. *Huth* (17), where it was laid down that an action of deceit was not maintainable without shewing that the representation was false to the knowledge of the person making it, or that he acted fraudulently in making it; and this must be taken now to be the settled and established law. In other words, ever since 1845 it has been clear and established law that in considering the principles governing this class of cases the term "fraud" must be used and understood in the common meaning of the word as it is ordinarily used in the English language and as implying some base conduct and moral turpitude. With all deference to those who have persistently continued to use the expression "legal fraud," which I believe was first introduced by Lord Kenyon in 1801; it is certainly a matter of regret that the expression has ever been introduced into legal language. I adopt, with regard to that expression, the words of Lord Bramwell in *Weir* v. *Bell* (18), where he says—"I do not understand 'legal fraud.' To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, except where some duty is shewn, and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty."

Armed with this authority of Lord Bramwell's, I reject the phrase "legal fraud," as distinguished from "moral fraud and deceit," as wholly inapplicable and inappropriate to legal discussion, and I simply ask the question in the present case, do the facts disclose a case of fraud? and I reply unhesitatingly that they do not. Perhaps it is scarcely necessary to add that there can be no doubt that if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact and for his own benefit, regardless of whether the fact is so or not—then that is the strongest possible evidence of fraud in the plain meaning of the word, because by the hypothesis he could not have known that to be true as a fact which he pretended to know, and which he represented that he knew to be a fact. Still, even in such a case as that, the fraudulent element must be found to exist as a fact, and cannot be adopted as a mere inference of law —see *Taylor* v. *Ashton* (19), *Thom* v. *Bigland* (20) and *The King* v. *Mawbry* (21), in which Mr. Justice Lawrence says—"Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false"; and see *Haycroft* v. *Creasey* (22), where the defendant had said to the plaintiff that he knew as a fact of his own knowledge that he might trust a certain person to any amount, and it turned out that that person was in fact an impostor and without means, and that the defendant consequently could not in one sense have actually known what he said to be true, but that being himself duped he

(16) 3 Q.B. Rep. 58; 11 Law J. Rep. Q.B. 251.
(17) 14 Mee. & W. 651; 14 Law J. Rep. Exch. 366.
(18) 47 Law J. Rep. Exch. at p. 707; Law Rep. 3. Ex. D. 243.
(19) 11 Mee. & W. 415; 12 Law J. Rep. Exch. 363.
(20) 8 Exch. Rep. 725; 22 Law J. Rep. Exch. 243.
(21) 6 Term Rep. 627.
(22) 2 East, 92.

believed it. Lord Kenyon left the case to the jury as a case of fraud, not in the sense which affixes the stain of moral turpitude, but falling within the definition of legal fraud, and the jury under this direction found a verdict for the plaintiff; but this was afterwards set aside by the Court, on the ground that it was essential that the jury should find that the defendant had acted in bad faith and *malo animo* and *fraudulenter*.

Perhaps it is also here necessary to guard against the supposition that a class of cases have been here included which come under an entirely different principle of law: for instance, cases where money may be recovered back where it has been paid under a mistake of fact, or where there has been a mutual mistake as to the subject-matter—as in *Bingham* v. *Bingham* (23), where a man purchased his own estate; or where there turns out to be no subject-matter in existence, as in *Hitchcock* v. *Giddings* (24), *Hastie* v. *Coturier* (25) and *Gompertz* v. *Bartlett* (26); or where, by reason of an innocent reticence or misrepresentation of fact in effecting a marine insurance, the parties are not *ad idem*, and there is no contract from the beginning. All these cases belong to a different branch of the law, and form no real exception to the principle governing the present decision. In support of the proposition that the rule is the same in equity as at law after conveyance, I may refer to *Wilde* v. *Gibson* (27). In that case Mademoiselle D'Este, afterwards Lady Wilde, sold certain building lands upon the cliff at Ramsgate to Mr. Gibson. The lands were described in the treaty for the sale as adjoining a certain liberty way belonging to the town of Ramsgate, and unaffected by any right or liberty of way over them. After the purchase was completed, Mr. Gibson discovered that the public way called "The Liberty Way" passed through the property at one point, and that the vendor's mother had executed a deed-poll to the authorities of the town acknowledging the right of way, and covenanting to pay 2*s.* 6*d.* a year for the privilege of enclosing the portion of the land over which it ran, and to open it whenever required. This 2*s.* 6*d.* had been regularly paid down to the date of the sale. Gibson filed his bill to set aside the conveyance, and Vice-Chancellor Knight-Bruce, entirely acquitting Mademoiselle D'Este of personal fraud or deception in the matter, set aside the conveyance. Upon appeal to the House of Lords, this decree was reversed.

Lord Cottenham based his decision upon this, that the plaintiff Gibson had rested his case in his bill upon personal misrepresentation and fraud, and upon that had founded his claim for setting aside his complete purchase, that he had only proved constructive notice, and that nothing short of positive knowledge could be sufficient for that purpose.

Lord Campbell said, "In the Court below, the distinction between a bill for carrying into execution an executory contract and a bill to set aside a conveyance that had been executed has not been distinctly borne in mind. With regard to the first, if there be misrepresentation or concealment which is material to the purchaser, a Court of equity will not compel him to complete the purchase; but where the conveyance has been executed, . . . a Court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind if, upon discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside." See also the observations of Lord Justice Cotton in the recent case of *Arkwright* v. *Newbold* (28), and *Bree* v. *Holbeck* (29), *Legge* v. *Croker* (30) and *Pasley* v. *Freeman* (31) and the authorities there collected.

The only further question remaining is,

(23) 1 Ves. 126.
(24) 4 Price, 135.
(25) 9 Exch. Rep. 102; 22 Law J. Rep. Exch. 299, and in *Dom. Proc.* 25 Law J. Rep. Exch. 253; 5 H.L. Cas. 673.
(26) 2 E. & B. 849; 23 Law J. Rep. Q.B. 65.
(27) 1 H.L. Cas. 605.
(28) 49 Law J. Rep. Chanc. 684; Law Rep. 17 Ch. D. 301.
(29) 1 Doug. 654.
(30) 1 Ball & B. 506.
(31) 2 Sm. L.C. 6th ed. 71.

whether there was here any breach of any contract or warranty contained in the conveyance itself.

Now in answering this question we must turn to the conveyance, and there we find the land described as two parcels, each defined in the most particular manner by metes and bounds and other details, and each "as containing by estimation one and a half acres or thereabouts."

It turned out when the lands came to be measured that the two parcels together amounted to only 2a. 1r. 12p.; and the question is, does this amount to a breach of warranty as to quantity? It will be noted that the conveyance does not say, "containing by admeasurement so-and-so," but "containing by estimation so-and-so or thereabouts." I am not aware that any exact definition has been judicially given to these words, although there have been several cases illustrating their meaning—for example, it has been held that a discrepancy of five acres out of forty-one was not so serious as to amount to a breach.—See *Winch* v. *Winchester* (32). On the other hand, a difference of 100 acres out of 349 was considered too serious to be covered by the qualifying expression—*Postman* v. *Mill* (33).

I am not able to extract any principle from these cases, but I would venture to say that the real question is, whether the parcels had or had not in truth and in fact been estimated to contain the quantity stated or thereabouts. If the discrepancy were very small there would be very little difficulty in believing that it might have been so estimated: if the error were very great the statement might be rejected as incredible; but still I would venture to say that in each case it is a question of fact whether the quantity had been so estimated or not: and by this I mean, of course, a real genuine estimate, and not a merely illusory one. Now what is the evidence upon the point in the present case? It appears that the defendant had himself bought the land by the description that it contained by estimation three acres or thereabouts, that he never measured it, and that he in fact believed it to be three acres; that the plaintiff himself saw the land and was content to take it at the estimated quantity and believed it to amount to three acres; and there is nothing except the bare fact of the error to shew that this estimate was an irrational, still less an impossible one.

I come to the conclusion upon these facts that the land had been actually and in fact estimated at three acres or thereabouts, and that the plaintiff upon whom the onus of proof lay to establish the contrary, did not do so, and that there was consequently no breach of any warranty.

I think, therefore, that the judgment of the County Court Judge was erroneous and ought to be reversed, and judgment ought to be given for the defendant.

SMITH, J.—I had not the advantage of hearing the whole of the arguments in this case, but I concur in the result arrived at by my brother Williams in his judgment, which I have read, and in which my brother Cave agrees.

I wish to add upon the point which was much argued at the Bar on behalf of the respondent—namely, as to what constitutes fraud—that in my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the defendant has made a statement false in fact and fraudulent in intent.

If a man makes a statement, knowing it to be untrue, with the intention that another should act upon it, that obviously is fraud; so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which, in my opinion, is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this, in my judgment, will not suffice to maintain an action for deceit for damages. In this case the necessary moral turpitude is wanting.

It seems to me to be misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Lord Justice Bramwell upon the point in *Weir* v. *Bell* (18). In

(32) 1 Ves. & B. 375.
(33) 2 Russ. 570.

my judgment, fraud as above described, and nothing short of it, must be established to sustain an action for damages for deceit.

Solicitors—Pickett & Mytton, agents for Bailey & White, Winchester, for plaintiff; Taylor, Hoare & Taylor, agents for Nodder & Gater, Salisbury, for defendant.

[IN THE COURT OF APPEAL.]

1883. June 20, 21, 22. } ABRATH *v.* THE NORTH EASTERN RAILWAY COMPANY.*

Malicious Prosecution—Reasonable and Probable Cause—Preliminary Questions for Jury—Onus probandi.

In an action for malicious prosecution the burden of proof lies on the plaintiff to establish the facts, which the jury have to find with a view to the decision of the Judge on the question of reasonable and probable cause, namely, whether the defendant took reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he prosecuted.

Judgment of the Queen's Bench Division reversed.

Appeal by the defendants from a judgment of the Queen's Bench Division making absolute a rule for a new trial. The case is reported *ante*, p. 352.

The plaintiff was the medical adviser of one McMann, who brought an action against the defendant company for compensation for injuries received in a collision at Ferryhill Junction on the 10th of September, 1880. On the 4th of July, 1881, that action came on for trial at Newcastle, and was settled, on the defendants paying 725*l.* damages and 300*l.* costs. Some time between July and November in the same year information was given to Mr. Rayne, a medical man in the employ of the defendants, by detectives employed to watch the plaintiff; and on the strength of that information application was made to Mr. Wharton, a director of the defendant company, who gave instructions to Mr. Dix, a solicitor of Gateshead, to take the statements of witnesses, obtain the opinion of counsel, and lay the matter before the directors. That having been done, on the 7th of November an information was laid on behalf of the defendants charging the plaintiff with conspiring with McMann to defraud the company. The plaintiff was committed for trial, and was tried and acquitted in January, 1882. Thereupon he brought the present action for malicious prosecution against the defendants.

At the trial Cave, J., left the following questions to the jury:—first, did the defendants take reasonable care to inform themselves of the true state of the case? Secondly, did they honestly believe the case which they laid before the magistrates? Thirdly, were the defendants actuated by any indirect motive in preferring the charge? The learned Judge as to the two first questions directed the jury that it was for the plaintiff to prove that the defendants did not take reasonable care to inform themselves of the true state of the case and that they did not honestly believe the case which they laid before the magistrates.

The jury answered the two first questions in the affirmative, but did not answer the third. Cave, J., upon these findings, held that the defendants had reasonable and probable cause for instituting the prosecution, and entered the verdict and judgment for the defendants.

A rule *nisi* for a new trial was afterwards obtained by the plaintiff on the ground of misdirection and of the verdict being against the weight of evidence.

The Queen's Bench Division made the rule absolute.

The defendants appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Digby Seymour, Q.C.* (with them *Gainsford Bruce* and *J. L. Walton*), for the defendants.

Sir H. Giffard, Q.C., and *MacClymont*, for the plaintiff.

The following cases were cited in the course of the argument:—*Johnson* v.

* *Coram* Brett, M.R.; Bowen, L.J., and Fry, L.J.

Emerson (1), *Edwards* v. *The Midland Railway Company* (2), *Walker* v. *The South Eastern Railway Company* (3), *Turner* v. *Ambler* (4), *Sutton* v. *Sadler* (5), *Pickup* v. *The Thames Insurance Company* (6), *Lister* v. *Perryman* (7), *Mitchell* v. *Jenkins* (8), *Waring* v. *Waring* (9), *Butler's Case* (10), *The King* v. *Turner* (11), *Willans* v. *Taylor* (12), and *Phillips on Evidence* (13).

BRETT, M.R.—In this case the plaintiff brings an action against the railway company for malicious prosecution, and it is, no doubt, most necessary to consider for what he was prosecuted. He was prosecuted for a conspiracy with a person of the name of McMann to cheat and defraud the railway company, and the propositions which it was necessary for the plaintiff to substantiate in order to make out his claim are really not in doubt. It is not enough for the plaintiff to shew, in order to support such a claim, that he was innocent of the charge upon which he was tried; he has to shew that the prosecution was instituted against him, and that it was instituted by the defendants, without any reasonable or probable cause for instituting it, and he has to shew that it was instituted against him with a malicious intention in the mind of the defendants, not with a mere intention of carrying the law into effect, but with an intention in the mind of the defendants which was a wrong and malicious intention in point of fact. It has been decided over and over again that all these propositions must be established by the plaintiff, and that the burden of proof of each and all of them lies upon the plaintiff.

Now in considering this case I find the greatest possible difficulty in expressing myself clearly, and I shall say in the outset that I envy the clearness with which my brother Cave summed up the case to the jury. The plaintiff in order to support his claim must make out three propositions, and if he fails to make out any one of them, he fails to make out the final proposition which is the support of his claim. The burden of proof of each of these major propositions, it is admitted, lies upon the plaintiff; but it is said that if, in any one of those three propositions, a minor proposition is raised which must be proved in order to support the proposition in question, then the burden of proof is not upon the plaintiff. It seems to me that wherever a claim or defence consists of several necessary parts, the party on whom the burden of proof of the whole rests has also imposed upon him the burden of proving each of those necessary parts. The burden of proof of one of these major questions or issues lies upon the plaintiff; therefore the burden of proof lies upon the plaintiff to shew that there was an absence of reasonable or probable cause. If, in order to shew the absence of reasonable or probable cause, there are minor questions which it is necessary to determine in order to determine that question, it seems to me the burden of proving each of those minor questions lies upon the plaintiff, just as much as does the burden of proving the whole. Now, in order to shew whether there was an absence of reasonable and probable cause for instituting the prosecution for a conspiracy, I cannot doubt myself but that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted; and I wholly differ from the suggestion made that it is sufficient for the plaintiff to shew that he was innocent of conspiracy. If the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems to me that he would fail; and a learned Judge could not

(1) 40 Law J. Rep. Exch. 201; Law Rep. 6 Exch. 329.
(2) 50 Law J. Rep. Q.B. 281; Law Rep. 6 Q.B. D. 287.
(3) 39 Law J. Rep. C.P. 346; Law Rep. 5 C.P. 640.
(4) 10 Q.B. Rep. 252; 16 Law J. Rep. Q.B. 158.
(5) 3 Com. B. Rep. N.S. 87; 26 Law J. Rep. C.P. 284.
(6) 47 Law J. Rep. Q.B. 749; Law Rep. 3 Q.B. D. 594.
(7) 39 Law J. Rep. Exch. 177; Law Rep. 4 H.L. 521.
(8) 5 B. & Ad. 588, 594; 3 Law J. Rep. K.B. 35.
(9) 6 Moo. P.C. 341.
(10) Russ. & R. 61.
(11) 5 M. & S. 206.
(12) 6 Bing. 183; 7 Law J. Rep. C.P. (o.s.) 250.
(13) 10th ed. ch. 10, p. 380.

be asked, without some evidence of the circumstances under which the prosecution was instituted, to say whether there was absence of reasonable and probable cause.

Now, the evidence which is to determine the question whether there was reasonable and probable cause must consist of the facts, or circumstances which existed in fact, under which the prosecution was instituted. In this case evidence was given of circumstances upon which the learned Judge had to determine whether in his judgment they amounted to reasonable and probable cause for instituting the prosecution. But the facts or circumstances being in evidence, there arose another question of fact which it was necessary to decide in order to enable the Judge to give his opinion upon all the existing circumstances and facts, namely, whether the defendants took reasonable care to inform themselves of the true state of the case. That question was asked in this particular case when it had been proved, or at least strong evidence had been given, that certain testimony or statements had been laid before them. If the question whether the defendants had taken reasonable care to inform themselves of the true state of the case had not been raised, the Judge would not have assumed a want of reasonable care. But it would have been assumed on all sides that some reasonable care had been taken. It would not signify what were the statements which were laid before those who had instituted the prosecution, if those statements were laid carelessly before them—that is, if they received them carelessly, or if they did not take reasonable care to inform themselves of other facts which, if they had taken reasonable care, ought to have been present to their minds. The question whether reasonable care had been taken by those who instituted the prosecution to inform themselves of the true state of the case, was a necessary fact to be determined one way or other, in order to enable the Judge to give his opinion. It therefore became a necessary part of the question whether there was an absence of reasonable cause, to determine whether the defendants took reasonable care to inform themselves of the true state of the facts. The question whether reasonable care to inform oneself of the real state of the case has or has not been taken is one which has itself to be decided by evidence, which may be given for and against. It is a necessary part of the question whether there was reasonable and probable cause or not; because, if there had been on the part of the defendants a want of reasonable care to inform themselves of the true state of the case, then there must have been a want of reasonable and probable cause. It is one of those facts for which I have not succeeded in finding a satisfactory designation, but which has been described as a "fundamental" fact, in order to try and distinguish it from a fact which is mere evidence of something else. It is a fact which, if the whole case is expanded, would have to be alleged and proved, and is not merely a fact which is evidence of something which is to be alleged and proved. Therefore it is, to my mind, a fact, the burden of proving which lies upon the person who alleges it, within the rule that I have stated. The burden of satisfying a jury that there was a want of reasonable care lies upon the plaintiff, because the proof of that want of reasonable care is a necessary part of the larger question the burden of proof of which lies upon him, namely, that there was want of reasonable and probable cause for instituting the prosecution. It follows, therefore, to my mind, that if the learned Judge's direction to the jury was this only—namely, "I tell you that it is a necessary part of the question which I have to decide with you, namely, whether there was a want of reasonable and probable cause for instituting these proceedings, that the question should be decided whether reasonable care was taken to inform themselves of the true state of the case; and then I tell you that, inasmuch as that is a necessary part, and it is a question which can be decided by evidence for or against, in the end the burden of proof of that proposition, just as much as of proving the whole proposition, lies upon the plaintiff,"—then it was a perfectly right direction.

Now it has been suggested that what he said goes further than that; and it is suggested, first of all, that he did not say that, but that he said something else, namely, "The plaintiff has given evidence

upon this question, which is *prima facie* evidence upon which you may find that there was an absence of reasonable care to enquire. The defendants have undertaken to shew you, in answer to that, that they did make sufficient enquiries, and I tell you that if the evidence which the defendants have given leaves you in doubt whether it is true or not, you are—because the burden of proof lies upon the plaintiff—to hold and consider that the defendants have proved those facts." Now nobody for a moment could suppose that the learned Judge meant to say that if the defendants swore to certain facts, the jury, although they did not believe them, were to believe that the facts existed. It is impossible to suppose that any Judge could have meant to say that. The matter is therefore reduced to the question whether we are to suppose that the learned Judge so expressed himself that the jury did understand that, or anything like it. It is absurd to suppose that the jury could have so misunderstood what the Judge meant to say, and I am perfectly certain that the learned Judge neither intended to say it nor in fact did say it. Therefore, in that sense, there cannot be any misdirection, and that is not the sense which has been attributed to the summing-up and upon which the decision of the Divisional Court was given. The learned Judges of that Court have given their judgment upon a different view. The alleged misdirection, according to Mr. Justice Grove, was that the learned Judge stated to the jury, which he certainly did several times, that the onus of proving, not any particular fact which was evidence of some other fact, but that the defendants did not take reasonable and proper care in order to inform themselves on the question of reasonable and probable cause—which was one of the questions which the Judge put to them—lay upon the plaintiff. It was contended that the learned Judge was wrong in stating to the jury that it was for the plaintiff to negative that, namely, that it was incumbent upon the plaintiff to satisfy the jury that the defendants did not take reasonable care to inform themselves of the true state of the case. That is what is said to be misdirection, and is thus dealt with by the learned Judges in the Divisional Court—"It was argued that where the defendant undertakes to satisfy the Judge that there was reasonable and probable cause, the onus is on him to shew the necessary facts to the jury. I am of opinion that this is a right view of the law." I also am of opinion that the onus is on the person who gives evidence of a fact to shew that that fact is true. But it does not signify whether anybody else has given evidence of any other fact or not, if it is a fact which is to be evidence of some other fact. But then it does not follow from that, that where a defendant undertakes to bring forward facts for the purpose of satisfying, not the jury, but the Judge, that there is reasonable and probable cause, then the onus of proving that there was reasonable and probable cause is upon him. If that is what the learned Judge meant, then I absolutely disagree with it. Now the learned Judge seems to me to go into another ground, for he says—"The existence of these facts, presumably, is known only to the defendants. It is impossible for the plaintiff in an action for malicious prosecution to know what course the defendant took, by what means he satisfied himself of the probable truth of the information conveyed to him—or, to use the words of the question, the defendants only can know whether they have taken reasonable care to inform themselves of the true state of the case." But that is trying to bring the case under another head of law, and is putting it upon a suggestion that all this is in the exclusive knowledge of the defendants. Then his Lordship proceeds, "as to the second question, they alone also know whether they honestly believed the case which they laid before the magistrates. It is true that honest belief is a matter in their own minds, but they know the best mode of satisfying the jury upon those facts, so that the jury may draw reasonably the inference. So with regard to the first part of the question, and the second part as to whether they honestly believed the case which they laid before the magistrates. All that is in the knowledge of the defendants, and, presumably, in their knowledge alone. At any rate,

it is not likely in an action for malicious prosecution the plaintiff can know whether the defendants took reasonable care to inform themselves of the true state of the case, or whether they honestly believed it. We think, therefore, that the onus rests on the person affirming—the person who brings forward for his own purposes a statement of facts, the truth of which he pledges himself to, and which he alleges to be true—that the onus rests on him to prove them." Now, I confess that that leaves my mind in considerable doubt as to what was the real ground of the learned Judge's decision. Sir Hardinge Giffard has stated it to be this—"Given that the question to be decided is whether there has been reasonable enquiry as to the truth of the case or not, if the plaintiff gives evidence which, if unanswered, ought to lead the jury to the conclusion that there had been a want of reasonable enquiry, then, if the defendant gives no evidence at all, the jury ought to find the question in favour of the plaintiff." That is true. But then he says:—"If the defendant gives evidence, then the burden of proving the facts stated in that evidence lies upon him." Again, I say if the plaintiff gives evidence of facts which he desires to prove, it lies upon him to satisfy the jury that the facts which are alleged in his evidence are correct. But, if that is all, it comes to very little. If the plaintiff has given *prima facie* evidence, which, if unanswered, either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour, then if the defendant gives evidence, either by contradiction or by other facts, the jury have to consider upon the facts given in evidence by the plaintiff, and upon so much of the facts given in evidence by the defendant as they think are proved to be facts, whether they are satisfied absolutely with regard to the question that the plaintiff calls upon them to answer. If they are, then they find for the plaintiff; but if upon a consideration of all these facts they come clearly to the opinion that the question as put by the plaintiff ought to be answered in the negative, then they must find for the defendant. But if upon all these facts the jury are left in real doubt as to the way in which they are to answer the question, and if they had to answer it would say that they were all agreed that they could not answer the question one way or the other, the burden of proving the question lies upon the plaintiff; and if the defendant has been able by the additional facts which he has adduced to bring the mind of all the jury to that state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him, namely, to satisfy them of the way in which they ought to find the question. I have stated the way in which the learned Judges in the Divisional Court said that the question was presented to them. Now, here is the way in which it was presented to the jury by Mr. Justice Cave:—"I think the material question for you to examine is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case? That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and, notwithstanding all they do, are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause. With regard to this question"—that is, the whole question—"you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not"—that is, whether they did or did not take reasonable care to inform themselves—"inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point." That is what was said to the jury, and what, as it seems to me, was said more than once. The jury were not told that the burden of proof lay upon the plaintiff as to each particular fact which is evidence of whether that question ought to be answered in the affirmative or negative, but that, taking the evidence which was before them, they had to answer this question, and that if their minds were made up one way or the other

there would be no difficulty; but that if after consideration they remained in doubt as to how it ought to be answered, then the burden of proof as to that lay on the plaintiff; and that if either the plaintiff's evidence, or the defendants' evidence added to that of the plaintiff's, had really left them in doubt, then the plaintiff had failed to satisfy the burden of proof which lay upon him. Now, it is no misdirection not to have told the jury something which it is afterwards suggested might have been told them. There is no misdirection unless the Judge has told the jury something wrong, or unless what he has told them would make that wrong which he has not told them but left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that which I have just pointed out. I can see nothing here but what to my mind was an exact and proper direction to give to the jury upon this question, which was a necessary part of one of the questions which were in issue, and which the plaintiff had to prove. I think that the law was put upon the right footing by Mr. Justice Cave, and that the direction given to the jury—to take the evidence given by the plaintiff and that given by the defendants, and upon as much of both as they thought was proved in fact to give their opinion upon the question at issue; but that, if all the evidence taken together left them in doubt, the burden of proof was on the plaintiff, and therefore if they were in doubt they must find for the defendants—was a right direction. Upon the appeal therefore as to a new trial, I differ from the Divisional Court, and think that their judgment must be reversed (14).

BOWEN, L.J.—This is an action for malicious prosecution, in which the plaintiff has to prove—first, that he was an innocent man, and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the original prosecution—or, in other words, he has to prove circumstances which, in the opinion of the Judge, are inconsistent with reasonable and probable cause; and, lastly, that the unreasonable proceedings of which he complains were initiated in a malicious spirit—that is, from an indirect and improper motive, and not in furtherance of justice. The plaintiff has to make out these three propositions, and amongst them the proposition that the circumstances of the original prosecution were such that the Judge does not see in them any reasonable and probable cause for having instituted it. If any step is necessary to make out any one of those propositions, the burden of proving that step rests on the plaintiff, and for a very obvious reason—that no chain can be stronger than its weakest link. I think that the whole of the mistake of the Court below in the present case, if we are right in thinking it is a mistake, and the whole of the fallacy, if we are right in thinking it a fallacy, of the argument that has been addressed to us lies very much in the misconception of what the learned Judge really did say at the trial, and in the misconception of the sense in which he used the term "burden of proof." In order to make each step good as I proceed, I should like to say a few words about the way in which I understand the term "burden of proof." Wherever there is a lawsuit, somebody must go on with it. The plaintiff is the first person to begin; if he does nothing, he fails. If he makes out a *prima facie* case, and nothing more is done by the other side to answer it, the other side fails. The test, therefore, as to onus of proof, or burden of proof, whichever term is used, is this—which party would be successful if no evidence at all were given, or if no more evidence were given than is given at this particular point of the case. For it is obvious that as one travels along the controversy in the litigation, one from moment to moment arrives at points at which the onus of proof shifts, and at which the

(14) There was also a cross appeal by the plaintiff from the judgment of Cave, J., upon the ground that even if the defendants had taken reasonable care to get at the truth of the case, yet there was not reasonable and probable cause for the prosecution, and that the learned Judge was wrong in holding that there was; but the Court, after reviewing the facts and the evidence, came to the conclusion that the appeal was not substantiated, and that it must be dismissed.

tribunal will have to say, if one stops at those points, that the case must be decided in a particular way. The test being such as I have stated, the burden of proof is not one which goes on for ever resting upon the shoulders of the person upon whom it is cast; for as soon as that person gives evidence which *prima facie* rebuts the evidence against which he is contending, then the balance descends upon the other side, and the burden rolls over for a limited period until again there is evidence which satisfies the demand. That being so, the question as to onus of proof is only a rule for deciding upon whom the obligation of going further rests, if he desires to succeed. It is not a rule for saying how much further he ought to go, in the sense of enabling the jury to judge of the value of conflicting evidence, for when once a conflict of evidence arises there ceases to be a question of onus of proof. The old rule, no doubt, then remains that a person who is seeking to maintain the proposition about which there is conflicting evidence has laid upon him the burden of making out his case. But in deciding upon a conflict of evidence, to use the term "onus of proof" would be to use a misleading term. This is another part of the ground which ought to be cleared in order to make what I am about to say clear. As causes are tried, the term "onus of proof" may be used in one or more ways. Sometimes a cause is tried, and the jury are left to find a verdict generally either for the plaintiff or for the defendant. In such a case it is essential that the Judge should tell the jury which is the party upon whom the burden of making out the case rests, and when and at what period the burden shifts. Issues may be left to a jury upon which they are to find generally for the plaintiff or for the defendant. If the jury have to find generally for the plaintiff or for the defendant they ought to be told on whom the burden of proof rests. It is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law which have to be explained to the jury.

Another way of trying a case is to ask the jury specific questions. If there is a conflict of evidence, it is not necessary, except for the purpose of making the matter plain, to explain to the jury about onus of proof, unless there are presumptions of law—such as, for instance, the presumption of consideration for a bill of exchange, or the presumption of consideration in a deed, or any other presumption of law. But if the jury are asked a plain question, it is not necessary to explain to them about onus of proof if the only answer to be given is "yes" or "no." The burden rests upon the Judge of saying how the answer is to be applied, and whether, if the jury say that they are not satisfied that the affirmative is proved, they are to find for the defendant. By the side of that use of the term "onus of proof," one must not forget that there are canons of evidence which are useful to the Judge in commenting upon the evidence, and also rules of reason for determining the weight of conflicting evidence. But those canons and rules are not the same as "onus of proof."

The plaintiff in an action for malicious prosecution has got the burden all through of making out that the circumstances of the original prosecution were such that the Judge can see no reasonable or probable cause. It is said that in one sense that is an assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. But that is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of that assertion will still rest upon him. One cannot help recollecting, it seems to me, that the use of the terms "negative" and "affirmative" is after all the use of relative and not absolute terms. But when one is dealing with a question like the question of carelessness or negligence, one may regard negligence as a negative or an affirmative question according as one adopts the definition by which the circumstances are to be measured. When used with reference to a legal standard they are relative, and not absolute terms. I think it is beyond all question true that wherever a person asserts affirmatively and it becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a par-

ticular purpose, that is a positive averment which the party who makes it is bound to prove. It is said that there is an exception in the case where the facts lie peculiarly within the knowledge of one of the parties. But Sir Hardinge Giffard does not go the length of saying that in all those cases the onus shifts, and that the party within whose knowledge the matter peculiarly lies is bound to prove it. I do not think that such a proposition could be maintained, and I think that the exceptions which may be supposed to exist in the class of cases with regard to the game laws are very special, and might be shewn to exist upon their own peculiar grounds.

Now, coming back to the question of malicious prosecution, the case we have to deal with, and thinking as I do that the language of Mr. Justice Cave has been misunderstood, let us see which out of the possible ways in which the case might have been tried the learned Judge selected, because as soon as that is ascertained I think it will be seen that the criticisms which have been made on his judgment are unsound. Thus a case may be tried by leaving it to the jury to find a verdict generally, explaining to them what the disputed facts are, and telling them that if they find the disputed facts with reference to want of reasonable care in favour of one side or the other, the Judge's opinion as to reasonable and probable cause will differ accordingly; and telling them what in each alternative his view will be, and enabling them to apply that statement further with reference to the issue as to malice. That is a way which in a very simple kind of case may be adopted. But Judges have been in the habit of adopting a very different course whenever the circumstances are at all complicated. Thus a Judge may tell the jury what the issues or questions are, and at the same time inform them what will be the effect upon the verdict, which they will then be asked to give, of the answers which they give to the specific questions. Now that is leaving the jury both to answer the questions and to find a verdict after the Judge has explained to them what the answers to the questions will involve, and is the way in which Mr. Justice Cave really did try this case. There is also a third way in which a case may be tried—where the Judge asks the jury specific questions, and does not leave them to enter a verdict, but enters the judgment himself upon their findings. That is the third way, which, although not actually adopted by the learned Judge, differs, it will be observed, only slightly in form from the mode of procedure which in fact he did adopt. If the second mode of procedure is adopted, it is obvious that specific questions are put to the jury, with the intention, as soon as they have answered those questions, to request them to go still further and to find their verdict one way or the other. It is obvious that the Judge is not required to explain to them about the onus of proof exactly in the same way as if they had been left to find a verdict generally. In answering the questions where there is a conflict of evidence, the jury do not require to be told on whom the onus of proof lies, provided that the alternative is always left to them to say that they do not think the materials enable them to answer this or that question. But still a Judge who tried the case would probably let a jury know, as intelligent persons, what they were doing, and might easily explain to them so much of the law about onus of proof as would give them an intelligent interest in their functions. I do not think that Mr. Justice Cave did more than that. When he came to sum up the case to the jury, the whole of it was then before him. The question whether there was want of reasonable and probable cause for the prosecution depends upon the materials which were in the possession of the prosecution at the time when it was instituted, and also upon the further point whether those materials were carefully collected and considered. There may be two views of the materials which were in the possession of the prosecution, nor is it a simple question of law which view of those materials is taken. It may be said either that those materials were absolutely worthless, or that they were reasonable. According as one view or the other is taken, the burden of shewing the carefulness in the enquiry might be shifted as a matter of reasoning only. If the materials were admittedly worthless, that would be a strong *prima*

facie case for throwing on the defendants the burden of shewing that they nevertheless had been misled, after all their care, into relying upon worthless materials as if they had been materials which were reasonable and sound. If the materials were reasonable, they would be enough to justify those who had entered upon the prosecution. Sir Hardinge Giffard's contention is, as it seems to me, that as a matter of law Mr. Justice Cave ought to have assumed the former view—that the materials which were in the possession of the prosecution at the time when they instituted the proceedings were worthless; and that then he ought to have directed the jury to further consider, as if it were an independent matter, whether the prosecution had so conducted themselves as to relieve them of this grave opprobrium of having acted upon worthless materials; that he ought in fact to have left to the jury an issue whether an enquiry of any kind had been conducted reasonably and properly by the prosecution—that is, whether the information had been carefully collected. I think that that would have been a distinct blunder in law if Mr. Justice Cave had done it. The worth of the materials—I do not mean the legal inference to be drawn from them—was to some extent a question of fact. It was not a pure question of law, but a question of fact according to the view which the jury took as to the evidence about them. It seems to me that Mr. Justice Cave avoided the difficulty by abstaining from dividing into two parts the questions of fact which would arise, assuming one question of fact to be one way and leaving the jury to decide about the other. The two parts were put together, and the true question which the jury were asked—a question which I think covered the whole of the controversy of fact that relates to materials—was whether the defendants took reasonable care to inform themselves of the true state of the case; not whether they took reasonable care to collect the materials in their possession. Two views may be taken of the summing-up. Sir Hardinge Giffard's view is that the learned Judge directed the jury in such a way that his direction either did mean, or would be understood by reasonable persons to mean, that wherever a fact was put forward in the course of the case by the defendants, the jury were to assume the fact existed until it was shewn that it did not. I do not think that that is what Mr. Justice Cave said, and I think that the Court below was wrong in assuming in part that that was what he did say. The learned Judge told the jury to bear in mind that it lay upon the plaintiff to prove that the defendants did not take reasonable care to inform themselves of the true facts of the case. The meaning of that is, that if the jury were not satisfied whether the defendants did or did not, inasmuch as the plaintiff was bound to satisfy them that they did not, the defendants would be entitled to a verdict on that point. That is absolutely true. The learned Judge was not directing the jury to keep their minds in a particular attitude of distrust towards the plaintiff's testimony in considering a limited portion of the investigation; but he was informing the jury what was true—what the result of the whole case was, and that the burden of proving want of reasonable and probable cause rested upon the plaintiff. It has been said that innocence is proof *prima facie* of want of reasonable and probable cause. But I do not think that it is. When in cases it looks like it, it is because the fact of innocence involves with it other circumstances which if they existed would shew that there was want of reasonable and probable cause—as, for instance, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting be true or not. In that case, if the man is innocent it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause.

If the circumstances are such that the prosecutor must know whether the accused is guilty or innocent if he exercises reasonable care, it is only an identical proposition to infer and say if the man is innocent that there must be want of reasonable and probable cause. It must be innocence under such circumstances as to raise this presumption that there is such a want of reasonable and probable cause. It was the plaintiff's business to shew the

absence of such reasonable and probable cause; and it is because the Court below was misled, if I may use the expression, by the ingenuity of the argument into thinking that what Mr. Justice Cave was leaving to the jury was an issue upon a subordinate fact that they have gone wrong.

FRY, L.J.—The proposition which most commends itself to me on the part of the appellants is that where on the evidence given one party must win, then the burden of proving any new or independent facts is on the other party. It was said on behalf of the plaintiff that such was the condition of the case in the present instance, and that the enquiry directed by the learned Judge with regard to the reasonable care taken by the defendants was an enquiry with regard to a new fact without which the defendants could not have succeeded. That appears to me entirely to be a misapprehension of the state of things at the time when the learned Judge was summing up the case to the jury. Upon the evidence which was given by the plaintiff alone, it appears to me to be far from clear that the plaintiff could have succeeded. On the contrary, it appears to me that, taking the whole of the evidence given by the plaintiff, as matters then stood, the plaintiff must have failed. That being so, the burden of proving the new facts must rest upon the person who required them—that is, upon the plaintiff. I entirely agree with the judgments which have been delivered by the Master of the Rolls and Lord Justice Bowen. Everything which I intended to have said if they had not said it, has been said by one or the other of them.

Appeal allowed (15).

Solicitors—J. Balfour Allen, agent for W. M. Skinner, Sunderland, for plaintiff; Williamson, Hill & Co., agents for George S. Gibb, York, for defendants.

(15) There was also an appeal by the defendants in the case of *McMann* v. *The North Eastern Railway Company* which was governed by the decision in the present case.

[IN THE COURT OF APPEAL.]

1883. June 8. THE NORMANTON GAS COMPANY *v.* POPE AND PEARSON (LIMITED).*

Gasworks Clauses Act, 1847 (10 *Vict. c.* 15), *s.* 6—*Gas Mains laid in Highway without Statutory Powers—Subsequent Act giving Authority—Duty on Landowner to leave Support—Right to Compensation—Gasworks Clauses Act*, 1871 (34 *&* 35 *Vict. c.* 41), 41 *&* 42 *Vict. c. clxi.*

A limited gas company, acting without any statutory authority, and without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of a highway. Subsequently a gas company was constituted by a private Act, which incorporated the Gasworks Clauses Acts, 1847 *and* 1871. *The private Act of this company provided for the dissolution of the limited company, and enacted that all the lands, gasworks, easements, mains, pipes, plant and apparatus placed by, vested in, or which were the property of the limited company immediately before the passing of the Act, should be similarly vested in the incorporated company, and the incorporated company were empowered to maintain the existing gasworks and to lay down and maintain additional mains and pipes. The Gasworks Clauses Act*, 1847, *gives power to undertakers of gasworks to open the soil within their district, to lay and repair pipes therein, and to do other acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. The Gasworks Clauses Act*, 1871, *renders it compulsory on undertakers of gasworks to supply gas on certain conditions and within certain limits.*

The defendants, the lessees of the minerals under and adjacent to the highway under which the plaintiffs had laid their pipes, had by working the coal thereunder let down the soil of the highway and caused injury to the plaintiffs' pipes:—

Held, *that the plaintiffs were entitled to support for their pipes, and that the landowner was entitled to compensation for the burden thus imposed upon him; that the plaintiffs could therefore recover damages by action for any injury caused to their*

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

pipes, while the owner of the minerals could recover compensation in an arbitration for the limitation thus put upon the user of his land.

Appeal from the judgment of the Queen's Bench Division on a Special Case stated in an action pursuant to Order XXXIV. of the Rules of Court. The Special Case stated the following facts:—

By the Normanton Gas Act, 1878 (41 & 42 Vict. c. clxi.), a limited company, formed in 1869, called the Normanton Gas and Water Company (Limited), was dissolved, and the proprietors in the undertaking of the company were thereby united into a company for the purposes thereinafter mentioned, and incorporated by the name of "The Normanton Gas Company." The Gasworks Clauses Act, 1847, and parts of the Companies Clauses Act, 1863, and of the Lands Clauses Consolidation Acts were incorporated therewith; and it was enacted that the Gasworks Clauses Act, 1871, should apply to the then existing undertaking of the limited company as if the same had been authorised by the Act.

Section 6 of 41 & 42 Vict. c. clxi. enacted—"subject to the provisions of this Act, all the lands, gasworks, erections, buildings, rights and easements which immediately before the passing of this Act were vested in the limited company or any person in trust for them, or to which the limited company were in anywise entitled, and all mains and pipes, plant, plugs, lamps, irons, retorts, gauges, meters, lamp-posts, syphons, apparatus, stock, effects, matters and things, which have been by them purchased, provided, laid down, erected or placed in any place or house within the limits of this Act, or which immediately before the passing of this Act were the property of the limited company, and all moneys . . . . and other property whatsoever which immediately before the passing of this Act belonged to the limited company . . . . shall be, and the same are hereby, vested in the company to the same extent, and for the same estate and interest as the same were previously to the passing of this Act vested in the limited company or any trustee on their behalf, and may, according to the provisions of this Act, be held and enjoyed, sued for and recovered, maintained, altered, discontinued, removed, dealt with and disposed of by the company as they think fit."

Section 44 enacted—"subject to the provisions of this Act, the company may from time to time maintain, alter, improve, enlarge and renew or discontinue their existing gasworks upon the land on which the same are erected, or any part thereof, and which is described in the schedule to this Act, and they may also erect, lay down, provide, and from time to time maintain, alter, improve, enlarge, extend and renew or discontinue additional and other gasworks, retorts, gasometers, receivers, drains, sewers, mains, pipes, meters, lamps, lamp-posts . . . . and other works and apparatus and conveniences, and may do all such acts as they may think proper for making and storing gas, and for supplying gas within the limits of this Act. . . ."

The defendants are a limited company incorporated in 1874, when they became the assignees of a sublease of the coal lying under lands in Normanton, granted in 1860 by the lessee, who holds direct from the trustees of the Duke of Leeds, the lord of the manor and the owner, whose rights to the coal were preserved by the Normanton Common Enclosure Act, 44 Geo. 3. c. lxxii. That Act provided for the inclosure of a common, and directed that a public highway should be set out over the common. This was done, and from the time of their incorporation down to 1881 the defendants worked the coal thus leased to them near to and underneath the public highway so set out. In consequence of these mining operations the support which this road had previously derived from the minerals was taken away, and during the latter part of 1878 the road subsided and sank in many places to the extent of three or four feet. Neither the plaintiffs nor the Normanton Gas and Water Company, Limited, were, or are, owners or occupiers of any allotments, lands or grounds whereon or wherein the mines and minerals so reserved to the Duke of Leeds are situate. In 1874 the Normanton Gas and Water Company, Limited, with the knowledge

and consent of the then surveyors of highways, opened the highway set out under the Enclosure Act as above mentioned, and laid thereunder certain mains and gaspipes, which they so laid and used, without the consent of the defendants, for the purposes of their undertakings, and which were so used by them at the passing of the Normanton Gas Act, and which the plaintiffs continued afterwards to use without the consent of the defendants. The taking away by the defendants of the support of the Normanton Common road, and its consequent subsidence, caused the mains and gaspipes to be broken and damaged in several places, whereby a quantity of gas escaped.

The defendants sank pits and incurred expense in working the coal, and still possess a large tract of coal under the highway and adjacent thereto. If the defendants are obliged to leave coal in order to support the pipes and mains of the plaintiffs so placed in the highway, they will sustain loss and incur expense.

The questions for the opinion of the Court were, whether the plaintiffs were entitled to the support claimed; whether the defendants wrongfully deprived them of it; whether they were entitled to the damages claimed in the action, and for what period; whether they were entitled to an injunction restraining the defendants from continuing to injure the gas mains of the plaintiffs by taking away the support of the land; whether the defendants were entitled to work the mines as freely as if the pipes and mains had not been there; and whether the defendants were entitled to be indemnified against or compensated for any loss or injury that may be sustained by them in giving the support claimed to the pipes and mains of the plaintiffs under the highway, and by reason of the burden imposed on them.

The Queen's Bench Division gave judgment for the plaintiffs.

The defendants appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*) and *H. D. Greene*, for the appellants.—If the plaintiffs are entitled to the support, the defendants must be entitled to compensation; and if these pipes had been laid by the Normanton Gas Company under their private Act of 1878, then the defendants would be entitled to compensation under section 6 of the Gasworks Clauses Act, 1847 (1), on the principles laid down in *In re The Corporation of Dudley* (2); but these pipes were laid without any statutory authority, and the permission of the highway authority was only of use to protect the plaintiffs against an action by the highway authority for destroying the highway—*The Benfieldside Local Board* v. *The Consett Iron Company* (3). The private Act of 1878 does not enable the plaintiffs to recover for damage caused by workings before that date, nor does it give them any compulsory powers to enter or to take land; it only enables them to maintain additional gasworks, not those already existing.

Forbes, Q.C., and *C. Atkinson*, for the plaintiffs.—The plaintiffs have a right to support, and they are not bound to pay

(1) 10 Vict. c. 15: "And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows:—Section 6. The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil and pavement of the several streets and bridges within the limits of the special Act, and may open and break up any sewers, drains or tunnels, within or under such streets and bridges, and lay down and place within the same limits pipes, conduits, service pipes, and other works, and from time to time repair, alter or remove the same, and also make any sewers that may be necessary for carrying off the washings and waste liquids which may arise in the making of the gas, and for the purposes aforesaid may remove and use all earth and materials in and under such streets and bridges, and they may in such streets erect any pillars, lamps and other works, and do all other acts which the undertakers shall from time to time deem necessary for supplying gas to the inhabitants of the district included within the said limits, doing as little damage as may be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

34 & 35 Vict. c. 41. s. 11: "The undertakers shall, upon being required to do so by the owner or occupier of any premises situate within twenty-five yards from any main of the undertakers, or such other distance as may be prescribed, give and continue to give a supply of gas for such premises. . . ."

(2) 51 Law J. Rep. Q.B. 121; Law Rep. 8 Q.B. D. 86.

(3) 47 Law J. Rep. Exch. 491; Law Rep. 3 Ex. D. 54.

compensation, for there is no real burden imposed upon the owner of the minerals. The private Act of 1878 incorporates the Gasworks Clauses Act, 1847, and applies it to the existing undertaking; and further, section 6 of the private Act vests the property of the previously existing limited company in the Normanton Gas Company.

[FRY, L.J.—Were these pipes which were laid in the land of another person before 1878 the property of the old limited company?]

The company never gave up their right to those pipes, and section 6 of the Private Act provides for the transfer to the new company of two classes of property—that is, of all pipes laid within the district, and of all the property vested in the old company.

[FRY, L.J.—But only for the same estate and to the same extent as the property was vested in the old company—so that the question still remains, were the pipes laid before 1878 the property of the old company?]

When the plaintiffs acquired the right to lay down the pipes, they then acquired a right of support; and it does not follow that any right to compensation was therefore given to the defendants—*Brand* v. *The Hammersmith Railway Company* (4). The ownership of the soil in a road is of little value to the owner, so that it was not thought necessary to give him compensation for that which was no real value —*Thompson* v. *The Sunderland Gas Company* (5).

Greene, in reply.

BRETT, M.R.—In this case the action is brought against the defendants, who have, by virtue of a lease from the lord of the manor, a right to work mines under certain land which was enclosed pursuant to the provisions of an enclosure Act. That Act directed that a highway should be set out, and reserved to the lord of the manor the right to work the minerals under the highway and the enclosed land. The highway was duly set out, and then a certain gas company, which was registered as a limited company under the Joint Stock Companies Act, began to lay pipes, both under the highway and in other lands. At the beginning of 1878 that gas company was at work, and was using these pipes. It was not affected by the Gasworks Clauses Act, so that no rights were conferred, nor were any liabilities imposed on it by that Act. The company laid the pipes without having any Parliamentary authority to do so. The Special Case does not state in what way the company came to lay them; but this much is certain, that the pipes were at the date I have mentioned in the possession of and used by the company. The highway authority gave the company permission to lay the pipes under the highway; the lord of the manor apparently gave no authority, but it would also seem that he did not object. In 1878 a new company was formed, and procured Parliamentary powers by an Act entitled The Normanton Gas Act, 1878. By this Act the new company took over all the property of the old gas company limited, and part of this property consisted of the works of the old gas company and of the pipes laid in the highway, which were at that time in use as part of the works.

It has been suggested that, as the old gas company limited laid the pipes in the highway without either the authority of the lord of the manor or of the Legislature, the pipes so laid belonged to the lord of the manor, and would not pass to the present plaintiffs.

I confess that this appears to me a formidable point; but I also think that we ought to consider the usual course of business, the procedure pursued in procuring a private Act of Parliament, and the intention of the Legislature in passing such an Act. The plaintiffs, the new gas company, must have proposed to Parliament to acquire powers to take over the pipes and materials belonging to the old limited company; for, if they did not so propose, their application to the Legislature would have been nugatory and absurd. It is not to be supposed that the new company intended to take over the works of the old company, and not these pipes, which were a substantial part of those works. I do not know whether

(4) 38 Law J. Rep. Q.B. 265; Law Rep. 4 E. & Ir. App. 171.

(5) 46 Law J. Rep. Exch. 710; Law Rep. 2 Ex. D. 429.

the lord of the manor was represented before the committee; but it is obvious that if the pipes in question were supposed to belong to him, the Act would have contained provisions the effect of which would be to transfer the property in them from him to the new company. If the lord of the manor acquiesced in the pipes being laid under the highway and used, then it might be assumed that he gave the old company a licence so to lay them; and if so, no question would arise as to whether the company would obtain a right by the user, for it would not be an adverse user. If he did give such a licence I think it would be an irrevocable licence. It appears to me that in the circumstances of the case both the new company and the Legislature assumed that the pipes laid under the highway were part of the works of the old limited company which the new company wished to acquire, and which it was intended should be transferred to them. The Normanton Gas Act, 1878, incorporates the provisions of the Gasworks Clauses Acts, and so gives the new company power to lay pipes under the highway without the consent of the owner of the land. Now as to any new pipes so laid under the provisions of this Act, it appears to me that it would be unjust if the Legislature were to allow this company to lay pipes on or under the soil of a landowner without his consent, unless it also gave him compensation. It is to be observed that the Legislature took away all right of action in respect of this matter from the landowner, as to lay pipes pursuant to the provisions of the Act would be a rightful authorised act. If then the words of the statute are doubtful, and if it is not clear whether the right claimed is or is not given, then it seems to me that the Court ought to say that if no compensation is given to the person whose interests are affected by the right, the right claimed cannot in fact be given.

The 6th section of the Gasworks Clauses Act, 1847, gives the company a right to lay and maintain pipes when laid. Is it then a correct inference to say that as regards the new pipes there is given by the statute a right as against the landowner in or upon the edge of whose land the pipes are laid without his consent, and that the company laying the pipes is entitled to subjacent support for those pipes? I repeat, what I have before said, that subjacent support does not mean a mathematical vertical line, measured as it were with a plumb-line under the thing to be supported, and that some space of soil wider than the pipes laid in the soil may be required for their support, and therefore if the pipes are laid at the edge of two properties, subjacent support may be required from a landowner in whose land the pipes do not actually lie.

I am of opinion that it is a sound rule of construction to say that we ought to avoid attributing to the Legislature conclusions ridiculous and palpably absurd, and that we ought to say that when the Legislature has given something to do, the execution of which requires of necessity subjacent support from the land, then the persons who are authorised to execute the powers given by the Act get also a right as against the landowner to the necessary subjacent support. If this be so, then the Legislature has imposed on the landowner a burden. If, however, there is a doubt about the language of the Act or of the implication to be drawn from it, then, if we find that compensation is to be given to the landowner for the burden thus imposed upon him, there remains no injustice, and there is nothing to prevent us from drawing the inference that the Legislature intended to confer the right against the landowner, but that it also wished to do justice, and therefore that it gave him compensation for the burden thus imposed.

With regard to the new pipes it appears to me that the proper construction of section 6 of the Gasworks Clauses Act, 1847, is that the plaintiffs have the power to lay pipes under highways, and consequently in the land of a landowner without his consent, and therefore that the Act imposes upon the landowner the burden of using his land so as not to destroy the necessary support required for these pipes.

Suppose then that there is a landowner who has minerals under the pipes thus laid in his land, the Act takes from him the free power of getting and selling that which is a valuable property. That must cause damage to such an owner. It is

said that no damage is done to him until he actually desires to work and does work the minerals; but it appears to me that that contention is not correct, the damage is the being unable to get the minerals, and it is the company which imposes a burden upon his land—the burden, that is, of preventing him from working the minerals as soon as ever they lay their pipes in his land. He is, therefore, in my opinion, entitled to receive compensation in respect of his being thus deprived of the free use of his minerals and land, and it results in his getting compensation for the risk thus undergone by him.

This Court held in *In re The Corporation of Dudley* (2), that such compensation could not be given in driblets, but that the landowner must obtain it once for all, and that appears to me to be a right view. This being so, then, with regard to all the pipes which the plaintiffs laid after they were incorporated, they laid them under the Act, and the owner of the minerals is in respect of those entitled to compensation. The plaintiffs also are entitled to damages for any injury caused to these pipes by subsidence caused by working the minerals, and that, in a fresh action, as often as the injury is caused. The damages thus accruing are not necessarily commensurate with the compensation to be received by the owner of the minerals. The one is not a condition precedent to the recovery of the other; they are independent rights and independent remedies.

There were, however, also pipes which were laid down by the old limited company before the passing of the Normanton Gas Act in 1878, and it was argued that the meaning of that Act was that the incorporated company were only to have power to lay down pipes thereafter. If that be so, then the Legislature must be taken to have enacted that if the new company took up the existing pipes and relaid them five minutes afterwards in exactly the same way and in the same place, then rights and liabilities would arise pursuant to the Gasworks Clauses Acts, and the provisions of those Acts would apply; but that if the old pipes were left in their position, then the Gasworks Clauses Acts would not apply. I cannot suppose that the Legislature intended to enact anything so ridiculous; and I think that the powers and rights given by, and the liabilities created by, the Gasworks Clauses Acts must be held to apply to the pipes existing before the incorporation of the new company and used by the old limited company.

If that be so, then the pipes which were in existence when the Normanton Gas Act, 1878, was passed must be treated in the same way as the pipes laid down after that Act and pursuant to that Act; and I am of opinion that the true construction of that Act is that section 6 of the Gasworks Clauses Act, 1847, applies to all the pipes laid down before the private Act was passed, and which were in use as part of the works of the old limited company, just as though they had been laid down after the private Act was passed. The plaintiffs are consequently entitled to support from the owner of the minerals for those pipes, and the owner of the minerals is entitled to the same compensation as though those pipes had been laid down under the Act. The plaintiffs are entitled to recover for any damage caused by workings carried on since the Act of 1878, but not for damage caused by workings prior to that Act; but if workings carried on since that date have, when taken with or added to what was done before that date, caused damage, then the plaintiffs are entitled to recover for damage so caused.

The plaintiffs being entitled to recover, and the owner of the minerals being entitled to compensation, the question is raised whether the latter can recover that compensation in the action brought by the plaintiffs. If no arrangement is made as to this, then I feel bound to say, as a matter of law, that the compensation cannot be recovered by an action at law, and therefore the defendants cannot raise this matter by way of counter-claim to an action by the plaintiffs. If so, then it follows that the plaintiffs are entitled to succeed in their action and to recover the costs, while the defendants are entitled to seek compensation in a properly constituted arbitration. Neither in the Special Case nor before the Divisional Court was the argument put in this way, and before us

each side contended that it was entitled to succeed absolutely. Each side has therefore gained a partial success, and on that account I think that each party must bear its own costs of the appeal.

LINDLEY, L.J.—I assume, but I do not decide, that the mains and pipes laid down by the old company are the property of the plaintiffs; the question is not raised by the Special Case, and does not appear to have been discussed until the parties came to this Court. It is plain that the plaintiffs, or their predecessors the limited company, had no right to support before July, 1878. The Normanton Gas Act, 1878, incorporated the Gasworks Clauses Act, 1847, and thereby put the plaintiffs into the position that either they have no right to support, or, if they have a right to support, then they are bound to give compensation to those on whose property a burden is thus imposed. The right of the plaintiffs to support appears to me to arise from this —the Normanton Gas Act of 1878 and the incorporated Acts give the plaintiffs the right to lay down, keep and maintain pipes, and the Gasworks Clauses Act, 1871, imposes on them the duty of supplying gas. The pipes of the company are therefore lawfully in the land, and no one has any right to do injury to them; so that the defendants infringe an actual right of the plaintiffs if they by their workings cause injury to the pipes; and it seems to me that the right to support is the necessary consequence of the powers given to and the duties imposed on the plaintiffs. It has been suggested that the provisions of the private Act of 1878 only apply to the mains which were put down after that Act was passed. It is difficult to see that the Act does in terms apply to the pre-existing mains, but it would lead to an absurd conclusion were we to hold that they do not so apply.

The next question is whether, assuming the plaintiffs to have obtained under the Act of 1878 and the Acts incorporated therewith, a right of support for the then existing mains, they have now a right of support for all their mains. The plaintiffs acquired under those Acts a right to lay down the pipes, and the landowner in whose land they are laid has no right so to use his land as to injure the pipes of the plaintiffs. I do not think that the defendants have imposed upon them by the Legislature the burden of giving support to the mains of the plaintiffs without also acquiring a right to compensation. This right is, I think, given by section 6 of 10 Vict. c. 15, and, unless this were the case, I should not see my way to holding that the plaintiffs have a right to support. I agree, therefore, that the decision of the Divisional Court is right in substance, though it is defective in not dealing with the question of compensation.

FRY, L.J.—I am of the same opinion. The first question is whether the plaintiffs are entitled to support for the pipes laid down before the local Act of 1878 was passed. This question involves also a question as to the ownership of these pipes; but it appears to me that it was not intended to raise this second question, for the Special Case assumes that these pipes are the property of the plaintiffs. I am unable, however, to concur with that part of the judgment of the Master of the Rolls which relates to those pipes and to the construction of the local Act of 1878; for if the pipes in question did not belong to the company before that date, then I think that the Act only intended to vest in the new company the property possessed by the old company. But this point is not material to our decision.

On the construction of the Act of 1878 I am of opinion that pipes which were previously to that date the property of the then existing company must be considered as though they had been laid down under the Act of 1878. Sections 2, 6 and 44 seem to me to effect this, for I do not think it is straining them to say that it results from the enactment contained in those sections that the pipes of the old company laid down before the Act are in the same position as those laid down after that Act was passed; and thus we avoid the strange conclusion that the pipes ought to have been taken up and then at once relaid.

Then we have to consider whether pipes laid down under the Act of 1878 are entitled to support from the subjacent land.

I think that the general rule was laid down in *In re The Corporation of Dudley* (2), and that it applies to this case. That rule is, in effect, that where an obligation is created by statute to maintain something which requires support, or where there is a statutory duty to do something, the necessary result of doing which is that some structure will be required for which support is necessary, and where compensation is given for damage done in the exercise of the powers of the Act, then the Courts will, as a rule, hold that such a structure is entitled to support, and that it cannot be interfered with by adjoining landowners.

To apply that to this case, it seems to me that if the matter rested on the Gasworks Clauses Act, 1847, alone, there would have been considerable difficulty in holding that that statute creates a duty in any one to maintain any structure; but when the Act of 1871 is considered and read with the earlier Act, it appears that an obligation is created, and that there is a duty to supply gas. There is then, when pipes have been laid down, a duty and a statutory obligation. And then I think that section 6 of 10 Vict. c. 15, which is to be read with the subsequent Act of 1871, gives compensation to those who have to give support to the pipes of the plaintiffs. There is a power to lay down pipes, and when the pipes are laid down there arises a statutory obligation to supply gas; and therefore I am of opinion that the plaintiffs are entitled to support, and that the defendants are entitled to compensation.

Judgment accordingly.

Solicitors—Badham & Williams, agents for Marsden, Williams & Co., Wakefield, for plaintiffs; J. & W. Maude, agents for Butler & Middlebrook, Leeds, for defendants.

[IN THE COURT OF APPEAL.]

1883. June 27, 28. } DAVIS *v.* BURTON (BLAIBERG *claimant*).*

Bill of Sale—Bills of Sale Amendment Act, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7 *and* 9—*Accordance with Form in Schedule.*

The Bills of Sale Act (1878) *Amendment Act*, 1882, *s.* 9, *enacts that a bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void, unless made in accordance with the form in the schedule to the Act annexed. The form permits the insertion of terms as to insurance, payment of rent or otherwise, which the parties may agree to, for the maintenance or defeasance of the security.*

By section 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes; first, if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security; secondly, if the grantor shall become bankrupt or suffer the goods or any of them to be distrained for rent, rates or taxes; . . . fourthly, if the grantor shall not without reasonable excuse upon demand in writing by the grantee produce to him his last receipts for rent, rates and taxes."

A bill of sale of goods was made by way of security for the payment of 300*l. money advanced and of* 180*l. agreed capitalised interest thereon; the whole sum of* 480*l. to be paid by instalments at certain specified dates. There were covenants that the grantor would deliver to the grantee the receipts for rent, &c., when demanded in writing or otherwise; that the grantor would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition.*

It was further agreed that if the grantor should break any of the covenants, all the moneys secured by the bill of sale should immediately become due and should be forthwith paid to the grantee, and that all

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

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the foregoing covenants were necessary for maintaining the security within the meaning of sub-section 1 *of section* 7 *of the Act; and there was a proviso that the chattels assigned should not be liable to seizure for any cause other than those specified in section* 7 *of the Act:—*

Held, *that the bill of sale was void, inasmuch as it was not substantially in accordance with the form in the schedule, and was in violation of section* 7.

Judgment of the Queen's Bench Division affirmed.

Appeal by the claimant from a judgment of the Queen's Bench Division in favour of the execution creditor upon a Special Case which raised the question whether the bill of sale was in accordance with the form given in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, and, if not in accordance therewith, whether it was void as against the execution creditor. The case is reported *ante*, p. 334, where the bill of sale, so far as is material, is set out.

Winslow, Q.C., and *A. T. Lawrence*, for the claimant.—This bill of sale does not offend against the statute. There is no express provision that the grantee may take possession; the only power given is one implied in the concluding provision of the bill of sale, and the right there given is limited to the causes specified in section 7 of the Act of 1882.

[LINDLEY, L.J.—The effect of this bill of sale is that all the payments secured by it may become due at once, and then the general provisions of the statute enable the grantee to seize the goods.]

Any terms not forbidden by the statute may be inserted in a bill of sale. The parties may agree to terms, and then the statute says that those terms must be expressed in a certain form.

[BRETT, M.R.—If section 7 stood alone, perhaps the bill of sale might not be effective if the provisions of that section were disregarded; but then section 9 goes further, and makes the bill of sale void.]

The bill of sale does not contravene the statute; it only contains a promise to pay a sum and interest at so much per cent.

[FRY, L.J.—It contains a provision that if default is made in payment of one instalment, then all the other instalments are at once to be due, and that does not seem to be in accordance with the form in the schedule.]

The Legislature does not forbid a provision which fixes that a sum shall become payable at a time the date of which may be accelerated by the happening of certain events. In *Wilson* v. *Kirkwood* (1), Chitty, J., approved of a bill of sale not unlike the present one; and although the order was by consent varied by the Court of Appeal, the judgment of Chitty, J., was not impugned.

[BRETT, M.R.—Here the sum of 180*l.* is not really interest. The bill of sale contains a provision to pay a different sum from that advanced, and that on a condition which might happen at an early date; and that is contrary to the form.]

The Act of 1882 contemplates three things in particular which must now be set out in a bill of sale: First, the consideration must be truly stated; secondly, it must contain a schedule of goods comprised in the bill of sale, and must not extend to any other goods; and, lastly, it may contain those powers of entry and seizure only which are included in section 7. The statute does not interfere in any way with freedom of contract; and the parties may enter into any terms as to the payment of the money. This bill of sale does not in substance conflict with the form in the schedule. It was intended that a bill of sale might be modified in many particulars according to the circumstances under which it is given; and that there should be powers of entry and seizure upon default in payment of the instalments. The form allows the money to be repaid by equal sums, and empowers the parties to capitalise the interest. No doubt when an instalment is paid the grantor continues to pay interest at a necessarily higher rate, because he is paying interest upon principal which has already been repaid; but that is a necessary incident of the form in the schedule.

Meadows White, Q.C. (with him *C. C. Scott*), for the execution creditor.—The vice in this bill of sale is with regard to

(1) 27 Solicitors' Journal, 296; in the Court of Appeal, Weekly Notes, 1883, p. 44.

Davis v. *Burton, App.*

what is called capitalised interest. There must be a sum together with interest at a certain rate per cent. The interest must be a rateable interest—that is, interest payable at a certain rate per cent. for the forbearance. The latter part of section 3 shews that the Act applies only to documents given by way of security for advances. A bill of sale substantially in accordance with the form would satisfy the requirements of the Act, but the present bill of sale contravenes the Act in several particulars.

[He was stopped by the Court.]

BRETT, M.R.—It is clear to me that this Act of Parliament is drawn as a benevolent Act towards borrowers and as a stringent Act for the holders of bills of sale. It seems to me that it is the intention of section 9, which refers to the model bill of sale given in the schedule, that a bill of sale should have as near as may be the simplicity of that model bill of sale, so that the borrower of money may easily see how far he is placing a burden upon himself; and also in order that a creditor of the borrower where a bill of sale has been registered may be able to see, when he comes to look at the bill of sale, how far he may trust the proposed borrower. The bill of sale is therefore to be registered in a sufficiently easy form for such creditor to come to a conclusion as to its meaning without being obliged to take advice, as he would be obliged to do in the case of the intricate bill of sale now under consideration. The Legislature, in order to carry out that view, has introduced section 9 into this Act of Parliament, in addition to other matters which have been introduced, as, for instance, by section 7. In order to carry out the simplicity of the bill of sale, and of the transaction—because, if the bill of sale is to be simple, the transaction also must be simple—section 9 provides that every bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void—that is, void as against all the world, including the grantor—unless made in accordance with the form given in the schedule to the Act. I do not think that this means that it shall be void unless made in every particular in the form given in the schedule; but I take it that the word "form" is merely a word of reference to that given in the schedule, and that the meaning is that, unless the bill of sale is made in accordance with the model, it would differ from the form in the schedule. It was suggested on behalf of the claimant that everything which was not inconsistent with that form would be in accordance with it. But that is an argument which I am unable to accept; for the words "in accordance with the form" must mean that the bill of sale is in form to be substantially like the one given in the schedule. It must not, by means of any contradiction or addition, be made substantially different from that form. A bill of sale may be so over-laid with additions as to make it unlike the form. The principle aimed at by section 9 was that the recorded transaction should be as simple as the transaction in the model bill of sale, and that the bill of sale itself should also be as simple as the model bill of sale. The principle is, that whatever may be the consideration for the sum to be secured, there shall be a sum fixed which shall be stated in terms and figures, and that the security shall be to secure the repayment of that sum and rateable interest thereon and upon nothing else. That interest must be a rateable interest. Inasmuch as the transaction which is to be expressed is the loan of money, the interest—a rateable interest—is to be fixed in some way or other. An attempt must not be made in any way to alter the sum of money the payment of which is to be secured by the bill of sale; and nothing must be added to that sum except a rateable interest. I see nothing to prevent a stipulation to the effect that a sum of 500*l.*, the repayment of which is to be secured by a bill of sale, shall be repaid by instalments of 100*l.* at a stipulated time and with interest at a named rate. It seems to me to be contrary to the transaction in this bill of sale, and therefore contrary to what this Act of Parliament has insisted upon, if the stipulation were that upon payment of the first 100*l.*, together with interest thereon up to the time of payment, the same rate of interest is to go on and be payable upon the principal sum and future instalments; for

that would be a payment of interest upon a sum which has already been paid, and would be contrary to the form given in the schedule, and also contrary to the transaction which the form was intended to describe. It would be wholly contrary to the form if any condition is added so that the principal sum is made different by increasing it. A fatal blot upon this bill of sale is that it does, upon the happening of the condition described in it, alter the principal sum the repayment of which is secured by the bill of sale. The construction of this bill of sale, apart from the statute, is, that upon breach of any one of the covenants, which breach may happen at any time, the principal sum to be paid is altered from the sum there named into another and larger sum by the addition of a sum of 180*l.*, which is called capitalised interest. That sum is no longer interest because it is to be paid, although the lender of the money can pay himself the whole of the principal sum by the seizure of the goods. He would, therefore, within a month of the execution of the bill of sale, be entitled to pay himself the whole sum of 300*l.*, together with 180*l.* more. That is not the rate of interest for the forbearance of payment of the loan: for the assumption there is that the lender is then paid. That is the vice in the present bill of sale, and is sufficient for the purposes of the present decision. If it is necessary to say so, I think that the other objection, which was pointed out by Mr. Justice Cave in the Court below, is equally fatal to this bill of sale. I am of opinion that this appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. First of all it is necessary to ascertain the true construction of the Act of Parliament, and then to see whether the bill of sale as construed comes within the terms of the Act. If so, the bill of sale is valid, even though its object may have been to evade the Act. It is not necessary to read the various provisions made in this Act, but sections 7, 8 and 9 are the material sections in deciding this case. Section 8 provides that a bill of sale shall be void, unless it is attested and registered. Then section 9 says that a bill of sale shall be void, unless made in accordance with the form in the schedule. The first thing to be ascertained is, whether the bill of sale is in accordance with the form in the schedule. It is difficult in this case to separate the form from the contents of the form; but the bill of sale must be substantially in the form given in the schedule. The form is framed with reference to the provisions of section 7. A much better form might have been given, but it is to be worked with the rest of the Act of Parliament, and that fact has been overlooked by the present claimant. The vice in the bill of sale under consideration is that it substantially departs from the form in the schedule; and it lies in the last two lines, namely, "that if the mortgagor shall break any of the covenants above set forth, then all the moneys hereby secured shall immediately become due and shall forthwith be paid to the mortgagee." This bill of sale renders the whole of the section nugatory; for if any of the covenants are broken, the whole of the money is to become due. That appears to me to be entirely contrary to the form in the schedule.

FRY, L.J.—I am of the same opinion. The first enquiry is as to the meaning of section 9. That section might be paraphrased to mean that the bill of sale shall be void if in substance it is not in accordance with the substance of such a contract as is expressed in the form in the schedule. Turning to the form I find that the plain object and substance of the bill of sale there given is to secure the payment of a certain sum of money together with interest at a certain rate. Any arrangement for a fair rate of *interest* would be a contract in the form in the statute. Then, undoubtedly, the form gives these words, "or whatever else may be the rate." It is to be observed that the variations are to be confined to a rate—it may be per pound, or by the month, week, or day—but whatever the interest is, it must be interest after a rate. That is the key-note to the whole of the contract in the schedule. It is apparent that in the present case the interest was not so rateable. The rate of interest here would vary according to

certain contingencies not in the knowledge of the grantor. The ascertainment of the rate at the time when the bill of sale is made is important for two purposes—first, in order that the grantor may know exactly the nature of the bargain; and, secondly, because it was the intention of the Legislature to give publicity to the dealing between the parties to the bill, and in order that the position of the grantor as regards the amount and time of payment at the time when the bill of sale was entered into might be known. But that cannot be known if the matter can only be reduced to a certainty at a time when the certainty becomes immaterial. Section 7 shews that it was the intention of the Legislature that chattels should be seized under circumstances that are there specifically mentioned. It was contended that the money might be made payable and the property made liable to seizure upon the happening of any event whatever; but that would be to open the door to the insertion in the bill of sale of any clause which the money-lender may require, and to allow him to seize the goods upon the happening of any event. This bill of sale is clearly at variance with and sins against the provisions of section 7, because it allows the lender to seize the goods upon the happening of other contingencies than those mentioned in that section. It was said that the words in the form, "here insert terms as to insurance, &c., which the parties may agree to for the maintenance or defeasance of the security," enabled all these clauses to be inserted; but I do not think so, because, in my opinion, the security to be maintained is the security referred to in the earlier clause—that is, the definite sum with rateable interest. It is plain that the effect of the Act of Parliament cannot be altered by any stipulation between the parties; and the clauses inserted in the bill of sale under consideration were not necessary for the maintenance of the security, and were not within the scheme of the statute. Undoubtedly there are several questions which may arise for consideration hereafter upon the construction of these sections; but as to them I say nothing. It is enough to say that the bill of sale in the present case sins against sections 7 and 9 and the form given in the schedule. The judgment of the Court below was therefore correct.

Appeal dismissed.

Solicitors—Walter & Durham, for execution creditor; Moresby White, Salmond & Co., for claimant.

[IN THE COURT OF APPEAL.]

1883. July 4, 30. HAIGH AND OTHERS *v.* THE ROYAL MAIL STEAM PACKET COMPANY (LIMITED).*

Carriers—Ship and Shipping—Tort—Injury and Death caused by Collision at Sea—Meaning of words "Loss or Damage"—Passenger's Ticket—Action by Personal Representatives—9 & 10 *Vict. c.* 93.

The personal representatives of a deceased man cannot maintain an action under Lord Campbell's Act (9 & 10 *Vict. c.* 93) *where the deceased if he had survived would not have been entitled to recover.*

The defendants, a steamship company, issued a passenger's ticket, which contained, amongst others, the following condition: "The company will not be responsible for any loss, damage or detention of luggage under any circumstances . . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom . . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner":—Held (*affirming the judgment of the Queen's Bench Division*), *that the words "loss or damage arising from the perils of the sea," as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants' servants.*

Appeal by the plaintiffs from a judgment of the Queen's Bench Division overruling a demurrer to a statement of defence.

* *Coram* Brett, M.R., and Fry, L.J.

Haigh v. *Royal Mail Steam Packet Co., App.*

The case is reported *ante*, p. 395.

The plaintiffs, as executors of Charles Schwind deceased, sued the defendants, under Lord Campbell's Act (9 & 10 Vict. c. 93), for the benefit and on behalf of his wife and children, alleging that Schwind lost his life through the negligence of the defendants' servants on board the defendants' steamship *Douro*. The deceased was being carried as a passenger on board the defendants' ship on a voyage from Rio de Janeiro to Southampton, when the ship came into collision with another ship, and was sunk, and the deceased was thrown into the sea and drowned.

The defendants, by way of defence, alleged that the deceased was received by them as a passenger upon the terms of a certain passenger ticket which was given to him by the defendants as a receipt for his passage-money, and which contained, *inter alia*, the following condition:—"The company will not be responsible for any loss, damage or detention of luggage under any circumstances. . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence resulting therefrom, during any detention consequent upon the occurrence of any cause to prevent the vessels from meeting at the appointed places; nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea . . . . or from any act, neglect or default whatsoever of the pilot, master or mariner."

The plaintiffs demurred. The Queen's Bench Division overruled the demurrer.

The plaintiffs appealed.

A. T. Lawrence (with him *Cohen, Q.C.*), for the plaintiffs.—The taking away of life or inflicting personal injury is not "loss or damage" within the meaning of this contract. That term applies only to loss or damage to goods. Even if the contract includes personal injury done to a passenger, it does not apply to the actual taking away of life, and does not take away the right of the representatives of the deceased to maintain an action under Lord Campbell's Act. The contract contemplates the possibility of three classes of goods—luggage, treasure and merchandise—which may suffer loss or damage; if that happens to either of them the defendants would be liable at common law as carriers; a condition relieving them from liability would therefore in their own interest be a necessary condition. But the contract makes no provision for exemption from liability for loss or damage to goods except luggage. The exceptions which follow the words "loss or damage" cannot apply to cases of personal injury or loss of life, but only to such loss of, or damage to, property or pecuniary loss which may be sustained by the passenger—*Smith* v. *Brown* (1) and *The Franconia* (2). Even assuming that the deceased by reason of his contract could not have recovered damages for personal injuries, yet his personal representatives can, in the event of his death, maintain an action under Lord Campbell's Act. The case of *Griffiths* v. *The Earl of Dudley* (3), which is relied upon by the defendants, is not in point, because there the deceased had entered into a contract for himself and his personal representatives, which relieved his employer from liability.

Russell, Q.C., and *Phillimore*, for the defendants.—The case of *Read* v. *The Great Eastern Railway Company* (4) shews that negligence and not death is the cause of action; so that the death of the person injured does not give rise to a fresh cause of action to the personal representative under Lord Campbell's Act. It was contended that the words "loss or damage" did not include "personal injury"; but the Privy Council in the case of *The Beta* (5) expressed an opinion that it did—see also *The Franconia* (2); and although a contrary opinion was expressed in *Smith* v. *Brown* (1), yet the balance of authority is in favour of the contention that those words do include "personal injury." The condition must be construed having regard to the subject-matter of the contract, which is, that in consideration of the defendants carrying the deceased on lower terms than they

(1) 40 Law J. Rep. Q.B. 214; Law Rep. 6 Q.B. 729.

(2) 46 Law J. Rep. P., D. & A. 71; Law Rep. 2 P. D. 163, 171, 173.

(3) 51 Law J. Rep. Q.B. 543; Law Rep. 9 Q.B. D. 357.

(4) 37 Law J. Rep. Q.B. 278; Law Rep. 3 Q.B. 555.

(5) 38 Law J. Rep. Adm. 50; Law Rep. 2 P.C. 447.

otherwise would have done, the defendants are to be relieved from liability in the event of the deceased suffering any personal injury.

Thompson v. *The Royal Mail Steam Packet Company* (6) was also cited.

Lawrence replied.

Cur. adv. vult.

The judgment of the Court was (on July 30) delivered by

BRETT, M.R.—The question is whether in this case the executors of Schwind can maintain an action against the defendants under Lord Campbell's Act on behalf of his widow and children; and they certainly can do so unless they are prevented by something beyond the mere law of negligence. The defendants relied upon a contract which the deceased man had entered into with them, by virtue of which, if the events which did happen had happened without causing his death, he himself could not have recovered against the defendants. On the other hand, it was argued that the deceased man's representatives could recover on behalf of his widow and children, although he himself, if he had survived, could not. In my opinion that is contrary to the obvious interpretation of Lord Campbell's Act, under which it is clear the executors can only recover if the deceased man could have recovered, supposing that everything did happen to him which had he not been killed would have entitled him to bring an action. The question therefore is, whether the contract into which the deceased man entered would have prevented him from maintaining an action against the defendants for the personal injury caused to him by the negligence of their servants. That depends upon the construction of the passenger's ticket, which formed the contract between him and the defendants. The ticket was given to the deceased as a receipt for the passage-money paid by him in respect of the carriage of himself and of a certain amount and kind of luggage which he might take with him. The ticket therefore applied both to the person and to the luggage of the passenger. As regards the luggage, the defendants stipulated that they would not be responsible "for any loss, damage or detention of luggage under any circumstances." The Court of Exchequer, in the unreported case of *Thompson* v. *The Royal Mail Steam Packet Company*, have construed a stipulation which was similar to the words of the condition now in question, namely, "The company will not be responsible for any loss or damage to luggage in any circumstances"; and the Court there held that the words "in any circumstances" applied to loss or damage to luggage by negligence. It had been previously decided that a stipulation that the company would not be responsible for any loss or detention of goods did not include loss by negligence (7). But after that decision this stipulation was put into the contract, and the words "under any circumstances" were added to the words which had been held not to include loss by negligence. I agree with the Court of Exchequer that those words must have been intended to carry the case further, and that they would include loss or damage to luggage by negligence (8). If that be so, the case of luggage is fully provided for by the ticket now in question. But the ticket is also a passenger ticket, and contains a stipulation as regards passengers, that the company will not be responsible for their maintenance, nor for any delay arising from accidents, nor for any loss or damage arising from perils of the sea. I confess that that is an odd stipulation, because I am unable to understand any loss or damage to a passenger, as such, exclusive of loss or damage to his property, which could be a loss if it were caused by a peril of the sea, for which the shipowner would be liable. So again, by reason of the words "or from machinery, boilers or steam," if any damage happened by the accidental explosion of a boiler, or steam, or from some accident which was not the result of negligence, the shipowner would

(6) Not reported.

(7) As to this see *Martin* v. *The Great Indian Peninsular Railway Company*, 37 Law J. Rep. Exch. 27; Law Rep. 3 Exch. 9; see also the opinion of Blackburn, J., in the House of Lords in *Peek* v. *The North Staffordshire Railway Company*, 10 H.L. Cas. 743, 491; 32 Law J. Rep. Q.B. 241.

(8) See also *Taubman* v. *The Pacific Steam Navigation Company*, 26 Law Times, N.S. 704.

not be liable. Therefore, excluding the words which are not applicable to the present case, the stipulation would read thus —The company will not be responsible for any loss or damage arising from any act, neglect or default whatsoever of the pilot, master or mariner. It was suggested that the word "damage" is not the correct word to apply to "personal injury." It is hardly usual to say that a man is damaged, but rather that he is hurt. "Personal injury" is not "loss," because a limb may be broken without being lost. The word "injury" would certainly have been more apt, but the word "damage" can certainly mean personal injury. Here the word occurs in a sentence which seems to be solely applicable to passengers personally. Therefore, upon consideration, we are unable to say that we think that injury to the person is not covered by the words of the stipulation. Injury to the person caused by the negligence of the pilot, master or mariner is an injury from which the defendants have relieved themselves. Therefore, after careful consideration and considerable hesitation, we are of opinion that we cannot differ from the decision of the Court below and say that this injury, if the deceased man had been alive, would have been one for which he could have recovered. It is therefore one in respect of which the executors cannot recover under Lord Campbell's Act. We are, therefore, of opinion that the appeal must be dismissed.

Appeal dismissed.

Solicitors—C. W. Dommett, agent for Slater & Turnbull, Manchester, for plaintiffs; Wilson, Bristows & Carpmael, for defendants.

[IN THE COURT OF APPEAL.]

1883. June 11, 30. } FRASER v. MASON AND ANOTHER.*

Copyhold — Fine on Admittance — Mode of Assessing—Assessment of, on Annual Value of Premises—No Assessment of a Precise Sum.

A lord of a manor who is by custom of the manor entitled to a fine upon admission of a copyhold tenant on the roll of the manor is entitled to assess and recover such fine as a certain number of years of the improved annual value of the land, and he is not bound to assess it at, and to claim, a precise sum of money.

Judgment of the Queen's Bench Division affirmed.

Appeal from the judgment of the Queen's Bench Division.

The case is reported *ante*, p. 423.

Action by the lord of a manor to recover a fine from a tenant admitted to a tenement within the manor.

By Judge's order the question raised on the pleadings was stated for the opinion of the Court. The question was whether the lord of a manor who is by custom of the manor entitled to a reasonable fine on each admittance to a copyhold hereditament is, on the admittance of two lives to a single copyhold hereditament, entitled to assess the fine at three years' improved annual value, and, without fixing or assessing any amount or sum certain as the amount of such improved annual value or of such fine, to bring an action for the purpose of ascertaining the same and obtaining payment accordingly.

The Queen's Bench Division gave judgment for the plaintiff.

The defendants appealed.

Jelf, Q.C., and *S. Will*, for the appellants.

Anstie, Q.C., and *Rose*, for the plaintiff.

The following cases were cited and discussed:—*Trotter* v. *Blake* (1), *Wharton* v. *King* (2), *Lord Verulam* v. *Howard* (3),

* *Coram* Lindley, L.J., and Fry, L.J.

(1) 2 Mod. 229.
(2) 3 Anst. 659.
(3) 7 Bing. 327.

Fraser v. *Mason, App.*

Dalton v. *Hamond* (4), *Wheeler* v. *Honour* (5), *Holles* v. *Hutchinson* (6), *Halton* v. *Hassell* (7), *Lord Northwick* v. *Stanway* (8), *Denny* v. *Lemman* (9), *Hayward* v. *Raw* (10), *Willowe's Case* (11), *Grant* v. *Astle* (12), *Allen* v. *Abraham* (13), *Viner's Abridgment, Tit. Copyhold, North* v. *Lord Strafford* (14), *Shuttleworth* v. *Garnett* (15), *Cooper* v. *Jones* (16), *Clarke* v. *Westrop* (17), *Daniel* v. *Gracie* (18), *Ex parte Voisey* (19), *Holdsworth* v. *Wilson* (20), *Parkin* v. *Radcliffe* (21) and *Parkins* v. *Titus* (22).

Cur. adv. vult.

The following judgments were delivered on June 30:--

LINDLEY, L.J.—The substantial question raised in this case is one of considerable importance in copyhold law—it is whether the lord of the manor can sue for a fine on an admittance to a copyhold hereditament without claiming an exact sum and proving that the exact sum so claimed is the right amount of the fine. It is argued by the appellants that the lord must assess the fine accurately, and that unless this be done he cannot recover it, even though he assesses it on the right principle. The history of this question is found in a judgment of Lord Loughborough in the note to *Grant* v. *Astle* (12). He says at p. 727*a*—"It was contended upon the part of the lord that the mere non-payment of the fine assessed would amount to a forfeiture. That proposition appeared too strong even in a Court of law; however, the Court of King's Bench, in the 36th of Eliz., held that after the demand of a fine by the lord and the refusal of the tenant to pay, though the fine should be unreasonable, the estate should be forfeited.

"This Court, a term or two afterwards, in the case of *Jackman* v. *Hoddesdon* (reported in *Cro. Eliz.* 351), held that in such a case there was no forfeiture. The Court of King's Bench (as has been just stated) had held the contrary, but the opinion of this Court prevailed, and in the 43rd of Eliz., in the case of *Hobart* v. *Hammond* (reported in 4 *Coke*, 27, B), the Court of King's Bench, referring to the case of *Jackman* v. *Hoddesdon* in the Common Pleas, varied their idea, and held that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report of the case is stated, and the anxiety with which the Judges support the proposition, one would be apt to conclude it had not been of great antiquity.

"A few years afterwards, in the 6th of King James, in *Willowe's Case* (13 *Coke*, 1), this point again occurred, and the law was not then taken to be so settled as for the Court simply to say 'the point is so'; but the report states a great deal of reasoning and argument to support the position that the Judges not only might, but ought, either upon the facts appearing upon a demurrer, or upon evidence to go to a jury, to determine what was a reasonable fine; and in that case the Court held that two years' value was an unreasonable fine.

"Thus then the matter rested: the fine was to be assessed by the lord, and whether it was reasonable or unreasonable was a question for the consideration of the Court and jury; and it would obviously be subject to much fluctuation and uncertainty. To prove, upon a trial, the annual improved value of land; and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction that recourse would frequently be had to the Court of Chancery, which had always relieved against the forfeiture, and taken upon itself without a jury to determine what should be a reasonable fine.

(4) Cro. Eliz. 779.
(5) Sir T. Raym. 41.
(6) 3 Swanst. 665.
(7) 2 Str. 1042.
(8) 3 Bos. & P. 346.
(9) Hob. 135.
(10) 6 Hurl. & N. 308; 30 Law J. Rep. Exch. 178.
(11) 13 Coke, 1.
(12) 2 Dougl. 722.
(13) 1 Co. Lit. 59, B, note 1.
(14) 3 P. Wms. 148.
(15) Carth. 90.
(16) 25 Law J. Rep. Chanc. 240.
(17) 18 Com. B. Rep. 765.
(18) 6 Q.B. Rep. 145; 13 Law J. Rep. Q.B. 309.
(19) 52 Law J. Rep. Chanc. 121; Law Rep. 21 Ch. D. 442.
(20) 4 B. & S. 1.
(21) 1 Bos. & P. 282.
(22) Carth. 12, and *sub. nom. Parkins* v. *Titus*, 3 Mod. 132, and Skin. 247.

Fraser v. *Mason*, *App.*

"Lord Keeper Coventry, in the 5th of Charles I., and again in the 12th of the same reign (1 *Chanc. Rep.* 18 or 33, *Middleton* v. *Jackson*; and ibid. 51 or 96, *Popham* v. *Lancaster*), held that one year's improved value was a reasonable fine—guarding the decree—that one year's value should not be counted a fine certain, but referable to the discretion of the Court whether it was reasonable, and that the payment was then directed because it was reasonable. In the 29th of Charles II., in the year 1677, Lord Nottingham, in the case, in 2 *Rep. in Chancery*, 135, *Morgan* v. *Scudamore*, held that two years' value was a reasonable fine, and that at the time of this determination, in 1677, two years' value was not a much higher payment than one year's value had been at the time of Lord Coventry's determination: the interest of money had been reduced, and from that and other causes the value of land had risen. One year's value might be nearly as large as an aliquot part of the selling price of land in the 5th of Charles I., as two years' value at the time of Lord Nottingham's determination. From that time to the present the idea of two years' value being a reasonable fine in the case of a fine arbitrary (or, in the more proper phrase, arbitrable) has prevailed uniformly, and the adhering to this rule has been a matter of great convenience, though it cannot be said to be a matter of strict justice."

That historical sketch of Lord Loughborough shews that a controversy existed as to the duty of the lord in this matter. It was first settled that his duty was to assess what was reasonable. The Court of Chancery has since settled that two years' improved value is a reasonable amount, as was explained in *Lord Holles* v. *Hutchinson* (6), which also shews that the Court of Chancery exercised a control in this matter. I have looked into the various cases which were cited on the argument, and it appears to me that the following propositions are well established in copyhold law. The fine must be assessed by the lord or his steward. If the amount is disputed, a jury must settle the dispute, either in ejectment for a forfeiture, or in trespass for a seizure, or in an action for the fine.

Before the Judicature Act, it was held that if the lord assessed the fine at too large amount and sued for that, he could not recover in that action anything which the jury might find to be the proper sum, and the lord had to bring a fresh action. That is established by *Grant* v. *Astle* (12), *Hayward* v. *Raw* (10) and *Lord Northwick* v. *Stanway* (8). It appeared to be a strong proposition to say that if the lord had assessed the fine, and had made a mistake in the sum assessed, he could not recover anything. But even when the pleading rules were more stringent than at present, if the lord had assessed the fine at two years' value, and had in his action declared for that amount and stated the exact sum claimed under a *videlicet* so as to avoid pinning himself down to the exact figure, it seems he might have recovered what the jury might find to be the proper sum, at least if it did not exceed the amount stated in the declaration. This at least is what I gather from *Parkins* v. *Titus* (22), from the old authorities on pleading, and from Lord Mansfield's remarks in *Grant* v. *Astle* (12). If that is true, then the matter becomes a mere question of pleading and procedure; and under section 24 of the Judicature Act, 1873, it would seem to be startling to hold that if the lord made a mistake in the amount he must bring a fresh action. I do not think that we are obliged to hold that the lord must assess a particular sum, for if he does do so he may be placed in a difficult position. The case of *Lord Northwick* v. *Stanway* (8) goes the length of saying that where the lord assessed the fine at 100*l.*, and then remitted or waived a part of it so as to reduce it to 60*l.*, he could not recover, as the old assessment was in law an assessment of 100*l.* The Judicature Act does not affect the law of copyholds; but I am of opinion that the lord can recover the amount of the fine assessed, although he has not assessed the actual sum; and this appeal therefore fails.

FRY, L.J.—This question is stated by order, to raise a particular question set out in the order.

The question which thus arises is this—By law a fine must be a certain fixed legal

sum of money assessed and demanded by the lord, and it is asked whether an assessment of that which is reasonably certain is sufficient. It is well known that the certainty which is required in different cases must vary according to the subject-matter, and that there are degrees of certainty in law as in other matters; and the question here is, whether there is a certainty which is adequate. It appears to me that there is; the improved value of a hereditament is naturally more in the knowledge of the tenant, the heir, or the purchaser, than in the knowledge of the lord. So far as I am aware, the lord had no right of entry to survey the property, except indeed under the jurisdiction possibly of the Court of Chancery. The lord had no means to obtain discovery except possibly through the intervention of a similar proceeding, and therefore he was placed at a great disadvantage in assessing the annual value of the property.

Turning now from principle to authority, I find in *Coke upon Littleton*, s. 136, p. 96—"It is a maxim in law that no distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty, for, *id certum est quod certum reddi potest;* for *oportet quod certa res deducatur in judicium;* and upon the avowry damages cannot be recovered for that which neither hath certainty nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty, as a man may hold of his lord to sheere all the sheepe depasturing within the lord's manor, and this is certaine enough, albeit the lord hath sometime a greater number and sometime a lesser number there, and yet this incertainty being referred to the manor which is certaine, the lord may distraine for this uncertainty."

That lays down the principle that certainty in any given matter need only be such as is required for the purpose in hand. The case of *Parkins* v. *Titus* (22), which I have before me in *Carthew's Reports*, at p. 12, shews that there is enough certainty in the claim made in this case. In that case the action was for trespass: the defendant justified in his own right as bailiff of the Earl of Essex; the plaintiff replied that land in question was part of a manor, and that he had been duly admitted. To this the defendant rejoined that a fine had been set, that the fine was reasonable, and that for non-payment he entered for a forfeiture. The plaintiff surrejoined that the fine was not reasonable, and alleged a custom that tenants desiring admittance should pay as a fine "*tantam denariorum summam quantam terræ vel tenementa valebant per annum tempore talis admissionis et non amplius*, and that the lands, &c., were but of the value of 20*l.*," which he tendered. "The defendant demurred, pretending that this was a frivolous custom and not good for the incertainty, because the value of the land is always incertain, sometimes of a greater and sometimes of a less value, and so there cannot be any certainty of the sums which the lord is to have for a fine; but 'tis in the power of the tenant to make the fine a very low value by not cultivating the land." The judgment was that the custom was good and reasonable, and there was sufficient certainty to justify the entry.

Again, in the case of *Shuttleworth* v. *Garnett* (15), at page 90 of *Carthew's Reports*, it was held that the lord could obtain the fine on *assumpsit*, and that that being so, he could establish the amount he claimed under a *videlicet*, and that he ought not to fail in his action if he wrongly assessed the value of the fine at the time he named. This view is corroborated by what Lord Mansfield said in *Grant* v. *Astle* (12), "This action," said he, at page 732, "is for a certain precise sum, and, under the circumstances of the case, it could not be brought in any other way. The cases cited for the plaintiff—namely, of debt on a foreign judgment, or against a tenant for double the value of the land when he holds over under the statute of 4 Geo. 2. c. 28, or for treble the value for not selling out tithes under the statute of Edw. 6, or of *assumpsit* for a total loss on a policy of insurance when there has been only a partial loss—are not at all applicable to the present case, for in all of those the gist of the action is supported and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the jury shall find to be the value or the damage."

Now, here the gist of the action brought

by the lord is to recover two years' value, and he is entitled to recover it on *indebitatus assumpsit.*

It appears to me, moreover, that the common law Courts entertained a jurisdiction to ascertain the *quantum* of a fine on a number of years' improved value, that the number of years was ascertained by the Judge, and the *quantum* by the jury. I gather this from *Willowe's Case* (11), where the third resolution is stated as follows:—"It was resolved that if the lord and tenant cannot agree of the fine, but the lord demandeth more than a reasonable fine, that the same shall be decided and adjudged by the Court in which any suit shall be for or by reason of the denying of the fine, and the Court shall adjudge what shall be said a reasonable fine, having regard to the quality and value of the land, and other necessary circumstances which ought to appear in pleading on a demurrer or found by verdict." This would seem to import both elements into the consideration of the Court; but, whether or not this jurisdiction was exercised in the common law Courts, it seems to me that such a jurisdiction was exercised by the Court of Chancery, as is shewn by the case of *Holles* v. *Hutchinson* (6) in the note to Swanston's 3rd volume of Reports. In that case there were three decrees; there had been two decrees—"one in the time of the Lord Bacon, when the fines were ascertained at two years' value . . . . another in the time of the Lord Chancellor Bromley, which was to explain the former decree upon a complaint that the lord took upon himself to judge the values, whereupon the Chancellor issued out a commission to survey the value of every tenement, and upon the return of that commission a decree was drawn up by consent to make this survey the binding and perpetual measure as to like values." Lord Bromley was not content, it appears, to ascertain only the number of years, but he desired to ascertain the value of every tenement. Lord Nottingham proceeded to find all the fault that he could with the second decree which was made by consent, and he said at page 667: "Thirdly, there are many precedents in this Court whereby fines uncertain have been reduced to a reasonable estimate or value; but this second decree is the first precedent whereby uncertain values were made certain and perpetual by a survey." The form of this observation is against the principle of perpetual assessment; and Lord Nottingham then issued a new commission, and directed a new survey to ascertain the quantum, saying at p. 668, "The only difficulty which remains with me is that the bill doth not pray to vacate the decree or to set it aside, but only to amend the defects of the survey, and that a new commission may be awarded to that purpose; that to open a new survey the true state and value of all the tenements may be known; now, though this kind of remedy will be necessary to be renewed every thirty or forty years, yet since no decree can go beyond the prayer of the bill, I awarded such commission, and will consider of the further settlement at the return of that commission."

Therefore Lord Nottingham actually awarded a commission for the purpose of ascertaining the value in money of each of the tenements, and thereby of ascertaining the fine payable in respect of each tenement. That is distinct assertion of the jurisdiction of the Court of Chancery to assess the precise amount. I will only add that, if we were to yield to the objection taken by the appellants, we should go counter to the principles of the Judicature Act, 1873, s. 24. sub-s. 7.

Appeal dismissed.

Solicitors—F. Needham, agent for E. & A. Caddick, West Bromwich, for plaintiff; Taylor, Mason & Taylor, for defendants.

1883. April 3.

WILLIAMS *v.* DAVIES.

Bastardy—Second Order to pay on Expiration of First—Jurisdiction of Justices—Bastardy Act, 1872 (35 & 36 *Vict. c.* 65).

[For the report of the above case, see 52 Law J. Rep. M.C. 87.]

1883. May 30. } GULLICHSEN v. STEWART BROTHERS.

Charter-party—Bill of Lading—Incorporation of Terms of Charter-party—Inconsistent Terms — Demurrage — Port of Discharge.

By a charter-party made between the plaintiff and the defendants it was stipulated that the liability of the defendants should cease "as soon as the cargo is on board the vessel holding a lien upon the cargo for freight and demurrage." The bills of lading contained the words "he or they paying freight and all other conditions as per charter-party." The defendants were the owners and receivers of part of the goods the subject of one of the bills of lading, having indorsed the said bill of lading to indorsees for value as to the other part of such goods. By reason of delay in discharging the goods of which the defendants were owners and receivers, the vessel was delayed five days beyond the lay days, and the plaintiff claimed demurrage for that delay:—Held, *that the words, "he or they paying freight and all other conditions as per charter-party," did not operate to incorporate conditions of the charter-party inconsistent with the other terms of the bill of lading, and that the conditions in the charter-party were incorporated in the bill of lading as far as they applied to demurrage at the port of loading, but did not extend to absolve the defendants, as owners and receivers of the goods, from liability for demurrage at the port of discharge.*

This was a Special Case, stated pursuant to the Rules of the Supreme Court, Order XXXIV. rule 1. The plaintiff, a shipowner, sued the defendants, timber and general merchants, for the sum of 56*l.* 13*s.* 4*d.*, for the demurrage of the vessel *Alette*, and for 8*l.* 3*s.*, for balance of freight and bank commission.

The defendants paid the said sum of 8*l.* 3*s.* into Court.

The charter-party made between the parties contained the following clauses:—

"It is agreed that as this charter-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board the vessel holding a lien upon the cargo for freight and demurrage. The usual custom of each port to be observed by each party in cases where not specially expressed."

"Seventeen days, Sundays and holidays excepted, are to be allowed the merchant (if the ship be not sooner despatched) for loading, and for discharging cargo fifteen like days. Lay days to commence when ship is ready in a proper loading and discharging berth respectively, demurrage at the rate of 4*d.* per register ton per day to be paid to the ship if longer delayed."

Goods were shipped under this charter-party under two bills of lading, by which the goods were made deliverable at the port of discharge, on the river Mersey, to the defendants or their assigns, "he or they paying freight and all other conditions as per charter-party." The defendants indorsed the first of the bills of lading to indorsees for value, and also the second bill as to part of the goods the subject of such bill of lading. As to the rest of the goods the subject of the second bill of lading, the defendants remained the owners and receivers of them. The discharge, through no fault of the ship, was not complete until five days after the fifteen lay days had run out.

The defendants contended that their liability ceased on the cargo being shipped, and that the plaintiff was bound to exercise his lien.

The question for the Court was whether, upon the facts above set out, the defendants were liable.

Edwyn Jones, for the defendants.—The shipowner, having by his lien given in the charter-party a sufficient remedy for the breach sued for, is not entitled to maintain this action. The responsibility of the defendants having ceased upon the loading of the cargo, they never came under any liability to the plaintiff in respect of the demurrage sued for, and the circumstance that the defendants were owners and receivers of a portion of the cargo can make no difference as to their liability, as they are not sued in respect of any act or default of theirs as such receivers, but for a breach of a clause in the charter-party

for which they had ceased to be liable. *Evans* v. *Foster* (1), *Smith* v. *Sieveking* (2), *Wegener* v. *Smith* (3), *Porteous* v. *Watney* (4) and *Sanguinetti* v. *The Pacific Steam Navigation Company* (5) were cited.

C. Russell, Q.C., and *French*, for the plaintiff.—The receipt of the goods under the bill of lading created a new contract, under which the defendants are liable for demurrage in accordance with the terms of the charter-party. Though the liability of the defendants as charterers ceased as soon as the cargo was on board, they are none the less liable as owners and receivers under the bill of lading. Only so much of the cesser clause as is not inconsistent with the bill of lading can be imported into it. *French* v. *Gerber* (6) and *Porteous* v. *Watney* (4) were cited.

POLLOCK, B.—This is an action for 56*l.* 13*s.* 4*d.*, demurrage alleged to be due on delay in discharging the cargo of the ship *Alette*, chartered under a charter-party made between the owners of the *Alette* and the defendants to carry a cargo of deals, &c., to the west coast of Great Britain. There was the usual clause as to the time for loading, which in this case was seventeen days, and for unloading, fifteen days. The cargo was loaded and came forward. There is no claim for damages for delay in unloading, as in *Randall* v. *Lynch* (7), but the claim is for demurrage under a condition alleged to have been imported into the bill of lading by words of reference to the charter-party. No doubt by those words of reference there is imported into the bill of lading so much of the condition in the charter-party as is referable to the receipt of cargo at the port of loading. When the cargo is once on board, however, the charterer's liability ceases by reason of the cesser clause; but, in my judgment, that clause does not displace the right to sue the defendants as receivers of the goods for freight and demurrage at the port of discharge. It is said for the defendants that the consignee, by the words of the bill of lading, became the assignee of the charter-party, and that all the conditions of whatever kind contained in that charter-party are thereby imported. But, to my mind, it would be unreasonable to say that into whosesoever hands the bill of lading comes the holder is exempt from liability for demurrage at the port of discharge. There is clear authority for saying that only so much of the charter-party is to be imported as is consistent with the other parts of the bill of lading. I think, therefore, there must be judgment for the plaintiff, with costs.

LOPES, J.—It is important to recollect that this is a claim for demurrage at the port of discharge made by the owners of a vessel against the defendants as consignees of cargo and holders of a bill of lading. The bill of lading contains the words "he or they paying freight and all other conditions as per charter-party," and the question is, what effect we are to give to them. It is perfectly clear from the judgments of Lord Justice Cotton and Lord Justice Thesiger in *Porteous* v. *Watney* (4), that we must incorporate any part of the charter-party not inconsistent with the bill of lading. Therefore the condition in the charter-party as to demurrage at the port of loading must be incorporated. But the same authority points out that what is inconsistent must be rejected. The cesser clause, therefore, cannot be imported into the bill of lading as affecting the right to demurrage at the port of discharge, but relates only to the liability up to the time of the cargo being put on board. There must therefore be judgment for the plaintiff, with costs.

Judgment for plaintiff, with costs.

(1) 1 B. & Ald. 118.
(2) 4 E. & B. 945; 24 Law J. Rep. Q.B. 257.
(3) 15 Com. B. Rep. 285; 24 Law J. Rep. C.P. 25.
(4) 47 Law J. Rep. Q.B. 365, 643; Law Rep. 3 Q.B. D. 534.
(5) 46 Law J. Rep. Q.B. 105; Law Rep. 2 Q.B. D.
(6) 45 Law J. Rep. C.P. 880; 46 ibid. C.P. 320; Law Rep. 1 C.P. D. 757; on app. ibid. 247.
(7) 12 East, 179.

Solicitors—Venn & Co., agents for Collins & Robinson, Liverpool, for plaintiff; Kearsey, Son & Hawes, for defendants.

[IN THE HOUSE OF LORDS.]

1883. April 24. THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF WEST HAM, ESSEX, *v.* ILES.

Poor—Rate—Rating of Owner or Immediate Lessor instead of Occupier—House let at Rent or Rate not exceeding 20*l. a year—Weekly Tenancies*—59 *Geo.* 3. *c.* 12. *s.* 19.

By Sturges Bourne's Act (59 *Geo.* 3. *c.* 12), *s.* 19, *the owners of houses "which shall respectively be let to the occupiers thereof at any rent or rate not exceeding twenty pounds nor less than six pounds by the year for any term less than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," are to be assessed to poor's rates instead of the occupiers*:—Held, *that the limitation of value governs the whole clause, and that the owner cannot be assessed in the case of an agreement under which rent is payable at a shorter period than three months, if the rent is at a higher rate than twenty pounds per annum.*

This was an appeal from the decision of the Court of Appeal reported 51 Law J. Rep. Q.B. 17; Law Rep. 8 Q.B. D. 69.

The respondent was the owner and immediate lessor of houses let upon tenancies terminable by a week's notice and subject to rents payable weekly. The weekly rentals were in every case at a higher rate than 20*l.* per annum. The question was, whether he was liable under 59 Geo. 3. c. 12. s. 19, to be assessed for poor's rate instead of the occupiers.

Meadows White, Q.C., and *Mugliston*, for the appellants.

The respondent did not appear.

LORD BLACKBURN.—In this case the whole question turns upon the construction of section 19 of 59 Geo. 3. c. 12. I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament, where the intention of the Legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shews us what the Legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one shewing an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material.

The preamble of the section in question states that the payment of rates is evaded by houses being "let out in lodgings," in which case I may observe that those who framed the preamble did not understand the law as it is perfectly settled now. A man who lets out houses in lodgings, and who is the occupier, is himself liable, and the lodgers are not. The preamble proceeds to say, "or in separate apartments," in which case the occupier of the separate apartments is rated; "or for short terms, or let to tenants who quit their residences or become insolvent before the rates charged on them can be collected." That is the evil which is pointed at; and then the section enacts a remedy for it, "that it shall be lawful for the inhabitants of any parish to resolve and direct that the owner or owners of all houses, apartments or dwellings in such parishes, being the immediate lessor or lessors of the actual occupier or occupiers, which shall respectively be let to the occupiers thereof" (for the moment I will leave out the next line and a half) "for any less term than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months, shall be assessed to the rates for the relief of the poor instead of the actual occupiers." Now, stopping there (I have left out the limitation as to value altogether), there are two things, as it seems to my mind—where there has been a letting to the occupier of a tenement for any less term than one year, the lessor may be rated instead of the occupier; or where there has been a letting to the occupier, and by the terms of the agreement the rent is made payable at any shorter period than three months, the lessor may be rated instead of the occupier. So far, I think, there can be no doubt about the matter. But it is very improbable that the Legislature would have passed any such enactment

without some limit of value; and accordingly there are here the words "at any rent or rate not exceeding 20*l.* nor less than 6*l.* by the year." Those words are put in immediately after the words "let to the occupiers thereof"—and the first question is upon the natural and grammatical construction of the words. Should they apply to a letting for any less term than one year or on an agreement by which the rent shall be reserved or made payable at any shorter period than three months?—or are they to be confined to the case where the letting is for less than a year, and is there to be no limit of value whatever applicable to the case where there is a letting, and the rent is reserved or made payable at a shorter period than three months? I think that the plain and natural meaning of the words is that they shall extend to both cases—the value must govern both classes.

Now it is said (and that is the only argument which to my mind seemed to amount to an argument in favour of the other side) that the effect of that construction would be to baffle the preamble, and that it would be necessary for the purposes of the preamble for us to say that whenever there are short terms of letting, not by taking in lodgers but by the letting of an actual room, for a sum which exceeds 7*s.* 8*d.* a week (so says the argument), the Legislature are baffled in their object, which was to prevent the rates being evaded. But that I cannot see at all. I think that for that purpose it is possible enough that if their attention had been called to it they might have put some limitation; but to say that in order that they may not be baffled of their purpose, which was with respect to the letting of small lodgings at a small rent, the enactment shall apply, without stint or restriction of any sort, to a house which is let (as a house may well be let) to a person who is not inclined to take it for a long time, but who is willing to pay at the rate of thousands a year for it, provided always that the rent is reserved or made payable monthly—to say that that is necessary in order to carry out the preamble is not, I think, in accordance with the rules of construction, and is not such a construction as it would be prudent to adopt.

Then the words which I have read are followed by what has been called a proviso. When the inhabitants have come to this resolution or direction, they "may rescind, renew, vary and amend every such resolution and direction." Then comes the words "so as no such resolution or direction shall extend to assess or charge the owner of any house, apartments or dwelling which shall, with the outhouses and curtileges thereof, be let at a greater rent than 20*l.* or less than 6*l.* as aforesaid." If it were not for these two words "as aforesaid" there could not have been any possible doubt, I think, that this provision extends not merely (as was attempted to be argued) to the rescinding, renewing, varying and amending, but to the original resolution and direction, the first resolution and direction, as well as those subsequently made. The houses, apartments or dwellings are not to be "at a greater rent than 20*l.* nor less than 6*l.*" The words "as aforesaid," it is argued, shew that this is intended only to apply to a letting for a period of less than a year. I must say that that is straining the words.

I have come to the conclusion, therefore, that the decision of the majority of the Court of Appeal was the right one, and consequently I move that that judgment should be affirmed and the appeal dismissed. As there is no one appearing for the respondent, there is no occasion to say anything about costs.

LORD BRAMWELL.—I am of the same opinion. The question is how these words are to be read. Mr. White proposes to read them as though the words beginning with "or on any agreement" were not connected with the immediately preceding words, which occupy about two lines, but were connected with the words ending at "occupiers thereof"; so that he would read them as though after the words "one year, or," there was the word "let." Now, if that were so, he would be in the right. If not, if what comes after the words "one year" is a part of the sentence which begins at "any rent or rate," then he is not right. I am of opinion that he is not right. I think that I will not say the grammatical

construction, because either construction is, in my judgment, grammatical, but the ordinary and obvious construction is that which is unfavourable to him, and which makes it necessary that although the premises are let under an agreement, by which the rent reserved is made payable at any shorter period than three months, still the rent shall not be more than 20*l.* to enable this Act to be acted upon. I think that is the ordinary construction of the sentence as it stands; and it is confirmed, to my mind, by what has been called the proviso, which shews that those who were drawing the Act of Parliament thought that they were dealing with a case in which they had provided that the rent should not exceed 20*l.*

Nor am I very much struck by the argument about the preamble. I dare say mischief may result from the law being as we state it to be; I do not, however, see but what the preamble is complied with upon either construction. There is this at least to be said, that if premises were let for three months at 7*l.*, clearly that case would not be within the Act of Parliament; and that being so, I do not think that we ought to suppose that the Legislature intended that if they were let for two months, whatever the value was, this Act of Parliament should apply.

I am of opinion, therefore, that the judgment should be affirmed.

LORD FITZGERALD. — I should have thought this an exceedingly plain case if it had not been for the judgment which was delivered in the primary Court by Baron Huddleston; but as it is, I shall content myself with saying that it appears to me now, after hearing the argument, to be clear that the limit of 20*l.*, "not exceeding 20*l.*," twice mentioned, determines the whole question. Therefore, my opinion is that the decision of the Court of Appeal is right.

Judgment appealed against affirmed, and appeal dismissed.

Solicitors—G. A. Sedgwick, for appellants.

[IN THE HOUSE OF LORDS.]

1883. June 1, 7. } DANFORD *v.* M'ANULTY.

Practice—Action for the Recovery of Land—Pleading—Order XIX. rule 15.

Under the Rules of Court, 1875, *Order XIX. rule* 15, *the statement by a defendant to an action for recovery of land that he is in possession puts the plaintiff to the proof of the allegations in the statement of claim.*

The plaintiff appealed from a judgment of the Court of Appeal (reported 50 Law J. Rep. Q.B. 294; Law Rep. 6 Q.B. D. 645), which held that a defendant in an action for the recovery of land pleading merely that he is in possession thereby puts the plaintiff to the proof of his case.

Charles, Q.C., and *A. Gwynne James* (*Graham* with them), for the appellant, contended that Order XIX. rule 15, merely relieved a defendant in ejectment from the necessity of setting forth his own title, not from that of denying the plaintiff's; that Order XIX. rule 4, made pleadings necessary in ejectment—*Philipps* v. *Philipps* (1); and rule 15 was not intended to exempt the defendant from rule 17, but merely to enable him to rely upon any facts consistent with the statement of claim (*e.g.* a lease from the plaintiff, or the Statute of Limitations) without pleading them.

Mellor, Q.C. (*Dugdale* with him), for the respondent, contended that rule 15 enabled a defendant in ejectment, pleading that he is in possession, to raise any defence, not excluded by the rule, including a denial of the whole or any part of the statement of claim.

Cur. adv. vult.

THE LORD CHANCELLOR (EARL OF SELBORNE) (on June 7).—The plaintiff (appellant in this case) brought an action against the defendant for the recovery of certain land. In his statement of claim he set forth the particulars of the title on which he sought to recover. The defendant, in his statement of defence, pleaded possession, without going on expressly to

(1) 48 Law J. Rep. Q.B. 135; Law Rep. 4 Q.B. D. 127.

deny, or to say that he did not admit, the allegations of fact contained in the plaintiff's statement. At the trial before Mr. Justice Stephen, the plaintiff insisted that by this form of pleading on the part of the defendant he was relieved from the necessity of proving his own case, and that all the facts alleged by him must be taken to be admitted by the defendant. The learned Judge was of that opinion; and (after offering the defendant liberty to amend on special terms, which the defendant did not accept) he gave judgment for the plaintiff, without requiring him to go into any evidence in support of his case. The Court of Appeal set that judgment aside, and directed a new trial.

The question, whether the order of the Court of Appeal was right, depends entirely upon the proper construction and effect of two of the Rules of Court as to pleading (rules 15 and 17 of Order XIX.) scheduled to the Judicature Act of 1875. By the 4th rule of that Order (which requires pleadings in all actions) it is provided, generally, that "every pleading shall contain, as concisely as may be, a statement of the material facts on which the party pleading relies"; and the 17th rule (which is equally general) provides that "every allegation of fact in any pleading in an action, . . . if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic or person of unsound mind not so found by inquisition." If there had been no provision specially applicable to actions of ejectment, these two rules, standing alone, would (no doubt) have established the appellant's case. But there is such a special provision in rule 15, which is interposed between them. It is thus expressed: "No defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state, by way of defence, that he is so in possession. And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

The appellant says that the effect of the 15th rule is only to limit the extent to which a defendant in ejectment would otherwise have been bound under rule 4 to set forth in his pleading the particulars of his own title; and that it does not make a mere averment of possession sufficient to put the plaintiff to the proof of the title alleged by him, unless the truth of the plaintiff's averments in his statement of claim is expressly traversed or put in issue by the statement of defence. The respondent, on the other hand, says that such a limitation of the effect of the 15th rule is inconsistent with the natural and literal meaning of the words "it shall be sufficient to state, by way of defence, that he is in possession": the traverse of the plaintiff's averments, in those cases in which it is required by the 17th rule, being unquestionably part of the defence, and of the statement by way of defence. He adds that the appellant's construction makes that part of the 15th rule inofficious, and gives to the whole rule no more effect than if it had contained the first and last clauses only, the middle clause being altogether omitted. And he contends that the construction which gives every word of this rule its full and natural sense, and makes every part of it officious, is also the more probable and reasonable; because the other construction would not be consistent with the principles of the former practice in actions of ejectment; an intention to adhere to which (in substance) may be presumed from the fact that it was thought necessary in these rules of procedure to make special and exceptional provision for that class of actions.

I am of opinion that in this contention the respondent is right. The appellant's argument treats the word "defence" in the 15th rule as equivalent to "title," and the whole rule as meaning only that a defendant in ejectment need not set forth any legal title in defence of his possession. But he would not have been obliged to do this if there had been no such rule. It must therefore have been the purpose of the rule to cover the whole ground of the necessary defence in such an action.

Rules of procedure ought to be clear practical directions, not pitfalls for suitors. To tell a defendant in ejectment that "it shall be sufficient to state by way of defence that he is in possession," and then to hold that if he does this, and no more, in his statement of defence, he is to be taken as admitting the truth of the plaintiff's case, as alleged by him on the record, is to make the rule a snare to him. On the other hand, the 15th rule, as the respondent interprets it, may very well stand with the 17th, which does not require any express traverse of the plaintiff's averments, if a traverse may be inferred "by necessary implication." Where a defendant makes an averment which by a preceding rule is declared to be "sufficient by way of defence," in an action of a certain kind, it seems to me to follow by necessary implication that he intends thereby to put the plaintiff who is suing him in an action of that particular kind to the proof of his title, as much as if he had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations of title contained in the plaintiff's pleading.

I am therefore of opinion that the order appealed from is right, and that this appeal ought to be dismissed with costs, and I so move your Lordships.

Lord O'Hagan. — I entirely concur with the view taken by the Lord Chancellor, and I have scarcely anything to add; but I think it right to say, in reference to the argument in the Court below and to some expressions of opinion on the part of the learned Judges there, that my view of the case does not depend at all upon a mere statement—authoritative though it be, and true as it unquestionably is—that the intention of the framers of these rules was in accordance with the views contended for by the defendant. We cannot act upon intention, either in the case of a statute or in the case of a rule; we must have the intention carried into effect; and if the intention is stated to have been such that the terms either of the rule or of the statute contravene it, or are in any way inconsistent with it, we cannot have regard to that intention; we can only say, either in the case of the Judges or in the case of the Legislature, what the Judges or the Legislature have actually done. It is manifestly impossible to enter upon such an enquiry without confusion and serious risk of defeating the ends of justice. In the case of the Judges, it may be more easy to find out exactly what they felt and wished than in the case of the Legislature; but still the difficulty would be enormous. We cannot act upon intention.

In this case we have very strong testimony as to the purpose with which this rule was framed by the Judges, who were afterwards to administer it. In a sense, this is put forward as a contemporaneous exposition of its meaning, and, in the course of conversation rather than of argument, in the Court below, it was stated, in answer to the present Master of the Rolls, that the question before us had not practically arisen, and that the Court might infer an agreement of the Judges and the profession in favour of the contention of the respondent. If it were so, I think that agreement was right, regard being had to the principles on which Acts of Parliament and rules equivalent to Acts of Parliament should be construed. We have to consider the state of the law at the time, and the object of the change, if a change was made. From time out of mind it was established that a plaintiff in ejectment must recover upon the strength of his own title, and that it was not necessary to go into anything on the part of the defendant, who might put him at arm's length, and require him to state why he was there at all. Now what was the object of the change? Looking to what was said in the Court below, it was not a change in the law—it was a change in practice, necessitated apparently by the incursion of equity upon the old domain of law; and that must be taken into account. I may say this further: in spite of this authoritative declaration, as it appears to be, in favour of a particular view, if it had been made out to my satisfaction that that view was untenable and opposed to the express terms of this rule, I should have been obliged, however reluctantly, to act upon that conception of the case. But, in my opinion, the ruling

of the Judges, so far as they have ruled upon it, and the alleged practice of the profession, are quite in accordance with the fair meaning of the rule, and at the same time in accordance with the contention of the respondent. It appears to me that the rule would be nullified if any other view were taken. The contention of the plaintiff amounts to this—that if a defendant does no more than plead "I am in possession," he does in effect say "I am in possession, and at the same time I admit everything you say. I admit every step of your title." Of course, in the majority of instances, that might admit conclusively the plaintiff's case. What is the benefit of that defence of possession, which is said by the rule to be sufficient, if any such conclusion can be drawn against the defendant?

I think, upon the whole, that the view of the Lord Chancellor is right, and I quite concur in the motion he has made.

LORD BLACKBURN.—I also agree; and I agree in what the noble and learned Lord (Lord O'Hagan) has just now said, that those rules which are contained in the schedule to the Act are to be construed so as to discover the intention expressed in the rules, and that it is not a legitimate ground of construction for the person or persons who drew the rules to say, "We wished and meant to express a particular intention." I do not think that that would be a legitimate ground—in fact, it has long been established that that is not a legitimate ground—upon which to construe any instrument in writing. But I think that the way in which we ought to construe these written instruments is by ascertaining what is the intention expressed by the words used; we are to consider what was the object which those who used the expressions had in view, and what was the subject-matter they were speaking about, and then to say, construing the words used with reference to such a subject-matter and to such an object, what is the intention expressed. Now taking that view, I entertain a very strong opinion indeed that the decision of the Court of Appeal, though not given, as I have already said, upon what seems to me exactly the right reason, was quite right and ought to be affirmed.

For a long time an action for the recovery of land at law was brought by ejectment, and it was so established as to be trite law—a commonplace expression of law—that, in ejectment, where a person was in possession, those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out must shew a superior legal title to his. If, however, they did shew that, still if the person who was in possession could shew that, although they had shewn a superior legal title to the possession, yet he had an equitable ground for saying that they should not turn him out; he, as the law stood, was obliged to go to a Court of equity, and as the plaintiff there, as the "actor" (to use a civil law expression), to make out that there was a sufficient reason for a Court of equity to interfere, and to prevent his being turned out of possession, on this equitable ground.

That being the then state of the law, when those who had to frame the new rules in the schedule of the Act came to this question, they had to consider what should be done with regard to it; and I think that if the object was (which I can myself have very little doubt was the object) to say that in actions for the recovery of land the former state of pleading and the former mode of proceeding should remain unaltered, the words used in these rules express that intention. The 15th rule says, "No defendant in an action for the recovery of land, who is in possession by himself or his tenant, need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff." As I have already pointed out, that was exactly the existing state of the law. If he meant to set up such an equitable ground he had to shew it in order to get the interposition of a Court of equity. Otherwise he had merely to set up the defence, "I am in possession, and you shall not come in until you shew a superior right to possession." That was the old rule of law. The new rule then goes on

to say, "But, except in the cases hereinbefore mentioned, it shall be sufficient to state, by way of defence, that he is so in possession. And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned." If the object was what I confess I think it must have been, to leave the law as it was before, that expresses it, except that I rather think that if I had been framing these rules, instead of saying, "He may nevertheless rely," I should have said, "He may under that rely"; but that is a very verbal criticism indeed, and does not come to much.

Now if that be the construction of that rule, is the 17th rule to be construed in such a sense as to undo it? It is said that it does not undo it; that it merely says, "In addition to all this, if you do not wish to admit all that is stated by the plaintiff in his claim, you ought to add six words—namely, 'And I do not admit his case.'" I confess that I feel very much as the Lord Chancellor did, that that would have been putting in a snare and a trap; and I do not think that is what one can fairly construe the rule as meaning.

Something has been said about the practice having put an interpretation upon the rule; and if there had been a long enough time, and parties had been acting upon a uniform notion of the practice, I should have been excessively reluctant to reverse it. But I do not think that during the years (nearly eight) which have elapsed since these new rules were made, there has been sufficient time to lead me to expect that a practice has grown up, and that there is an established rule of construction regarding them. I think, from what passed in the argument in the Court below, that there is no ground for believing that it has ever been decided, or that pleaders have been in the habit of pleading in any one particular way. Indeed, I think that if a pleader for the defence had entertained the idea that by merely alleging that the defendant was in possession he might raise this question, he would hardly have been rash enough not to add the few words (which would have done him no harm) "and I do not admit the statements in the claim of the plaintiff." I should say that it is most likely therefore that the question has never been raised; but certainly it has not been shewn that there was any practice, any *contemporanea expositio* of these rules, which would be admissible to lead us to a construction of them. I therefore come back to saying that, looking at the construction of the rules according to the ordinary canons of construction applied to written instruments, I think that the Court of Appeal have put the right construction upon them.

Lord FitzGerald.—The 19th Order is headed "Pleading Generally," and seems to have been intended to regulate the then new system of pleading, but not to take away or lessen pre-existing rights. Rule 15 of that Order is confined to a defendant in an action for the recovery of land who is in possession of that land, and it will be observed that the rule is exceptional, and is inconsistent with some of the prior and subsequent rules of the 19th Order (*e.g.*, rules 4, 18 and 20). We must seek for an explanation of its peculiar significance by reference to the position and rights of every one in actual possession of land, when called on to defend himself against a person claiming to oust him from that possession.

It is not necessary to involve ourselves in the consideration of the old action of ejectment as it stood prior to the Common Law Procedure Acts, or to present any explanation of that fictitious proceeding invented for the more easy trial of a right to the possession of land than by real action. The position of the real plaintiff in that abrogated form of proceeding was, that he could only succeed by establishing his right of property and his right of entry, and then, and not until then, was the defendant called on to answer, and he might rely on any case which shewed that the plaintiff's right of entry had been barred. The Common Law Procedure Act abolished the fictitious proceeding, and gave in its place a real summons directed to the parties in possession, calling on them to come in and defend their possession if they could. The principle of the proceeding and the rights of the parties remained otherwise wholly unaffected. The plaintiff

could succeed only on the strength of his own title, and could not found his claim on the weakness of the defendant's, for the law respected possession, and deemed it lawful possession until some claimant established in proof that he had a title to the land and a right of entry to oust the defendant. The party who sought to change the possession should first shew a legal title to it in himself. As a general rule the issue in ejectment never was cast on the defendant; he relied simply on his possession, and was not called on to say a word until the plaintiff had proved his title and right of entry.

The 15th rule of Order XIX. is divisible into three parts. 1. The defendant need not plead his title unless it is equitable. 2. It is sufficient for him to state that he is in possession. 3. He may rely on any defence he can prove, though he has not stated it. The obvious intention of this exceptional rule, if we are to construe it by its own light alone, seems to be to leave the defendant in an action for the recovery of land in the same position substantially as he was before the Judicature Act and Rules—that is to say, entitled to rely on his possession as a sufficient denial of the plaintiff's title, and a sufficient answer until the plaintiff had proved his title; and then enabling the defendant to rely on any defence he could prove, though he had not pleaded it.

There is in substance no pleading in such an action after the statement of claim, unless it arises *puis darrein continuance*. The defendant is not obliged to plead in the proper sense; he puts in a statutable defence, "I am in possession," and the plaintiff can do nothing but take issue on it and proceed to trial. The meaning of that defence is to me very plain. The plaintiff has set out his title in his statement of claim which must culminate in shewing that he has a right of entry—that should be the deduction from the preceding statement. The defendant, in saying that he is in possession, which means, as against the plaintiff, "lawful possession," in effect traverses that deduction and puts in issue the whole preceding statement of title. The statutable defence may be thus expanded, "I am in possession, and that is a good title against you until you prove a better title and right of entry." The concluding words of rule 15 open to the defendant every ground of defence which shews that the plaintiff's right of entry is barred.

The plaintiff relied, however, on rule 17; but once your Lordships have arrived at the conclusion that the defence "I am in possession" puts in issue by necessary implication the allegations of fact in the plaintiff's statement of claim, which are necessary to support his claim to a right of entry, all difficulty arising on the 17th rule ceases.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors—Remnant, Penley & Grubbe, agents for W. E. Richardson, Birmingham, for appellant; S. W. Johnson & Son, agents for Robinson, Watts & Jobson, Dudley, for respondent.

[IN THE HOUSE OF LORDS.]

1883. April 27, 30. } CORY AND SONS *v.* BURR.

Ship and Shipping—Marine Insurance—Barratry leading to Seizure—Warranty Free from Seizure—Cause of Loss.

A policy of marine insurance, in the ordinary Lombard Street form, enumerated among the perils insured against "barratry of the master," and contained a warranty "free from capture and seizure and the consequences of any attempts thereat." The ship was seized by Spanish revenue authorities for smuggling (the barratrous act of the master), and considerable sums were spent by the owners in procuring her release.

In an action brought against the insurers to recover the sums so spent:—

Held, *that the loss was one occasioned by capture or seizure within the meaning of the warranty, and was not recoverable as a loss by barratry.*

The statement in Arnould's Marine Insurance (5th ed. p. 773) "*Loss by barratry seems to form an exception to the*

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general rule of 'causa proxima, non remota spectatur'" questioned.

This was an appeal from a decision of the Court of Appeal (reported 51 Law J. Rep. Q.B. 468; Law Rep. 9 Q.B. D. 463), which affirmed one of the Queen's Bench Division (reported 51 Law J. Rep. Q.B. 95; Law Rep. 8 Q.B. D. 313).

The Special Case by which the facts were stated is set out in the report of the case in the Queen's Bench Division. The material facts sufficiently appear in the head-note to this report.

Webster, Q.C., and *Tyser* (*Myburgh, Q.C.*, with them), for the appellants.—Seizure or capture to punish smuggling is not such a seizure as the warranty refers to. It is an arrest; "arrest of princes" is expressly insured against, and is not excepted by the warranty. Capture or seizure must be confined to hostile or wrongful seizure, and cannot include arrest by a legal tribunal as an incident in a legal process. Here the arrest was a mere preliminary step in a proceeding *in rem*, like serving a writ in an action. Originally the warranty was intended to cover hostile seizure only. *Powell* v. *Hyde* (1) scarcely carried it further, though there was no actual war there; but *dicta* of Lord Campbell in that case led to *Kleinwort* v. *Shepard* (2), where coolies on board rose and seized the ship. There is no difference in meaning between "seizure" and "capture"—*Arnould on Insurance*, 4th ed. vol. ii. p. 699; as to the distinction between "arrest" and "capture," see *Phillips on Insurance*, s. 1108. The exceptions in a warranty are to be construed most strictly against the assurer—*Duer*, vol. i. lect. 2, part 1, s. 6, p. 161; the warranty is to be construed as a re-insurance by the assured—*Ionides* v. *The Universal Marine Insurance Company* (3) and *Phillips on Insurance*, ss. 131 and 1160.

Secondly, if this was properly a seizure, yet being the consequence of the barratry of the master, it was not within the warranty. Even if there had been no warranty, the assured could only have recovered as upon a loss by barratry. The rule "*proxima causa, non remota spectatur*" does not apply to barratry—*Arnould on Insurance*, 5th ed. vol. ii. p. 773. In *Vallejo* v. *Wheeler* (4) it was held that a deviation when barratrous does not vitiate a policy—*Waters* v. *The Merchants' Louisville Insurance Company* (5), *Roscow* v. *Corson* (6), *The American Insurance Company* v. *Dunham* (7), *Havelock* v. *Hancill* (8), *Suckling* v. *Delafield* (9), *Heyman* v. *Parish* (10), *Hahn* v. *Corbett* (11) and *Livie* v. *Janson* (12).

Cohen, Q.C., and *J. G. Barnes*, for the respondent, were not called upon.

THE LORD CHANCELLOR (EARL OF SELBORNE).—This is an appeal from a unanimous judgment of the Court of Appeal affirming a unanimous judgment of the Queen's Bench Division. The case has been argued with great ability; but your Lordships have had sufficient time to consider the effect of those arguments, and I believe that all your Lordships agree that it is not necessary to call upon the counsel for the respondent.

I am by no means sure that it might not be sufficient for me to say simply that I agree with the judgments given by Mr. Justice Field and by Mr. Justice Cave, and also with the reasons which they gave for those judgments, and with the reasons which were given in the Court of Appeal. I will, however, make one or two observations upon the principal points on which the case depends. Everything depends upon the construction of the words of the warranty in the policy, the warranty being "free from capture and seizure and the consequences of any attempts thereat."

The first question which has been considered in the argument has been, What is the meaning of the words "capture and seizure"? "Warranted free" clearly

(1) 2 E. & B. 607; 25 Law J. Rep. Q.B. 65.
(2) 1 E. & E. 447; 28 Law J. Rep. Q.B. 147.
(3) 14 Com. B. Rep. N.S. 259; 32 Law J. Rep. C.P. 170.
(4) Lofft, 631; Cowp. 143.
(5) 11 Peters U.S. Rep. 213.
(6) 8 Taunt. 684.
(7) 12 Wendell, 463; 15 ibid. 9.
(8) 3 Term Rep. 277.
(9) 2 Caines, 221.
(10) 2 Campb. 620.
(11) 2 Bing. 205.
(12) 12 East, 648.

means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which Lord Justice Brett seemed to think might have influenced him if there had not been authority against it—the view, I mean, that "capture and seizure" in such a warranty must be taken to mean *prima facie* belligerent capture and seizure only. My reasons for saying so are that the word "seizure" is used as well as the word "capture." I am disposed to agree that if the word "capture" had stood alone it might have appeared to point to a belligerent capture; but the addition of the word "seizure" is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word "capture," and to let in other "seizures," such as Lord Justice Cotton suggests, by means of the revenue laws of a foreign State.

The facts of this case shew what the nature and effect of such a seizure is. The ship was seized in every sense we can put upon the word "seize." It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship. And the case states that that would have been the result of the seizure which took place in the present instance, if money had not been paid to redeem the ship from that confiscation and total loss. To my mind those facts are properly described by the word "seizure" in its natural sense, and unless there is something else in the policy to shew that the word was meant to bear a different sense not inclusive of such a state of facts, I should have said, in the absence of authority, that they were included.

But there are two authorities which shew at all events that these words in such a warranty cannot be restricted to a belligerent capture. In the case of *Kleinwort* v. *Shepard* (2) there was a seizure by mutinous emigrants on board—an act which might be described as piracy on the part of those emigrants undoubtedly, and might therefore have come within the word "pirates" as mentioned in the policy; but it was not a belligerent seizure, beyond all doubt. And in the other case, *Powell* v. *Hyde* (1), there was no belligerent capture; the ship was shot at and sunk by a friendly power under an alleged mistake. That would certainly not be a belligerent capture; but it was regarded as a "capture" in the sense which was to be obtained from the juxtaposition of the words "capture" and "seizure," and the comparison of them with the other words which occur in the body of the policy, and which shew that it was meant to cover all sorts of losses of that kind—losses by "men-of-war," losses by "enemies," losses by "pirates," by "rovers," by "takings at sea," by "arrests, restraints and detainments of all kings, princes and people."

Therefore, both on authority and on principle, I reject the idea that these words "capture and seizure" can be so narrowly construed as to exclude such a seizure as that which took place in the present case.

But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty. Suppose the case of a belligerent capture: that belligerent capture is as much attributable to "men-of-war," or to "enemies," to "taking at sea," as any seizure by reason of barratry can be attributed to barratry—indeed more directly and immediately. Men-of-war and enemies might or might not have taken the ship; but their coming into contact with the ship, their firing at her, their placing her in a position of jeopardy, is the first step towards "capture or seizure" which is its consequence. Then the argument, if it is sound as to barratry, would seem to be sound as to "men-of-war" and "enemies" also, that because there is an express insurance against those

things, therefore a "capture or seizure," and consequently an attack by men-of-war or by "enemies," is to be taken out of the warranty. I might follow it further as to "pirates," as to "restraints and detainments of kings, princes and people." It is quite manifest that the object of this warranty is, and must be, to except such losses otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are losses occasioned by "capture or seizure." That appears to me to be equally the case whether remotely it was occasioned by barratry or not—in fact the remoter it is the stronger the argument that it must be the case as to barratry.

Therefore I entirely agree both in the conclusion and in the reasons of the two Courts below.

LORD BLACKBURN.—I also agree entirely with the result to which the Courts below have come; and, with one exception, which perhaps is not very material, I agree with their reasoning. But I think it is necessary to say that I do not at present agree with one thing said. A passage was cited from the last edition of *Arnould on Insurance*, which I now find was in the first edition by Sir Joseph Arnould—it is in vol. ii. p. 838, of the first edition. He has there laid down that, while it is very true that the general rule is that in insurance you look to the proximate cause and not to the remote one, there is an exception in the case of barratry, and that the remote cause may be looked to there. I can only say that I think there is no other authority for such a rule; and though certainly Mr. Justice Field and Lord Justice Brett seemed to suppose, naturally on the authority of that statement in the text-book, that this was a rule of insurance law, I, as at present advised, do not think that it is. The very instances which are given in the passage from *Arnould* are instances in which the Courts thought, rightly or wrongly (I think rightly), that the cause of loss was barratry, and that the consequence for which the parties were entitled to be indemnified was not a remote consequence. That is all I say upon that part of the subject. I am merely putting in a protest against what may be hereafter cited as being an established principle of insurance law. For my own part I do not think that it is.

Proceeding from that to the rest of the case, I thoroughly agree in the judgments which were pronounced below. The policy here is in the ordinary Lombard Street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured. Many of these, as for instance men-of-war, enemies, pirates, rovers, and, I may add, barratry of the master and mariners, do not in themselves necessarily occasion any loss; but when by one of those the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or, but for their own fault, might get, their property back—*Dean* v. *Hornby* (13). There are other perils, such as takings at sea, arrests, restraints and detainments of princes, which from their nature involve such a taking of the subject insured out of the control of the owners. That being the case, supposing there had been no warranty at all, was there a loss here which would be one for which the underwriters would be liable? Upon the facts stated I cannot doubt it. The definition of barratry in the case of *Earle* v. *Rowcroft* (14) has never been departed from. The effect of that case is that the act of a captain, for his own purposes and to serve his own ends, engaging in a smuggling transaction which might tend, and in fact in this case did tend, to the injury of his owners and to the ship being seized, is barratry. The captain in the present case had done that: he had employed the ship for the purpose of carrying tobacco. When he was off the coast of Spain, he caused the engines to be stopped, to look out for the ship into which he had intended to tranship the tobacco in order that it might be smuggled; and he proceeded "dead slow" while he was looking out for that vessel. That was a clear case of barratry. While he was doing this, two craft came alongside with Spanish revenue

(13) 8 E. & B. 180; 23 Law J. Rep. Q.B. 129.
(14) 8 East, 126.

officers on board, who seized the ship and took her into Cadiz.

Now, first of all, was that act of the two Spanish revenue officers, in taking and seizing this ship, in itself one of those matters which would be covered by the insurance against the enumerated perils? I cannot myself doubt that it was. I cannot doubt that it came quite within the terms "restraints and detainments of all kings, princes and people"—namely, the Government of Spain; and their seizing the vessel was, I think, a thing for which the owners might have recovered under that head. But it was also, I think, not at all a remote, but a direct and immediate, consequence of the barratrous act of the captain; and it might therefore have been recovered for in the old times, when we were particular about pleadings, under a count in which it was laid as being barratry, and the loss as being a consequence of it. The case that was referred to of *Havelock* v. *Hancill* (8) is a case where the plaintiff recovered on a count for barratry which in itself would not occasion any damage; but it was held good on demurrer, the count alleging almost identically the same things as happened here, except that the seizure was by the English Government for smuggling against the English law, instead of being by the Spanish Government for smuggling against the Spanish law. That was a case in which the underwriters were held to be responsible; and I think myself that they might also have been held responsible if the count had alleged the loss to be occasioned by restraint of princes.

Now comes the question, Does this warranty free the underwriters from that responsibility? That is the main question. First let us see what the warranty is. There are warranties, such as those which were referred to in the ingenious argument that we have last heard, which in effect merely say, We will define the sort of adventure which you shall be engaged in when we are to indemnify you; for example, it shall be warranted that the ship shall not sail anywhere except in the Mediterranean, or something of that sort, defining the risk which they are to encounter, and if the ship goes out beyond that distance, then it is like a deviation—she has incurred a different kind of risk from that which the underwriters undertook to bear—it has become altogether a different adventure. That is one description of warranty. But there is another, which has been for a long time used, expressed in the phrase "warranted free from" particular things. I need only point, as I did in the course of the argument, to the ordinary warranty which is printed at the foot, and has been so for more than a century, known as the memorandum—"Corn, fish, salt, fruit, flour and seed, are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins, are warranted free from average under five per cent.; and all other goods, also the ship and freight, are warranted free from average under three per cent., unless general, or the ship be stranded, sunk or burnt." That kind of warranty, "warranted free," in that sense, means that although the general terms of the policy would have covered this, yet, considering the special riskiness of the particular matter, the underwriters, unless they are paid a premium for consenting to take it in, do not choose to be liable where the particular thing happens which they have stipulated by this warranty that they shall be warranted free from. Now here they are "warranted free from capture and seizure, and the consequences of any attempts thereat." It was argued that here they have not been warranted free from barratry. That is true, but the barratry would itself occasion no loss at all to the parties insured. If it had not been that the Spanish revenue officers, doing their duty (they were quite right in that respect), had come and seized the ship, the barratry of the captain in coasting along there, hovering, as we should call it, along the coast, in order that the small smuggling vessel might come and take the tobacco, would have done the assured no harm at all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, as I said before, I think the seizure was as direct a consequence of the barratry as could well be. But still, as Mr. Justice Field says, it was the

seizure which brought the loss into existence—it was a case of seizure. Then why should it not be protected by this warranty?

The American cases which have been referred to are quite different; they are founded upon the English case which I have already cited—*Havelock* v. *Hancill* (8). There the ship was insured "in any lawful trade," and if it had been not a lawful voyage it would have been like a deviation—it would have been a different kind of adventure from that of which the underwriters took the risk. The fact of its being not a lawful voyage would have made it one for which they had not engaged to be responsible. The underwriter in that case might have said, "*Non hæc in fœdera veni.* I have engaged to indemnify you against the risks of a lawful voyage; you engaged in an unlawful voyage." But the answer was, "This was not an unlawful voyage, for what was done here was to engage in a lawful voyage, and the barratry of the captain did not make that voyage unlawful." The decision has stood now for a century, and has not been quarrelled with. I should have thought that that was as plain a decision as one could wish for. The American Courts upon that, with some want of logic I cannot help thinking, drew the inference that where there was a warranty "free from seizure or detention on account of illicit trading," they were to hold that it was to be an illicit trading to which the insured was a party (I think that is what it comes to), or at least to which the owner of the ship was a party. I think that that is an illogical consequence, and I do not approve of the reasoning by which it was come to. But it is sufficient to say that it has nothing to do with the present case. There are no such words here used as "warranted free from capture or seizure in consequence of illicit trading," if that would have made any difference.

The question then is reduced, as it seems to me, to this. When the whole loss was occasioned by that which was certainly a "seizure," is it within the meaning of the warranty? I say certainly it is. If it were perfectly *res integra*, there would be something to be said in favour of holding that "capture and seizure" ought to be limited, or might be supposed to be limited, to belligerent risks, risks in time of war, although I think that there would be a great deal to be said against it. But the point is not new. In *Kleinwort* v. *Shepard* (2) the seizure was in nowise connected with the act of foreign princes or their subjects, it being the act of coolies, who were not pirates in the sense of being assailing thieves, for they were lawfully in the ship; they were passengers who arose in mutiny; they were not barratrous, for they were not the captain nor the crew; but it had been held in the case of *Palmer* v. *Naylor* (15), which I argued myself, that whether they were pirates or whether they were not (they were, it was argued, not pirates because they were in the ship, they were not barratrous because they were not the crew of the ship), it was quite clear that they were *ejusdem generis*, and consequently they came within the words "other perils." I remember an illustration which I used in the argument, and which was adopted, I think, by the Court—it was this: I said that the case was like the bat in the fable, which said, "I am not a bird, look at my ears. I am not a beast, look at my wings." "But," said I, "if the words had been birds and beasts and all other animals, surely a bat would have been included"; and I think that the noble and learned Lord opposite (Lord Bramwell), who argued against me, felt that he could not resist that. It was at least another peril that was clearly covered. Now in the case of *Kleinwort* v. *Shepard* (2) it was decided that a seizure of that sort was a seizure within the perils which were warranted against. That is in fact a much stronger decision than the present. All that it is necessary to say in the present case is that the warranty is against a seizure by a power. I do not say at all that *Kleinwort* v. *Shepard* (2) is not perfectly right; I only say that it goes further than is required here; and I also say that when a decision has been acted upon for thirty years as to the construction of such words as these, it requires some very strong reasoning to justify one in saying that we should now hold that where people have used these identical words, knowing the meaning which has been previously put

(15) 10 Exch. Rep. 382; 23 Law J. Rep Exch. 323.

upon them by a judicial decision, they do not mean the same thing. Consequently I think that strong reasoning will be required for reversing the case of *Kleinwort* v. *Shepard* (2). But it is enough to say that this was a seizure, being the act of the power which made that seizure, and therefore that the Court below are perfectly right in the conclusion at which they have arrived.

LORD BRAMWELL.—I am of the same opinion. What was in contemplation by the parties in this case may be very doubtful; and I should have thought that it was very doubtful also what was the meaning of these words originally; but a meaning has been put upon them; and that meaning having been acted upon, I think it is desirable that it should be abided by—because undoubtedly people who make contracts make them in reference to the well-understood meaning of such words, and if that meaning is an inconvenient one they can alter the words.

I think that the meaning of the words which are here to be construed is now plain. The warranty is a warranty "free from capture and seizure"; it is perfectly general in its terms. If the vessel has been captured or seized, and a loss has been thereby occasioned, it is within the warranty. Now it is said here that the loss was not from the seizure, but that in truth it was from the barratry; and it is ingeniously suggested by Mr. Tyser that the seizure was "an intermediate step," as he called it. But it was the ultimate and final step which occasioned the loss; and but for the payment of money the ship would have been confiscated, which would have been merely a following up of the seizure. One might put this case—Suppose the ship had been confiscated and sold, and then the Spanish Government, upon some representations made to them, had returned a portion of the proceeds, would there not have been a loss by seizure? There would; and is it not equally so now? To my mind that point is really not tenable.

But then it is said that when barratry is the *causa remota* of the loss, it nevertheless may be relied on without reference to the *causa proxima*. Now I will say nothing as to any general rule, except to express a doubt as to whether what Lord Justice Brett said about that matter is perfectly correct. I have a misgiving about it; but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases, where there has been barratry and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like; that ultimate loss was caused by a seizure, and that was warranted against.

LORD FITZGERALD.—I entirely agree in the judgment which has been announced by the noble and learned Earl on the Woolsack.

The question arises on the proper interpretation of the limitation of the liability of the insurers contained in the clause "warranted free from capture and seizure, and the consequences of any attempts thereat." This warranty must be taken to apply to some of the risks previously enumerated, and to limit the otherwise unlimited liability of the insurers. On looking back to the enumeration of the perils which the policy was intended to cover, we find some, the generality of which may be the subjects of the limitations expressed in the warranty; for example—"arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes."

The contention of the plaintiffs is that the warranty does not apply where, as in the case before us, the seizure has been the immediate consequence of the barratrous act of the master; and on the other hand, the defendant insists on the literal construction of the warranty as embracing all cases in which the ship has been taken forcible possession of by superior power or authority. If the latter construction is to prevail, then the defendant contends that the seizure having been the immediate proximate cause of the loss, he, the insurer, is exempt from liability. The question seems a simple one; but if we depart from the literal construction we may be led into complications and

metaphysical refinements from which mercantile contracts ought, as far as practicable, to be free.

If the question had now come before us unfettered by authority, and if the decision in the Court below had been in favour of the plaintiffs, I should have been content. But there is one matter to which I have an invincible objection, and that is uncertainty in the interpretation of mercantile contracts. The literal interpretation of the exemption would embrace all cases of capture or seizure which would otherwise have been within the perils insured against; and so far as the authorities have gone, they are in favour of the defendant's contention. I allude to the cases of *Powell* v. *Hyde* (1) and *Kleinwort* v. *Shepard* (2), which have been already commented upon. In the construction of this warranty it is observable that "capture and seizure" do not mean the same thing. "Capture" would seem properly to include every act of seizing or taking by an enemy or belligerent. "Seizure" seems to be a larger term than "capture," and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority or by overpowering force.

I am quite satisfied with, and adopt the interpretation put upon these words in the very able judgments of the Courts below, following the views put forward in the case of *Powell* v. *Hyde* (1), decided twenty-four years before this policy was entered into, and in the case of *Kleinwort* v. *Shepard* (2). It was urged upon us that it was unreasonable and unjust as applied to the present case. It appears to me, on the contrary, that the warranty as now interpreted was a reasonable stipulation for the insurers to make. I find the following to be the definition of "barratry" given by Mr. Justice Willes in *Lockyer* v. *Offley* (16):—"Barratry is every species of fraud or knavery in the master by which the freighters or owners are injured." Now it is obvious that with so large a definition as that, there may be instances of barratry which may be either harmless or effect but a small loss—for instance, a deviation or wilful delay; but barratry may also consist in a very small matter over which the owners or freighters have no control, the effects or consequences of which may be very serious; and I can well understand the prudence of insurers stipulating—"We will not be responsible for seizure caused by some barratrous act of the master or crew, rendering not only the ship but also the cargo liable to confiscation and seizure."

If such be the interpretation which is to be put upon the contract, I ask the question—By what was the loss occasioned? I apprehend that there can be but one answer to this question—namely, that the loss arose from the seizure. There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless; but the seizure which was the effective act towards confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry, but that it was a violation of the revenue laws of Spain. That was the question which I put to Mr. Tyser in the course of the argument, and to which I received no answer. I asked him, "What was the cause of the loss?"

Now in the same clause of the warranty the words are, "warranted free from capture and seizure, and the consequences of any attempts thereat." If, in place of the Spanish cruiser having seized this vessel, she had failed to seize her, but in the attempt to seize her and in the pursuit had sunk the ship, I should have put the same question, "What caused the loss?" and the proper answer would have been, "Not the barratrous act of the captain, but the sinking of the vessel by the Spanish cruiser."

On these grounds I agree that the judgment of the Court below should be affirmed.

Order appealed from affirmed, appeal dismissed with costs.

Solicitors—H. C. Coote, agent for H. A. Adamson, North Shields, for appellants; Waltons, Bubb & Walton, for respondent.

(16) 1 Term Rep. 259.

1883. June 22. } DAVEY *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Negligence—Railway Company—Accident—Level Crossing.

The defendants' line of railway crossed a public footway and carriage-way on the level. There were carriage gates at the crossing which were locked, a gatekeeper being stationed there by the defendants whose duty it was to open and shut them when required; the wicket gates used by foot passengers were not fastened. There were trees and houses on one side of the crossing so situated as to make it impossible for any one crossing from the down side to see a train coming until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view up and down the line for the distance of about 300 *yards. The plaintiff passed through the wicket gate for the purpose of crossing from the down line side to the up line side of the crossing, and walked over the down line to the centre of the crossing, and thence to the up line, when he was knocked down and injured by a train travelling on the up line. The plaintiff admitted that if he had looked along the up line before actually crossing the up metals he must have seen the approaching train. The engine driver of the train did not whistle, nor did the gatekeeper take any steps to warn the plaintiff of the danger of crossing, or to prevent him from doing so:* —Held (*by* LORD COLERIDGE, C.J., *and* DENMAN, J.; *dubitante* MANISTY, J.), *upon the above facts, that the accident was solely due to the plaintiff's own recklessness, and that there was no reasonable evidence of negligence on the part of the defendants to be submitted to a jury.*

This was an action brought by the plaintiff to recover damages against the defendant company for personal injuries sustained by the plaintiff by reason of the negligence of the defendant company's servants. The action was tried before Huddleston, B., and a special jury, when the following facts were proved:—

It appeared that on the 29th of March, 1882, shortly after four o'clock in the afternoon, the plaintiff had occasion to pass on foot along a certain way near Chiswick, which is crossed on a level by the defendants' railway. The crossing is approached by wicket gates which are used by foot passengers crossing the line, and by larger gates used by persons driving or riding. The larger gates were locked, a gatekeeper being stationed there by the defendants whose duty it was to open and shut them when required; the wicket gates used by foot passengers were not fastened. There were houses and trees on the side of the crossing in such a position as to make it impossible for any one crossing from the down side to have any view of the line until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view up and down the line for the distance of about 300 yards. The plaintiff passed through the wicket gate for the purpose of crossing from the down line side to the up line side of the crossing, and walked over the down line to the centre of the crossing, and thence to the up line, when he was knocked down and injured by a train of the defendants' on the up line. The engine-driver of the train did not whistle. The plaintiff, in cross-examination, admitted that if he had looked along the up line before actually crossing the up metals he must have seen the coming train. The plaintiff, however, said that he saw the gateman on the opposite side talking to two boys a few yards from his box with a folded flag in his hand, and that, as no warning or gesture was given or made by the gateman to the plaintiff not to cross or that any train was approaching, he had no idea that he was running any danger in crossing the line.

At the trial, Huddleston, B., nonsuited the plaintiff; but a rule *nisi* was afterwards granted to set aside the nonsuit, and for a new trial on the ground of misdirection of the learned Judge in holding that there was no evidence to go to the jury in support of the plaintiff's claim.

Murphy, Q.C., and *Arbuthnot*, shewed cause.—This nonsuit was right. There was no evidence from which negligence on the part of the defendants could be reasonably inferred; the case was therefore properly withdrawn from the consideration of the jury. Even assuming there was any

negligence on the part of the company, the plaintiff's accident was entirely due to the plaintiff himself in not looking on to the line along which the train was coming, and which he could have seen perfectly well if he had chosen to look.

They cited *Stubley* v. *The London and North Western Railway Company* (1), *Skelton* v. *The London and North Western Railway Company* (2), *The Dublin, Wicklow and Wexford Railway Company* v. *Slattery* (3) and *The Metropolitan Railway Company* v. *Jackson* (4).

Kemp, Q.C., and *Cyril Dodd*, in support of the rule.—There was evidence for the jury that the crossing was a dangerous one, and, if it was, the defendants were bound to take reasonable precautions for the safety of persons using the crossing. It is contended on behalf of the plaintiff that they altogether failed to perform their duty in this respect. They neglected to give any warning to the plaintiff as to the approach of the train, and the conduct of their servant in charge of the crossing amounted to an invitation to the plaintiff to use the crossing. The *causa causans* of the accident was the swiftly passing train, which the company's servants had no right to drive over a level crossing without whistling or taking other proper means to warn foot passengers who were using such crossing. If there is evidence of negligence on the defendants' part, without which the accident would not have occurred, the plaintiff had a right to have his case submitted to the decision of a jury, notwithstanding that there might have been strong evidence of contributory negligence on his part.

They cited *Bridges* v. *The North London Railway Company* (5), *Cliff* v. *The Midland Railway Company* (6) and *Wyatt* v. *The Great Western Railway Company* (7).

(1) 35 Law J. Rep. Exch. 3; Law Rep. 1 Exch. 13.
(2) 36 Law J. Rep. C.P. 249; Law Rep. 2 C.P. 631.
(3) Law Rep. 3 App. Cas. 1155, Irish.
(4) 47 Law J. Rep., C.P. 303; Law Rep. 3 App. Cas. 193.
(5) 43 Law J. Rep. Q.B. 151; Law Rep. 7 H.L. Cas. 213.
(6) Law Rep. 5 Q.B. 258.
(7) 6 B. & S. 709; 34 Law J. Rep. Q.B. 204.

Lord Coleridge, C.J.—I am perfectly conscious of the difficulty of laying down a rule generally applicable which shall not be open to some exception. The rule of law, however, is clear enough; the difficulty lies in its application. The rule is that the plaintiff must shew negligence on the part of the defendants, and that such negligence caused the injury complained of. It is part of the plaintiff's duty to make out two things: first, that the defendants did or omitted to do something which a reasonably careful person would not have done or omitted to do; and, secondly, that the act or omission, as the case may be, caused the injury. Now it has certainly been determined in several cases, which have never been overruled, that if the plaintiff in attempting to establish his case fails to establish it by not shewing any act or omission of the defendants from which the accident arose, but, on the contrary, does shew that he himself caused the injury, then his case fails, because he proves affirmatively that he is the author of his own wrong. If, therefore, it be shewn by credible witnesses that the plaintiff's damage was caused by himself, the action ought, as it seems to me, to be withdrawn from the jury, because he has failed in sustaining the onus which it is incumbent on him to sustain, namely, that the injury resulted from the defendants' act. I think it is clear, upon the uncontroverted facts of this case, that the accident was caused by the plaintiff walking into a train which he might have seen. There is a double line of rails at the spot where the accident occurred, and the plaintiff in crossing had first to pass over the down line, upon which the train was not coming. There was then the breadth of the space between the two sets of lines. If he had only taken the ordinary precaution of looking to the left along the up line as he was crossing between the sets of rails, the plaintiff must have seen the train, and, unless he was out of his senses, would at once have drawn back. But he did not look to see what was coming, and was in consequence knocked down by a passing train. It has been contended on the plaintiff's behalf that he was not bound to look along the line—first, because it was a dangerous crossing, and the defen-

dants were bound to whistle; and, secondly, because there was a man there whose duty it was, *inter alia*, to warn persons of approaching trains, and that if this man had discharged his duty properly the plaintiff would not have come across. Now I am not prepared to lay it down as a general rule that the engine was bound under the circumstances to whistle. The gates of the carriage road were carefully kept locked, and were only opened by the man who was stationed there; the same could not be done in the case of the footpath, and people were allowed to go freely across the line from one gate to the other. I do not see that there was any duty on the part of the defendants' servants who were in charge of the train to whistle, nor do I think that it was any part of the duty of the man, who was obviously there for the purpose of unlocking the gates, to warn everybody who came across that a train was coming. I cannot see that the company omitted to perform any duty which they owed to the plaintiff. I do not propose to discuss all the authorities, which are very numerous, and are not all quite consistent, as to what ought to be left to a jury and what ought not. At one time the view was in favour of leaving everything to the jury in such cases; at another time a contrary impression prevailed. According to the latest decision in the House of Lords, the proper course now is for the Judge to decide whether there is any reasonable evidence of negligence, and it is for the jury to say what the effect of it is. The mischief of the Judge having to decide whether reasonable evidence of negligence exists is that other Judges may not agree with him; but that is a difficulty which cannot be avoided in such cases. The language used by Lord Cairns in *The Dublin, Wicklow and Wexford Railway Company* v. *Slattery* (3) seems to me to be strictly applicable to the facts as proved in the present case. He says: "If a railway train which ought to whistle when passing through a station were to pass through without whistling, and a man were, in broad daylight, and without anything either in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *The Metropolitan Railway Company* (4), as an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man, who rushed, with his eyes open, on his own destruction." This language of Lord Cairns seems to me to be in accordance with excellent sense, and is very forcibly expressed; and I am glad that I have so high an authority for the conclusion at which I have arrived, namely, that this case was properly withdrawn from the jury. The rule must be discharged.

DENMAN, J.—I am of the same opinion. I think it is clear, upon the undisputed facts of this case, that the accident was palpably and indisputably due to the plaintiff's own folly and recklessness, and nothing else. It is denied on the behalf of the plaintiff that such a conclusion is well founded, because it is said that there was no whistle to announce the approach of the train, and that therefore the plaintiff was not bound to expect the coming of a train. But that argument, as it seems to me, entirely fails, because, according to his own account, before he attempted to cross the line of rails on which the accident occurred, he was on the down rails, and had the time as well as the opportunity of looking along the up line. He saw that no train was coming along the down line, and yet never took the trouble to turn his eyes and look along the up line. If he had he could have seen at least 300 yards. The absence of the whistle does not, as it seems to me, play any part in the argument, for the accident is not proved to be in any way due to the want of whistling. Next it has been argued that the plaintiff was not guiity of folly, because a man in the employ of the company, who was stationed at a point from which apparently he could not see the train so far off as the plaintiff, failed to warn the latter of the approaching train. It seems to me that this is no argument against the proposition that the plaintiff's

Darcey v. *London and South Western Rail. Co.*

accident happened by reason of his own folly and recklessness. The man's duty was to open the gates, and the plaintiff cannot be allowed to say that because the man might be talking to somebody else or otherwise occupied, that his omission to give a warning amounted to an invitation to the plaintiff to cross the line without looking to see if he could do so safely. The case seems to me to be brought within the principle and language of Lord Cairns's judgment, which is full of admirable good sense and good law. For these reasons, I am of opinion that the rule ought to be discharged.

MANISTY, J.—I do not feel sufficient confidence in my own opinion absolutely to differ from the judgments which have been already delivered, but I am not prepared to assent to them. I should have left this case to the jury. There was, as it seems to me, evidence that this was a dangerous crossing; there were obstacles on each side to prevent persons who intended to cross from seeing approaching trains. I understand Lord CAIRNS's *dictum* to apply to cases where there are no obstructions and a person has full opportunity of seeing on both sides. That case seems to me to differ materially from a case like this, where a man cannot see the trains until he is on the line or only a step or two from it. I cannot help thinking that there was a question for the jury here—namely, whether, if the crossing was a dangerous one, the defendants had taken reasonable precautions for the safety of persons crossing over the line.

Rule discharged.

Solicitors—J. P. Godfrey, for plaintiff; Bircham & Co., for defendants.

1883. May 29, June 12. } BURTON *v.* THE MAYOR, ALDERMEN AND BURGESSES OF THE CORPORATION OF SALFORD.

Statutes of Limitation—Surveyor of Highways—Local Act—Local Authority— 5 *&* 6 *Will.* 4. *c.* 50 (*Highway Act*, 1835), *s.* 109—5 *&* 6 *Vict. c.* 97, *s.* 5—38 *&* 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 6, 144, 264, 340 *and* 341.

An urban authority, who, by virtue of a local Act, were already before the passing of the Public Health Act, 1875, *s.* 144, *surveyors of highways, were, in respect of an act done by them as such surveyors, sued more than three months, but less than six months, after the cause of action arose:* —Held, *that the three months limited by the Highway Act*, 1835, *s.* 109, *for actions against surveyors of highways for anything done under that Act, having expired, the action was too late, notwithstanding the limitation by* 5 *&* 6 *Vict. c.* 97, *s.* 5, *of two years for an action for anything done under a local and personal Act, and the limitation by the Public Health Act*, 1875, *s.* 264, *of six months for an action against a local authority for anything done under that Act.*

Taylor *v.* The Meltham Local Board (47 Law J. Rep. C.P. 12) *distinguished.*

Further consideration before Cave, J. The facts and arguments are stated in the judgment.

Gully, Q.C. (*Burder* with him) (on May 29), for the plaintiff.

Edmund Sutton (*Charles Russell, Q.C.*, with him), for the defendants.

Cur. adv. vult.

CAVE, J. (on June 12).—This is an action brought by the plaintiff, a bootmaker of Manchester, against the defendants, as surveyors of highways in Salford, for having negligently, in the course of repairing a highway called Bury New Road, made and left unguarded a hole in the highway, into which the plaintiff drove. At the trial at Manchester before me, without a jury, the damages were agreed upon, subject to the question of whether the action was commenced in time, which was reserved for further consideration, and

was argued before me on the 29th of May.

The cause of action arose on the 11th of July, 1882, and the action was brought on the 8th of January, 1883. Mr. Gully, for the plaintiff, contended that the period of limitation applicable to the case was not less than six months, and consequently that the action was in time. For the defendants it was urged that the period of limitation was three months, and that the plaintiff's action was barred.

The corporation of Salford were first made surveyors of highways by the 13 & 14 Vict. c. lxxv. s. 85, which enacted that the mayor, aldermen and burgesses of the borough of Salford, and none other, should be the surveyors of all highways within the limits of that Act, and within those limits should have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways were invested with and subject to by virtue of the law for the time being in force. This Act provides no period of limitation. A period of three months had been fixed by a former Act, the 11 Geo. 4. c. viii. s. 211, but that section was repealed by the 7 Vict. c. xxxiii. s. 158, probably in recognition of the repeal effected by the 5 & 6 Vict. c. 97, s. 5, which enacts that the period within which any action may be brought for anything done under the authority or in pursuance of local and personal Acts shall be two years.

The Highway Act of 1835 enacts, in section 5, that all the powers thereby given to, and notices, matters and things required for, and duties, liabilities and forfeitures imposed on, surveyors, shall be applicable to all persons, bodies politic or incorporate, liable to the repair of any highway; and by section 109 it is provided that no action shall be commenced against any person for anything done in pursuance of or under the authority of that Act after three calendar months next after the act committed for which such action shall be brought.

Upon this a question arises whether, after the passing of the 13 & 14 Vict. c. lxxv., the period of limitation for actions against the corporation for things done by them as surveyors of highways was two years, as provided by the 5 & 6 Vict. c. 97, s. 5, or three months, as provided by the 5 & 6 Will. 4. c. 50, s. 109. Such an act would be done partly under the authority of the Highway Act, 1835, which authorises the act to be done by surveyors of highways, and partly under the authority of the 13 & 14 Vict. c. lxxv., which made the corporation such surveyors. Looking at the 13 & 14 Vict. c. lxxv. s. 85, which enacted that the corporation were to be subject to all such liabilities as any surveyors of highways were subject to by virtue of the laws for the time being in force, I think the better opinion is, that the period of limitation for anything done by the corporation as surveyors of highways was the three months provided by the General Highway Act, and not the two years provided by the 5 & 6 Vict. c. 97, s. 5, for anything done under a local or personal Act.

The corporation were surveyors of highways, having equal powers and liabilities with ordinary surveyors of highways; and the only difference between them was that ordinary surveyors of highways became such by virtue of their election by the vestry under section 6 of the Highway Act, while the corporation became surveyors by virtue of their local Act. I cannot see why this difference in the method by which they became surveyors should produce a difference in their position or liability after they had become surveyors.

The 13 & 14 Vict. c. lxxv. has been repealed by the Salford Improvement Act, 1862, which, however, by section 162, enacts that the corporation, and none other, shall continue to be the surveyors of all highways within the borough, and, except as is by this Act otherwise provided, shall have all such powers and authorities and be subject to all such liabilities as surveyors of highways are invested with or subject to by virtue of any laws for the time being in force relating to highways. The same considerations, however, apply; and if the period of limitation for anything done by the corporation as surveyors of highways during the operation of the 13 & 14 Vict. c. lxxv. was, as I think it was, three months, it follows that the period of limitation was not affected by, and remained the same after, the coming into

operation of the Salford Improvement Act, 1862.

By the Public Health Act, 1875, s. 144, it is enacted that every urban authority (which, by section 6, includes corporations in boroughs) shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have exercise and be subject to all powers, authorities, duties and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities or duties are or may be inconsistent with the provisions of this Act.

By section 264 every action against any local authority for anything done, or intended to be done, or omitted to be done, under the provisions of this Act, shall be commenced within six months next after the accruing of the cause of action, and not afterwards. By section 340 it is provided that where within the district of a local authority any local Act is in force providing for purposes the same as or similar to the purposes of this Act, proceedings may be instituted, at the discretion of the authority or person instituting the same, either under the local Act or this Act, or both; and by section 341, that all powers given by this Act shall be deemed to be in addition to, and not in derogation of, any other powers conferred by Act of Parliament, law or custom, and such other powers may be exercised in the same manner as if this Act had not been passed.

Mr. Gully cited the case of *Taylor* v. *The Meltham Local Board* (1), in which it was held that an action against a local board for a matter done by them as surveyors of highways might be brought within six months, and need not be commenced within the three months limited by the 5 & 6 Will. 4. c. 50, s. 109; and he contended that according to the principle of that decision the period of limitation was two years if the corporation were acting under the local Act, and six months if they were acting under the Public Health Act.

In that case the defendants had become surveyors of highways by virtue of the 11 & 12 Vict. c. 63, s. 117, which constituted the local board of health surveyors of highways, with all such powers, authorities, duties and liabilities as any surveyor of highways in England. Section 139 of the same Act provided that every action against the local board should be brought within six months. The local board were made surveyors of highways by the 11 & 12 Vict. c. 63, and, having been so made, did the act in question by virtue of the powers conferred on them as such surveyors by the General Highway Act; and the Court held that the proper period of limitation was the six months prescribed by the 11 & 12 Vict. c. 63, and not the three months prescribed by the Highway Act.

It seems to me, however, that there is a distinction between the facts of *Taylor* v. *The Meltham Local Board* (1) and the present case, and that the *ratio decidendi* in that case does not apply here. The Court there thought that the retention of three months as the period of limitation for acts done by the local board as surveyors was inconsistent with section 139, which fixed a period of six months for all acts done by the local board or their officers, and that there was a clear intention displayed in that section that in respect of all their acts the local board and their officers should be grouped together as one class, having the same period of limitation, and should not be divided into classes having different privileges as to time according to the nature of the act done.

In this case there is nothing in the local Acts corresponding to the language of section 139 of the 11 & 12 Vict. c. 63, and I think that if I held that the corporation under their local Acts remained liable for acts done by them as surveyors of highways for two years, I should in effect be altering section 162 of the Salford Improvement Act, 1862, which enacts that they shall be subject to such liabilities as surveyors of highways are subject to.

I should also be introducing the anomaly that in an action against the corporation of Salford for an act done by them as surveyors of highways, the period of limitation would be two years; while in an action against the surveyors of an adjoin-

(1) 47 Law J. Rep. C.P. 12.

ing parish for a similar act, the limitation would be three months. I think that the Legislature cannot have intended that there should be a different limitation for similar acts done by the same public officers, discharging the same duties, conferred by the same statute, because in the one case those public officers were elected to be officers of the vestry, and in the other case appointed to be officers by a local Act.

The case of *Taylor* v. *The Meltham Local Board* (1) does indeed extend to decide that if the corporation were acting as surveyors of highways by virtue of the Public Health Act, the limitation was six months, and not three months; but the Public Health Act, in the sections I have cited, empowers the corporation to act at their discretion either under the local Act or the Public Health Act.

The statement of defence seems to contain an allegation that the corporation were acting under the local Act, and I do not know why I should assume, in the absence of any proof, that they, in their discretion, chose to act under the later statute with the consequences of increasing the duration of their liability from three months to six.

On these grounds I am of opinion that my judgment must be for the defendants, with costs.

Judgment for the defendants.

Solicitors — Yeilding & Barlow, agents for Warner & Burder, Manchester, for plaintiff; Hatchett-Jones & Letcher, agents for Graves, Salford, for defendants.

1882. Nov. 24. } VINTER (*appellant*) *v.* HIND (*respondent*).

Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 116 *and* 117—*Meat Unfit for Human Food—Seizure after Sale by permission of Purchaser—Penalty.*

[For the report of the above case, see 52 Law J. Rep. M.C. 93.]

1883. May 29. } THE QUEEN *v.* THE VICAR OF ST. ASAPH AND OTHERS.

Vestry—Election of Way-wardens—Separate Townships—Poll—Mandamus.

At an election of way-wardens for a parish containing eleven townships, the names of the candidates for each township were put separately to the meeting, and the candidate, in whose favour the shew of hands was, declared duly elected for that particular township, the successful candidate for the first township being declared before the election for the second was commenced, and so on. After the eleven way-wardens had been elected, an elector demanded a poll for those townships which had been third and fourth in order:—Held, *that the demand was too late, the election for each township being a separate and distinct election.*

In this case, a rule *nisi* for a mandamus had been granted directed to the vicar and churchwardens of the parish of St. Asaph, and calling upon them to convene a vestry meeting, and to proceed to the election of way-wardens to serve on the Highway Board of St. Asaph Highway District in respect of the townships of Bodeigan and Gwernglefryd, in the parish of St. Asaph, and to hold a poll of the ratepayers of the said townships for such election, and to take all necessary steps for that purpose pursuant to the statutes in that behalf.

It appeared from the affidavits that at a vestry meeting held at St. Asaph on the 27th of March, eleven way-wardens were elected for eleven townships in the parish. The election was conducted by a way-warden being proposed for a given township, and, in the absence of any other candidate, being declared by the chairman duly elected. If any other candidate was proposed, the chairman put the names of the different candidates to the meeting, and declared that candidate elected in whose favour the shew of hands was. The same proceedings took place with regard to all the eleven townships. After all the way-wardens had been elected, an elector demanded a poll in respect of the townships of Gwernglefryd and Bodeigan, which had been the third and the fourth in order of

The Queen v. *Vicar of St. Asaph.*

election. The chairman held that the demand was too late.

The principal question raised by the rule was, whether it was necessary to demand a poll for a particular township at the conclusion of the election for that township, or whether it was competent to the elector desiring a poll to wait until all the elections had terminated.

Channell shewed cause against the rule.
C. Stuart Wortley in support of the rule.

WILLIAMS, J.—I am of opinion that this rule should be discharged. [After dealing with other objections, his Lordship continued:] Another ground of objection to the election was, that a poll had been properly demanded and illegally refused. I am of opinion that that also fails entirely. I am clearly of opinion that the demand for a poll must be made at once, as soon as the preliminary shew of hands is over. Where an election is taken by shew of hands, the chairman is to form a judgment at once, to the best of his opinion, as to who is elected; and if it is the intention to test his decision in a more formal manner, that must be done at once. The question is, whether this was all one election, or whether they were separate and distinct elections. I am of opinion that the election for each township was a separate and distinct election, and therefore that the demand for a poll was too late.

SMITH, J.—I am of the same opinion. The matter in question arose out of an election of way-wardens for the parish of St. Asaph on the 25th of March last. In that parish there were eleven townships that had eleven separate way-wardens. An order of Justices had provided that the way in which the election was to be carried on was that each township should elect one way-warden. There was therefore necessarily a separate election for the way-warden of each township. The special business as regards each township had terminated when the shew of hands had taken place for that township. I am of opinion that it was not competent for an elector to lie by and allow all the elections to take place and then to demand a poll for some particular township. I may add that I entertain considerable doubt whether in any event a mandamus would have been the proper remedy here. It seems to me that if this writ was allowed to go, a perfectly good return might be made to it—namely, that the office was full. However, I give no decided opinion upon that point.

Rule discharged with costs.

Solicitors—Finney, Bruff & Cass, agents for Louis & Edwards, Ruthin, for respondents; Bolton, Robbins & Co., agents for Alun Lloyd, Ruthin, for applicants.

1883. May 28. } JONES *v.* PARSELL (J. A. JENKINS, *claimant*).

Bankruptcy—Sale by Sheriff—Notice of Petition in Bankruptcy—Sale occupying more than One Day—"Proceeds of such Sale"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

When there is a sale by a sheriff under a fi. fa. which occupies more than one day, the fourteen days contemplated by the Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87, *begin to run from the time when the sale authorised by the writ is completed, that is, the end of the last day of the sale.*

This was an interpleader by the sheriff of Pembroke, who, on the 29th of December, 1882, seized the goods of the defendant Parsell, under a writ of *fi. fa.*, in execution of a judgment for the sum of 85*l.*, recovered against him by the plaintiff Jones. On the 10th of January, 1883, the sheriff proceeded to sell, but after the sale had gone on for two hours it was stopped for the purpose of collecting the money, as it was a country place and the buyers came from afar. The sale was proceeded with and ended on the 12th of January, 1883. On the 25th of January, the claimant Jenkins gave the sheriff a notice under the Bankruptcy Act, 1869, s. 87 (1),

(1) 32 & 33 Vict. c. 71. s. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff .... shall

that a petition in bankruptcy had been filed against Parsell, and that he the said Jenkins claimed the proceeds of the sale.

The sheriff interpleaded, and the issue was heard in part by Manisty, J., and by him referred, with the consent of all parties, to the Divisional Court.

Llewellyn Lewis, for the claimant.—The period of fourteen days for which the sheriff is to hold the proceeds of the sale dates from its completion. The word "sale" includes all sales upon seizure for one writ, and it does not refer to each day of sale; until enough has been sold to satisfy the judgment and costs the sale is not complete—*Ex parte Rayner; in re Johnson* (2), *Ex parte Villars; in re Rogers* (3) and *Turner* v. *Bridgett* (4).

English Harrison, for the execution creditor.—The first day's sale commenced at 2 p.m. and was completed at 4 p.m. The proceeds of that day therefore belong to the execution creditors, as the fourteen days had elapsed on the 24th of January. The section is distributive. If there are two sales the time runs from the completion of each. The sheriff is bound to sell for cash, and therefore each day is a complete sale—nothing remains to be done except handing over the goods.

A. Cock, for the sheriff.

POLLOCK, B.—This is a case of interpleader by a sheriff. The plaintiff is an execution creditor, who obtained a judgment against the defendant Parsell, the execution debtor, and issued a writ of *fi. fa.* directing the sheriff to take the goods of the said defendant Parsell in execution. J. A. Jenkins, the claimant in the issue, is the trustee in bankruptcy of the defendant Parsell, who claims the goods as such trustee under the provisions of the Bankruptcy Act, 1869, s. 87 (1). The sheriff seized the goods on the 10th of January, 1883, and sold part of them on that day, continuing the sale on the 12th of January, 1883. The claimant served a notice in bankruptcy on the sheriff on the 25th of January, 1883, and now contends that it was served within fourteen days of the sale within the meaning of section 87 of the Bankruptcy Act, 1869. That section is as follows: [His Lordship then read the section.] If the word "sale" in that action is to be read as applicable only to the sale of the 10th of January, 1883, the fourteen days would have expired and the goods have become the property of the plaintiff the execution creditor; but if the sale is not held to have been completed within the meaning of the section on that day, but to have included the two days, then notice was served in time, and the trustee has established his claim. I do not say that I am free from doubt in the matter, as some of the cases seem to point to a construction adverse to the claim of the trustee; but on the whole I think that in this case, where no fraud has been suggested, and where it was deemed more convenient to extend the sale over two days, the sale on those two days must be taken to have constituted one sale, and to be the sale in the section referred. Till the goods taken in execution have been sold, the duty of the sheriff to retain the proceeds for fourteen days does not commence; but when they are sold, the section comes in and imposes on the sheriff, if, as I think is the case here, he has had notice of a bankruptcy petition, the duty of holding them in trust for the trustee in bankruptcy.

LOPES, J.—The question in this case is, if there is a sale by a sheriff under a *fi. fa.*, and it occupies more than one day, when do the fourteen days contemplated by the 87th section of the Bankruptcy Act, 1869, begin to run—from the beginning or the end of the sale, or at any intermediate period? I think from the time when all the goods taken in execution are sold, I mean when the sale authorised by the writ of *fi. fa.* is completed. The words of section 87 point to this—they are, "Where the goods of any trader have been taken in execution in respect of a

retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee . . . ."

(2) 41 Law J. Rep. Bankr. 26; Law Rep. 7 Chanc. 325.

(3) 43 Law J. Rep. Bankr. 76; Law Rep. 9 Chanc. 432.

(4) 51 Law J. Rep. Q.B. 377; Law Rep. 8 Q.B. D. 392.

judgment, and sold, the sheriff shall retain the proceeds of such sale for a period of fourteen days." Surely this refers to a completed sale under the writ. Any other construction would be inconvenient, and, in my opinion, contrary to the words of the section.

CAVE, J., concurred.

Order that sheriff do withdraw, and declaration that claimant is entitled to the proceeds of the two days' sale.

Solicitors—Parkers, agents for C. W. R. Stokes, Tenby, for claimant; Jones, Blaxland & Son, agents for R. D. Gilbertson, Pembroke, for execution creditor; Iliffe, Russell & Co., agents for S. H. Owen, Narberth, for Sheriff.

[IN THE HOUSE OF LORDS.]

1883. April 30. May 1. THE LAW SOCIETY OF THE UNITED KINGDOM *v.* WATERLOW AND OTHERS. THE SAME *v.* SKINNER (*executor of* BLAKE, *who carried on business as* SHAW AND BLAKE).

Solicitor and Proctor—Unqualified Person acting as—Proceedings to obtain Probate—Action for Penalties—23 *&* 24 *Vict. c.* 127. *s.* 26.

The defendants, law stationers, not qualified to act as solicitors or proctors, received from solicitors in London and in the country wills to copy and engross, and acting on instructions from the solicitors took the wills and engrossments, and other documents necessary for obtaining probate, to the Probate Registry at Somerset House, and afterwards paid the fees and received the probate. The solicitors' names were used, and any difficulty which arose was referred to them. The defendants charged the solicitors a messenger's fee only for the time of the clerk employed in attending at the Probate Registry:—Held, *that the defendants did not act as proctors, within the meaning of* 23 *&* 24 *Vict. c.* 127. *s.* 26.

The Law Society appealed from the judgments of the Court of Appeal in these cases, reported 51 Law J. Rep. Q.B. 249; Law Rep. 9 Q.B. D. 1.

The admissions on which the cases were tried are set out in the report of the proceedings below, and so far as is necessary appear in the headnote above and in the judgments.

Sir H. Giffard, Q.C., and *G. A. R. Fitzgerald* (*Reid, Q.C.*, and *Woodfall* with them), for the appellants.—The question is, whether acts which may be done by a solicitor acting through a clerk or servant may be done by him acting through one who stands in the relation of an independent contractor. It is contended that the statutes apply in all cases where that relation exists. The taking out probate is on the same footing as suing out writs, which is acting as a solicitor—6 & 7 Vict. c. 73. s. 2. One of the objects of the rule requiring a qualified person to act as proctor, is that there may be some one to answer the questions that arise upon probates—Probate Rules in respect of non-contentious business, 1862, rule 4. *Stephenson* v. *Higginson* (1) is strongly in the appellants' favour; *The Apothecaries' Company* v. *Greenwood* (2) and *In re Clark* (3). In the case of the respondents Waterlow, who acted for country solicitors, if they were allowed to do so it would enable the solicitors to practise in London without taking out a London certificate.

[THE LORD CHANCELLOR.—The solicitor might be liable to penalties for practising in London without a London certificate; but how does that affect the law stationer?]

The Attorney-General (*Sir H. James, Q.C.*), *Willis, Q.C.*, and *Finlay, Q.C.*, for Messrs. Waterlow; and *E. Clarke, Q.C.*, and *Bremner*, for Skinner, were not called upon.

THE LORD CHANCELLOR (THE EARL OF SELBORNE).—This action has been brought by the Law Society under certain penal clauses in two statutes. The first of those statutes is the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, which by the 2nd section says, that "no person shall act as an attorney or solicitor, or as such attorney

(1) 3 H.L. Cas. 638.
(2) 2 B. & Ad. 708; 9 Law J. Rep. K.B. 331.
(3) 3 Dowl. & Ry. 260.

or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding, in the name of any other person or in his own name," in any of the Courts, "unless such person shall have been admitted and enrolled, and otherwise duly qualified to act as an attorney or solicitor." And the later Act, which is more immediately applicable to this particular Court, the Probate Court, is the 23 & 24 Vict. c. 127, the 26th section being, "Every person who acts as an attorney or solicitor contrary to the enactment" in the section which I first read—namely, section 2 of the former Act, "or who in his own name, or in the name of any other person, in anywise acts as a proctor in or with respect to any proceeding in the Court of Probate" (I omit the other words) "without being duly qualified so to act, shall be deemed guilty of a contempt of Court." There is a special penalty in that case under this particular statute—"and shall be incapable of maintaining any action or suit for any fee or reward for" what he has so done, "and, in addition, shall forfeit and pay for every such offence the sum of 50*l*."

The question is, whether Messrs. Waterlow have incurred these penalties by what they have done, as admitted in this case. The admissions must, of course, be reasonably construed; but, being reasonably construed, it appears to me that they must be taken as conclusive in determining what the acts are which Messrs. Waterlow have done, and in respect of which the question is raised. I not only think that necessary on technical grounds, but to me it is clear that, looking to the parties in this case, namely, the Law Society on the one part, who, in the discharge of what they consider their duty to the public and to the profession, seek to have this question properly determined, and, on the other hand, a firm of law stationers, of whose credit and respectability no one suggests the slightest doubt, it is impossible to doubt that the facts have been fully and fairly stated, so as to raise the real question which the plaintiffs, on the one hand, have thought it their duty to bring before the Court for its determination, and in respect of which, on the other hand, the defendants desire to throw no obstacle in the way of a proper determination of that question.

That being the case, we take these admissions in connection, of course, with the statutes from which I have just read, and with the rules of the Probate Court, which, though they add nothing to the statutes, yet I think have been rightly regarded by the Court below as shewing that such business as may require to be transacted by a proctor, solicitor or attorney must, if transacted in the Probate Court, be deemed to be a proctor's, or solicitor's, or attorney's business. That being the case (and so far there is no controversy between the parties), it is perfectly clear that under these rules, when the executors or parties entitled to grants of administration do not personally apply without using any agency, the application for probate or for a grant of administration must be made through a proctor, solicitor or attorney; and inasmuch as the whole matters of business which are in question in this case are matters of business incident to the taking proper means for the necessary purposes of applications for probates and grants of administration, it is perfectly clear that they fall, so far, within the category of a proctor's or a solicitor's business. Well, that being so, the question is, who have been doing the proctor's or the solicitor's business under the circumstances which appear by these admissions—whether it has been done by the qualified persons, the proctors or solicitors; or by the unqualified persons, Messrs. Waterlow?

Now, the particular acts which Messrs. Waterlow admit that they have done, and which your Lordships must take to be all the acts relied upon as raising the question, are not any of them *per se* such as, apart from the general business for the purposes of which they are done, would be incapable in law of being performed by unqualified persons, and therefore I take it that they are not such acts as a qualified person was incapable of doing in law, *per alium*, by any person whom he employed to act on his behalf in carrying on this as part of his own business. It is conceded that the statutes in question do not as a matter of fact require proctors or solicitors to do every single matter of business of a kind which none but proctors or solicitors

are qualified to do, personally, or only through the agency of qualified persons themselves proctors or solicitors. It is admitted that office messengers, office servants, office clerks, when acting for solicitors in the transaction of solicitors' business, and not in any sense practising for themselves either in their own names or collusively in the names of others, do not incur these penalties by doing business of this kind either in Court or out of Court. In Court, before Judges, they can only do such business as the Judges permit to be transacted through such agencies; and so in the Probate Court it is quite clear that if it were thought that any particular description of person as representing the solicitor was a person who ought not to be permitted to represent him, there would be power to say, "We will not hear you." But the question is, whether that person has incurred a penalty; and to bring him under the penalty in a case in which it is clear that a qualified solicitor may act *per alium*, and is not bound necessarily to act *per se*, it must be shewn that some law or authority has restricted the solicitor to the use of a kind of agency different from that which he has actually employed, and has made the particular agent whom he has employed subject to the penalty. No such law has been shewn, and the facts of this case, to my mind, exclude the notion of any of those things having been done from which it ought properly to be inferred that Messrs. Waterlow have been practising as solicitors or proctors for themselves. The existence of a real solicitor in every one of these cases, really applying for probate, initiating the whole matter, carrying on the whole business in his own name, although not personally going to the office, is a fundamental fact in the case; and secondly, there is the fact that all the charges as between solicitor and client are made by the real solicitor, and that what Messrs. Waterlow do, by their own clerks and their own messengers, is what they are simply paid for as the agents for that purpose of the solicitor. What is it that they do? Why, according to these admissions, they merely pass between the solicitor and the Probate Office; they are intermediate channels of communication, if I may use the expression, between them. For the purposes of their own proper business, Messrs. Waterlow receive the will from their client to engross it, and they receive with it a letter of instructions telling them what to do with it when it is engrossed, and enclosing the documents upon which probate is to be granted, namely, the affidavit and the oath, which are not in the name of Messrs. Waterlow, but in the name of the solicitor in the country who gives them those instructions. Those documents, namely, the engrossed will, the oath and the affidavit, together with the original will, are carried by Messrs. Waterlow's clerk or messenger to the Probate Office, they are left in the name of the solicitor, and a receipt is given for them. They are left, as is said in the admissions, simply in order that information may be obtained whether the documents are in order or not. If they are in order, then the clerk or messenger of Messrs. Waterlow, who calls again a day or two afterwards, receives the probate and sends it to the solicitor. If any question arises, he does not take upon himself to determine that question or to do any solicitor's business concerning it, but the question is communicated to the person whom Messrs. Waterlow have sent; he communicates it to his employers Messrs. Waterlow, and they inform the solicitor, and then the solicitor does the proper solicitor's business arising therefrom. That is the whole matter, and the question is, who has been practising as a proctor or solicitor?

I say that the question is one of substance, and not of form. It being a case in which the true solicitor was at liberty to employ some other agency, no statute being shewn which enacts that he might not for those purposes employ this agency, there being nothing whatever in the rules which prevents the employment of such an agency, as I read them, the question is, who has been really practising as a solicitor in this case? It is impossible to say that Messrs. Waterlow have been practising as solicitors—the whole proceedings have been in the name of the real solicitor who has employed Messrs. Waterlow. It appears to me perfectly clear that Messrs. Waterlow

have not been practising as solicitors, and that they have simply executed instructions to do ministerial acts in order to save the real solicitor from the trouble and expense of doing them.

Now, it is very manifest that if Messrs. Waterlow desired to carry on the business for their own profit, and used the name of some solicitor in order colourably to appear to be qualified practitioners, it would be against the statute. Of course if, without using the name of any solicitor at all, they were themselves to do the business which under the rules can only be done by a solicitor, namely, to apply for probate and so on, they would be infringing the statute. But I think that they have acted *bona fide*, and have done nothing illegal when we look at the substance of the transaction. The statutes do not strike at this particular kind of agency used by a solicitor; they strike only at practising as a solicitor or as a proctor. The Court below has thought that in this case there has been no such practising, and I believe that all your Lordships are of the same opinion.

I therefore move your Lordships that the order appealed from be affirmed, and that the appeal be dismissed with costs.

LORD BLACKBURN.—I am entirely of the same opinion. There is not supposed to be anything unfair, or any fraud, or any concealment in this case at all; but Messrs. Waterlow, being law stationers, and acting for a great many country solicitors, followed a course openly which it is contended by the appellants was illegal; and the question is whether it was illegal so as to subject Messrs. Waterlow to penalties.

Now taking one instance given—namely, that of Mr. Remington of Ulverston, solicitor, who was employed to obtain probate of the will of David Atkinson, deceased. Mr. Remington in doing that was acting as a proctor, and was justified in so acting because he was a solicitor; but that he was acting as a proctor in doing that is quite certain. What Messrs. Waterlow, whom he employed as law stationers, had to do with the matter appears from the admissions. He sent to them the original will to be engrossed, and with the original will he sent the documents called the affidavit and the oath—these were the matters which were requisite—and with them he sent a letter of instructions to do the acts which Messrs. Waterlow did. In accordance with such instructions, it is said, "the original will and the engrossed copy, together with the oath and affidavit, are sent by a clerk or messenger in the employ of the defendants to the principal Registry Office at Somerset House;" and I may say at once that I do not think it is capable of being disputed that when the clerk or messenger was sent with them to Somerset House, the defendants Messrs. Waterlow did it just as much as if they had done it with their own hands. There is no difference between what they did by the clerk or messenger and what they would have done if they themselves had gone to Somerset House and performed the requisite acts. Then it is said, "The defendants provide the necessary stamps to discharge the fees payable at the Registry Office, the defendants being licensed dealers in stamps. The clerk in the Registry Office gives to the defendant's clerk or messenger a stamped receipt for the above-mentioned documents, which are left in the name of the solicitor, and not in those of the defendants, and the receipt so states." So that Messrs. Waterlow by their clerk or messenger took the original will, the proper affidavit and the proper oath, both of which had been prepared by Mr. Remington and sent to them, and the engrossed copy for probate, which in the course of their business as law stationers they had engrossed, to the Probate Office, and the Probate Office then gave a receipt shewing that these documents had been received from G. Remington, of Ulverston, solicitor. The matter, I think, is clear up to that moment.

Now one question is, Did Messrs. Waterlow, in taking these documents to the Probate Office and leaving them there for the purpose of having probate made out, act as proctors, not being qualified persons? That is the first question. I will, however, go on a little further. The admissions state what afterwards happens. "At the end of two days the clerk or messenger calls, in order to be

informed whether the documents are in order or whether any questions arise upon them. If the documents are in order the clerk or messenger, within one or two days, obtains on production of the receipt the probate from the Registry Office."

Now we will suppose that Messrs. Waterlow by their clerk go at the end of the two days, and, being told that the documents are all in order, produce the receipt, and say, "We have come from Mr. Remington, of Ulverston, solicitor. Here is your receipt for the documents which we have deposited with you. Give us the probate," and we will suppose that the clerk gets the probate and goes away with it. Have they in any way, within the meaning of the Act, acted as proctors, either in their own name (that is not pretended) or in the name of Mr. Remington? As to acting in the name of Mr. Remington, it is to be observed that it must be taken in these admissions to be perfectly *bona fide* and true that they were acting in this way in the name of Mr. Remington—that is to say, in order to get out the probate. It is also quite clear upon the admissions which follow the words I have read, that for doing so Messrs. Waterlow make a small charge to Mr. Remington; but they have no privity of contract whatever with the ultimate executor or administrator who employs Mr. Remington; they are to be paid, not by the person who is ultimately to have the benefit of the probate being taken out, but by the solicitor, just as the clerk of that solicitor would be paid wages by that solicitor. So much is admitted. It is quite clear that Messrs. Waterlow are not like a general clerk, they are not servants of Mr. Remington in the sense that Mr. Remington has the control over them and could direct them to do what he pleased. They are contractors in the sense that they are ready to act for any solicitors, and we must take it upon the admissions that they do act for a great many solicitors who employ them in that way. In fact what they do is incident to their business as law stationers, they lend this helping hand to country solicitors who are at a distance from Somerset House.

Now the question is, Are they acting as solicitors? A solicitor taking out probate is not bound to do everything in his own person. There are some things which he cannot delegate; he is to give his personal responsibility and obligation to his client, to use his own skill and his own judgment in some things which are to be done, and he ought not to delegate them at all. There are some matters, as to which, though he may delegate them and need not do them in person, but may employ a clerk, yet he would be required to see that that clerk had competent knowledge. I do not say that he is bound by statute in the sense that the thing would be illegal if he did not select a clerk of competent knowledge; but there is the kind of obligation upon him which I have mentioned. But there are many things which a boy at 5*s*. a week could do just as well as anybody else. Now are those things which hitherto I have been dealing with, and which it is admitted that Messrs. Waterlow have done, such that the solicitor in the country should employ a skilful person to do them? There is no reason that I can see, there is no reason certainly as far as I have gone hitherto, why the solicitor in the country should not send as dull a boy as one could well select, who would be quite competent, if he were honest, to carry the documents for probate to the office and to bring back the receipt. I do not see the slightest ground for supposing that that is required to be done by a skilful person. It does not appear to me that Messrs. Waterlow were acting as solicitors at all, but they were doing for the solicitor something which the solicitor might and should delegate to somebody to do for him. He chose to delegate it to Messrs. Waterlow, who, as collateral to their acting as law stationers, were willing to do this work, receiving a small payment from the solicitor for so doing. It is, to my mind, impossible to say that they were acting as solicitors in doing it.

But then the case goes on to say, "If any question should arise as to the correctness or sufficiency of the documents, such question is communicated to the clerk or messenger, and by him to the defendants, who inform the solicitor from whom they received the documents thereof." When a satisfactory reply is given there is the same procedure as

before. Now I certainly construe that to be—that when there are difficulties, when the answer is that the documents are not in order, the messenger has to carry back to Messrs. Waterlow, and through Messrs. Waterlow to the solicitor in the country, to Mr. Remington of Ulverston, the statement, "The documents are not in order for such and such a reason," and that Mr. Remington of Ulverston then rectifies them in such way as the case may require. If the clerk or messenger of Messrs. Waterlow merely receives such objection, and transmits the message of such objection being made, I do not see that it carries one further. But it was contended that it might be that a great deal more was done—that it might be that when the objection was one of a nature that could be obviated (as it might perhaps be) by argument at once, this messenger of Messrs. Waterlow was to argue it, and to advise upon it, and to discuss it, and to do various things which certainly I think Mr. Remington would not be doing quite his duty to his clients if he delegated to another person to do for him, and as to which certainly, if Messrs. Waterlow did them (I think it is probable that they were too wise), if they incurred all the responsibility of advising on matters of law and things of that sort, they would be doing a very foolish and rash thing. If they did all this, it would be a plausible argument to say that in doing things like that, furnishing intelligence and legal advice, and so on, which Mr. Remington ought not to have delegated to them to do, they were acting as solicitors. Sir Hardinge Giffard requested that we would not decide anything beyond what was in the case before us; and I do not say that this would be a thing which would make them liable to the penalty for acting as proctors if they were to do it; but I will go as far as to say that I do not believe they ever did it, and I am sure they will be wise not to do it in future if they have done it before. But I do say that we cannot upon these admissions hold that they are liable to pay a penalty of 50*l.* on the supposition that they may perhaps have done something or other which certainly the admissions do not state that they did.

I quite agree that if Messrs. Waterlow did this work upon payment from the ultimate client direct, if they were receiving a portion of the profits as partners, if they were in any way, by fraud or otherwise, acting in the name of Mr. Remington, but really and truly for themselves, they would be within the enactment. On these admissions it is clear that they were doing nothing of the sort. When I look at the judgment of the Court below, which is proposed to be affirmed, I see that it goes upon the ground that Messrs. Waterlow were honestly and really doing for Mr. Remington, and in Mr. Remington's name, a thing which Mr. Remington might delegate to them or to anybody else to do for him, it requiring no peculiar skill, and it not being at all requisite that it should be done by a servant of Mr. Remington if it was done by a person who did not in any other way act as a proctor.

LORD BRAMWELL.—I am entirely of the same opinion. I have no doubt that the matter of soliciting probate, such as a non-contentious probate even, is a matter within the Act of Parliament; and the question is, as Lord Justice Brett said, whether Messrs. Waterlow have acted as proctors in respect of these proceedings. Now I am of opinion that they have not, and I am of opinion that they have not because they have not; and really that is the only answer which one can give to the case made against them. People frequently embarrass and puzzle themselves in seeking for a reason for a negative opinion, and none can be given except that the thing has not been made out on the other side. In my opinion it has not been shewn that Messrs. Waterlow acted as proctors in this case. If the only evidence against them had been that they had engrossed the probate, I really do not see, supposing that that had been the case, what answer one could give, except that they had not acted as proctors; nor do I see what other answer can be given in this case, except that they have not acted as proctors.

Now the proctor or solicitor in the matter is the country solicitor, a duly qualified man. The defendants act for him. They have no communication with

the real client, they have no pretence of skill—that is to say, in advising the proceedings in any way—and they would not be liable for the want of it to the real client. All that they do is something for the duly qualified man. Well, is that an acting as proctors? I say, no. It is quite certain that the duly qualified man is not limited to acting in his own proper person. A solicitor is not bound to go to the Writ Office to get his writ sealed, nor to go to the Probate Office to get the probate of a will. It is admitted that he may do it by a clerk; and I should think it would be equally admitted that he may do it by a friend, or possibly by a friend's clerk; and I cannot help thinking that the real question in this case is that which has been put by Lord Justice Cotton—that the question, if anything, is for the Court of Probate. I suppose that the Court of Probate might say (there is nothing to prevent their doing it that I know of; and, if it were a discreet and proper thing to do, they would no doubt be upheld in it): "We will not allow you, the country solicitors, to send anybody except your London agent, or your own clerk or your London agent's clerk. We will limit your dealings to such persons as those; and we will not allow Messrs. Waterlow, or a commissionaire if he comes, to leave the papers, or to apply for the probate in return." That might be; but they do allow it at present, and what is done by Messrs. Waterlow is not to act as proctors, but to do something for a proctor; and I cannot help thinking that if we were to hold otherwise, this consequence might follow. If a solicitor were to permit a man to use his name to make some application to the Court, but which application was made in reality on his own account, and not on the account of the solicitor whose name was used, that would be a contempt of Court; and the consequence of our holding that Messrs. Waterlow were so acting would be that every one of these gentlemen who have employed Messrs. Waterlow would be subject to proceedings for contempt.

I am clearly of opinion that there is no ground for this action.

LORD FITZGERALD.—I adopt the construction put by the Court of Appeal upon the admissions in the case, and which has been adopted by the Lord Chancellor, and I concur in his judgment, and in the reasons which he has given for that judgment. I have come to the conclusion that Messrs. Waterlow have not been guilty of the offence (for it is an offence that is dealt with by the Act of Parliament; it is so described) which is imputed to them.

Orders appealed from in each appeal affirmed, and appeals dismissed with costs.

Solicitors—C. O. Humphreys & Sons, for appellants; Layton, Son & Lendon, for respondents Waterlow, Brothers & Layton; Ashurst, Morris, Crisp & Co., for respondent Skinner.

1883. June 18, 28. } ILLINGWORTH *v.* THE BULMER EAST HIGHWAY BOARD.

Highway—Neglect to Repair—Highway Board — Order for Expenses — Quarter Sessions—Appeal, Grounds of—Construction of—25 *&* 26 *Vict. c.* 61. *s.* 18.

A complaint having been made to Justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the Justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the Justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the Justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to Quarter Sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. *That the said Justices had no jurisdiction to make the*

said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the Justices wrongfully admitted evidence of witnesses other than the person appointed by them under section 18 *of* 25 *&* 26 *Vict. c.* 61. *5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said Justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground* :—Held, *that the highway board were entitled to appeal to Quarter Sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways*—(1) *because they were estopped by their admissions before the Justices;* (2) *because their grounds of appeal gave no notice that the point would be taken; and* (3) *because the question was not open to them when the order appealed against was made.* Held, *also, that the Quarter Sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it.*

Special Case stated on appeal from an order of the general Quarter Sessions of the peace for the North Riding of the county of York, quashing an order of two Justices purporting to be made pursuant to the 25 & 26 Vict. c. 61. s. 18, and ordering that certain roads should be put into repair at the expense of the appellants.

The facts of the Special Case, so far as they are material, are sufficiently set out in the judgment of the Court.

The questions submitted for the opinion of the Court were :—

1. Whether under the circumstances aforesaid any appeal lay to the Quarter Sessions against the said order of the Justices of the 4th of September, 1882.

2. Whether under the circumstances aforesaid, and having regard to the said admissions as to liability, and the said orders, notice and grounds of appeal, Inclosure Act and award, it was open to the said highway board to contend, or competent for the Court of Quarter Sessions to find, that the said roads other than the said part of Strensall Road were not highways, and were not repairable by the highway board, and on that ground to allow the appeal.

Forbes, Q.C., and *Yarborough Anderson*, for the appellants.—The point that these roads were not highways was not taken at all before the Justices, and, consequently, could not be raised upon the appeal to Quarter Sessions. In *Ex parte Firth; in re Cowburn* (1), it was held that an appellant cannot raise on appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that by any possibility the respondent might have been able to rebut it if the point had been raised originally. Jessel, M.R., says in that case :—"It is quite true that there is some evidence about that; but the point was not taken in the County Court, and the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence." Secondly, the point that these were not highways could not have been taken at the hearing before the Justices on the 4th of September, when the order was made against which the appeal to Quarter Sessions was brought. The only question that could be gone into then was whether these roads had been put into complete and effectual repair. Therefore that was the only point before the Quarter Sessions. Thirdly, no point can be raised before the Quarter Sessions which is not stated in

(1) 51 Law J. Rep. Chanc. 473; Law Rep. 19 Ch. D. 419.

the grounds of appeal. The grounds of appeal in the present case gave us no notice that the point that these were not public highways was to be raised.

[WILLIAMS, J.—The first ground of appeal is that the Justices had no jurisdiction to make the said order. The question is, whether under that they were entitled to shew that these are not highways.]

Fourthly, the Quarter Sessions only went into the question whether these were public highways, subject to the opinion of this Court as to whether that question was open to them. They did not decide that it was open. Fifthly, there was no right of appeal to Quarter Sessions in this case—*Mather* v. *Brown* (2).

A. Charles, Q.C. (with him *Scott Fox*), for the respondent.—The construction that the Quarter Sessions have put upon these grounds of appeal is that they do include the objection that these roads are not public highways. By 12 & 13 Vict. c. 45. s. 9, the decision of the Court of General or Quarter Sessions of the peace upon the hearing of any appeal as to the sufficiency of the statement of any ground or grounds of appeal, and as to the amending or refusing to amend any order or judgment of a Justice or Justices appealed against, or the statement of any ground or grounds of appeal, and as to the substitution of any new recognizance or recognizances as aforesaid, shall be final, and shall not be liable to be reviewed in any Court by means of a writ of *certiorari* or mandamus, or otherwise. That is a provision of Baines's Act, which applies to all appeals, except poor-law appeals. By implication, the Quarter Sessions have said here that these grounds of appeal are sufficient. It is submitted that that is conclusive. But, further, the question is sufficiently raised by the grounds of appeal. They are to be construed with reasonable latitude. In *The Queen* v. *Hutchins* (3), one of the grounds of appeal was that the street was a highway repairable by the inhabitants at large; and it was held that this was sufficient notice of the intention to contend that it had been declared to be so by a prior adjudication, and that the matter was therefore *res judicata*. Lush, J., says:—"The sessions refused to entertain the argument that the question was concluded by the previous decision, on the ground that this was not alleged as a ground of appeal. But one of the grounds of appeal is that the street was a highway repairable by the inhabitants at large, though the point was not specifically taken by the grounds of appeal that the previous adjudication was conclusive. It seems to me that it was not necessary to state how the allegation was going to be proved. If the previous adjudication had been stated as a ground of appeal, the party could not have demurred to it. The Justices were bound to receive the evidence, and when the previous decision was proved they were bound to act upon it." Field, J., says:—"The first question is, whether, upon the grounds of appeal, it was open to the appellant to contend that the previous adjudication was conclusive. I agree with my brother Lush in thinking that upon the grounds of appeal this contention was open to the appellant. The adjudication was at the least admissible in evidence, and I think the contention that it was conclusive was open, on the ground of appeal which raised the question whether this street was a highway repairable by the inhabitants at large or not. I do not think that grounds of appeal ought to be construed as pleadings. The books are full of the finest points with regard to the construction of grounds of removal and appeal, but I hope that the day for such subtleties has gone by. Again, I think if an amendment was necessary, it ought to have been made."

Cur. adv. vult.

The judgment of the Court (Williams, J., and Smith, J.), was (on June 28) delivered by

SMITH, J.—This is a case stated by the Court of Quarter Sessions for the North Riding of Yorkshire for the opinion of the Court. The facts are as follows:—

On the 22nd of April, 1882, John Illingworth, the complainant and respon-

(2) 45 Law J. Rep. C.P. 547; Law Rep. 1 C.P. D. 596.

(3) 49 Law J. Rep. M.C. 64; Law Rep. 5 Q.B. D. 353. Reversed on another point, 50 Law J. Rep. M.C. 35; Law Rep. 6 Q.B. D. 300.

dent herein, of the parish of Hoxby in the North Riding of Yorkshire, made complaint upon oath before a Justice of the peace in and for the said Riding, that there were two certain common Queen's highways, situate within the said parish, used by all the liege subjects of our Lady the Queen, with their horses, carts and carriages, to pass and repass at their will and pleasure, and that certain parts of each of the said common Queen's highways were then out of repair, and that the district board of Bulmer East in the said Riding, as such, was chargeable with the repairs of the said highways, and ought to repair and keep in repair the same according to the statute in that behalf. A summons was therefore issued to the said board to appear and answer the said complaint. On the 1st of May, 1882, John Illingworth and the highway board, by Edward Peters, their clerk, pursuant to such summons, appeared before the Justices sitting at Petty Sessions. No objection whatever was taken by the highway board as to the jurisdiction of the Justices; nor was it suggested by the highway board that the said roads were not highways, and it was admitted by the board that they were liable to repair them.

Upon such admission the Justices made the following order:—"And the said Justices find that the said highways are situate within the district of the said highway board, and that the said highway board ought of right to repair the said highways complained of, and the obligation to repair them not being in question, the Justices, according to the statute in that behalf, appoint Robert William Forbes, land agent, a competent person, in that behalf, to view the same highways, and to report thereon" to the Justices at an adjourned Petty Sessions to be holden for the said division on the 5th of June, 1882; and directed that the informant, John Illingworth, and the highway board should attend such adjourned sessions upon the day and at the place named in the said order. On the 5th of June, 1882, the adjourned sessions was duly held, at which the complainant, John Illingworth, the highway board, and Robert William Forbes attended.

Robert William Forbes reported the said roads to be out of repair. The Justices made the following order:—

"After hearing both parties and evidence upon oath on behalf of the said complainant, the highway board not having called any witness, we find that the said highways so complained of are not in a state of thorough and effectual repair; wherefore we, the said Justices, do order and direct that the said highway board shall cause the said highways so complained of as aforesaid to be put in complete and effectual repair on or before the 1st day of September, 1882." No objection was made to the jurisdiction of the Justices to make the order; but that was conceded; nor was it suggested by the highway board that the said roads were not highways, and it was admitted by the board that they were liable to repair them. The said highway board failed to obey the said order. On the 4th of September, 1882, a Petty Sessions was duly held, whereat, it appearing, as the fact was, that the said roads had not been repaired pursuant to the said order of the 5th of June, the Justices thereupon made the following order:—"And now here the said complainant and the said highway board, by their said clerk, attend, and after hearing both parties and their evidence upon oath, and on consideration of the matter, we find that the said highways so complained of as aforesaid have not been put into a state of complete repair. Wherefore we do order and direct that the said highways so complained of be put into complete and effectual repair, and appoint the said R. William Forbes to do the work for the sum of 250*l.*, and we do order that he be allowed the sum of 20*l.* for his services, and further that the complainant be allowed his costs of the proceedings, including witnesses on each attendance, amounting to the sum of 13*l.* 7*s.* 4*d.*, and we do adjudge that the said highway board do pay the said sums of 250*l.*, 20*l.*, and 13*l.* 7*s.* 4*d.* accordingly."

The highway board appealed to Quarter Sessions against the last-mentioned order of the 4th of September, 1882, directing them to pay the amounts therein named.

The highway board, at all the hearings before the Justices as before mentioned, had always admitted their liability

to repair the roads in question, and in our judgment had, down to the period hereinafter mentioned, admitted that the roads in question were highways, as set forth in the respective proceedings above mentioned.

The grounds of appeal delivered by the highway board against the said order for payment of the 4th of September, 1882, were as follows:—

1. That the Justices had no jurisdiction to make the said order.

2. That the said order is contrary to law.

3. That the said order is contrary to evidence.

4. That the Justices wrongfully admitted evidence of witnesses other than the person appointed by them under the 18th section of 25 & 26 Vict. c. 61.

5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair.

6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive.

7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was, at all the hearings before the said Justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of making thereof, disputed.

Looking to the above-mentioned grounds of appeal, and to what had taken place prior thereto, we are satisfied that, even at this period, it was not part of the case of the highway board that the said roads were not highways, as was afterwards started and contended for by them.

At the hearing of the appeal of the highway board by Quarter Sessions on the 17th of October, 1882, no evidence was called by the appellants to shew that the said roads were not highways, but it was suggested by them, upon the cross-examination of the respondent's witness, that the roads were private roads, and not highways. Objection must have been taken by the respondent, though not stated in the case, that the appellants were shut out from the contention that the roads were not highways by reason of the admissions repeatedly made by them, and also by reason that the point was not raised by their grounds of appeal; for this question is expressly asked of us by the Quarter Sessions.

It was forcibly urged for the respondent that the grounds of appeal never hinted at the fact that it was to be contended that the roads in question were not highways, and that the contention was not raised thereby, and that the grounds of appeal actually recognised that they were highways; and we are of opinion, in view of the facts of this case, that the respondent's contention is correct. It was pointed out that, had any such point been raised by the grounds of appeal, evidence would have been forthcoming on the part of the respondent to establish that, since the date of the award of the 3rd of April, 1771, the roads in question had, in fact, become highways repairable by the inhabitants at large, but, no such point having been raised or suggested by the grounds of appeal, such evidence was not in attendance at the hearing of the appeal.

The grounds numbers 1 and 2 seem to us to be wholly illusory.

The jurisdiction of the Justices having been continuously admitted, as before pointed out, what ground of appeal is it to say that they have no jurisdiction? No ground is stated why or wherefore they have not. The same observation applies to the second ground of appeal. It seems to us that these alleged grounds of appeal were no grounds at all. The real grounds of appeal appear to us to have been the 4th and 5th. It was argued that, by section 105 of 5 & 6 Will. 4. c. 50, an appellant was confined to matters stated in his grounds of appeal; and in this we agree; and we are of opinion that the point—namely, as to whether the roads were or were not highways—was not, in fact, raised, and was not intended to be raised, by the grounds of appeal.

It was argued for the appellants, the highway board, that inasmuch as the Court of Quarter Sessions had construed the grounds of appeal as raising the point as to highway or no highway, this Court is concluded thereby. Without disputing the general principle, we are of opinion that in this case the Court of

Quarter Sessions did not so find as a fact, but only held so for the purposes of the day, expressly leaving the point to be determined by this Court, and upon this they ask our advice. It was also argued before us for the appellants that they had only admitted their liability to repair because of the provisions of the award of the 3rd of April, 1771, and that they had never admitted that the roads were highways. In our judgment it is clear that they over and over again admitted the jurisdiction of the Justices, which only arose if the roads were highways, that they equally admitted that they were highways, and that this contention fails as a matter of fact. Having admitted that the roads were highways, as above mentioned, and having never raised or suggested the point till they were cross-examining the respondent's witnesses upon the hearing of the appeal, we are of opinion that it was not open to them then to attempt to construe their grounds of appeal as including an issue which they never raised—namely, as to whether the roads were or were not highways. A further point was raised by the respondent, and it was this: that inasmuch as the appeal was only against the order of the 4th of September, 1882, directing payment by the highway board of the sums therein mentioned, the question of highway or no highway could not be raised upon such appeal. The contention was as follows:—

The complaint of Mr. Illingworth of the 22nd of April, 1882, was made under section 18 of 25 & 26 Vict. c. 61, whereby it is provided, where complaint is made to any Justice of the peace that any highway under the jurisdiction of a highway board is out of repair, the Justice shall issue a summons directed to the highway board requiring such board to appear before the Justices in Petty Sessions, and that, unless the highway board undertake to do the repairs, the Justices shall direct the board to appear at some subsequent sessions, and shall appoint some competent person to view and report to the Justices on the state of the said highway. That this course was followed in this case, and that, at the Petty Sessions held on the 5th of June, 1882, the report was duly made. That the Justices, upon the facts and evidence and admissions before them, duly made the order of the 5th of June, 1882, ordering the highway board to do the repairs by the 1st of September, 1882; that that order, having been duly made and not appealed against, it became the bounden duty of the Justices (the order having been disobeyed by the appellants), by reason of the provisions of section 18 of 25 & 26 Vict. c. 61, to appoint some person to put the highway into repair, and to charge the expenses as they did by their order of the 4th of September, 1882.

It seems to us the order of the 5th of June, 1882, standing unappealed against, that this contention is well founded, and that, under these circumstances also, it was not open to the highway board to contend, upon the appeal in question, that the roads were not highways. A further point was taken by the respondent—namely, that there was no appeal at all to Quarter Sessions, and the case of *Mather* v. *Brown* (2) was cited in support of this proposition. We think, however, upon reading sections 9, 11 and 42 of 25 & 26 Vict. c. 61, coupled with sections 94, 95, 5 and 105 of the Principal Act, that an appeal is given to Quarter Sessions, and that this point cannot be supported.

For the reasons above, we are of opinion that the order of the Court of Quarter Sessions should be set aside, and we give judgment for the appellants herein, with costs.

Judgment for the appellants.

Solicitors—Smiles & Co., agents for R. & R. P. Dale, York, for appellants; Bolton, Robbins, Busk & Co., agents for E. & J. Peters, York, for respondents.

1883.
May 29.
June 12.
} ALLEN *v.* COLTART AND OTHERS.

Shipping — Charter-party — "If sufficient water" — Demurrage — Bill of Lading—Holder by way of Security.

A condition in a charter-party that the ship shall "discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," means that she is to discharge in the dock ordered, if there is sufficient water at the time of giving the order.

Liability for demurrage under a bill of lading imposed on the holder by way of security only who presented the bill and demanded delivery.

Further consideration.

Russell, Q.C., and *French*, for the plaintiffs.

Crompton, Q.C., and *Bigham*, for the defendants Coltart & Co.

Henn Collins, for other defendants.

The facts and arguments sufficiently appear from the judgment.

CAVE, J. (on June 12).—In this case, which was tried before me at Liverpool, the plaintiffs, who are shipowners, sued the defendants for delay in taking delivery of goods shipped on board the plaintiffs' ship *Bridgwater*, under a bill of lading of which the defendants were the holders.

On the 6th of November, 1880, the *Bridgwater* was chartered by the plaintiffs to Messrs. Knight & Co., of Quebec, under a charter which provided that the ship should load a cargo of timber at Quebec, "and, being so loaded, shall therewith proceed to Liverpool to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get always afloat, and there deliver the same as per bills of lading." The cargo was loaded, and bills of lading were signed, which provided for the delivery of the cargo at the port of Liverpool "unto the order of the shipper or to his assigns, he or they paying freight for the said goods. Dead freight and demurrage, if any, may be shewn due as per charter-party, conforming to all the conditions thereof, with average accustomed." The ship arrived in the Mersey on the 16th of June, 1881, when the defendants Messrs. Robert Coltart & Co., who were the holders of two out of the five bills of lading, ordered her to the Canada Dock. The other defendants, who were the holders of the remaining three bills of lading, took no part in this order.

At the time when the order was given there was not sufficient water to enable the ship to enter the Canada Dock, nor was there sufficient water for that purpose until the 14th of July, and the ship went into the Morpeth Dock at Birkenhead, that being a proper course to take under the circumstances, and there remained until the 14th of July, when she was taken into the Canada Dock. When the ship first arrived in the Mersey, the plaintiffs set up a claim to detain the cargo until payment of a sum claimed for the detention of the ship at Quebec for 103 days. This claim the plaintiffs afterwards abandoned, and the question disputed at the trial was, whether this claim of the plaintiffs was the sole cause of the delay in the delivery, or whether there was a further delay after that claim had been abandoned owing to any refusal by the defendants Messrs. Coltart & Co. to take delivery elsewhere than in the Canada Dock. Upon this question the jury found a verdict for the plaintiffs for 100*l.* against Messrs. R. Coltart & Co., and, by my direction, a verdict for the defendants Dempsey & Harrison.

At the trial, Mr. Crompton, on behalf of Messrs. Coltart & Co., took certain points of law which it was agreed I should reserve for further consideration, and the jury were discharged on the terms that if the discussion of these legal points involved the determination of any question of fact which had not been submitted to the jury, I should have power to determine it.

The case was heard, on further consideration, on the 29th of May.

The first contention was that Messrs. Coltart & Co. had no property in the goods, as they only held the bill of lading to recoup themselves for advances they had made on the timber, and consequently were not liable as assignees of the bill of lading under the 18 & 19 Vict. c. 111, s. 1,

and, in support of this contention, *Burdick* v. *Sewell* (1) was cited. I am of opinion that this contention is well founded. I think that under the circumstances proved at the trial I ought to hold that the intention of Messrs. Knight and Messrs. Coltart & Co. was, that the latter should hold the bill of lading and the timber merely as a security to cover the advances they had made, and that the intention of both parties in giving and receiving the indorsed bill of lading was, not to pass the property in the goods to Messrs. Coltart & Co., but to enable them to obtain possession of the timber on its arrival in Liverpool, in order that they might have the security of the timber for their advances. It appears to me, however, that the plaintiffs are entitled to maintain this action quite independently of the 18 & 19 Vict. c. 111. As far back as 1811 it was held, in *Cook* v. *Taylor* (2), that where the master of the ship had contracted by bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, was evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated to be made to the consignees named in the bill or their assigns, he or they paying freight for the said goods. It is true that that decision only extends to the payment of freight; but that is because that was the only condition of delivery in the bill of lading there under consideration. The ground of the decision is, that where goods are deliverable to the holder of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery accordingly by the master is evidence of his acceptance of that offer. Thus, when the bill of lading stipulated on the face of it for the payment of demurrage, it was held that the taking of the goods under it by the indorsee was evidence of an agreement to pay the demurrage—*Stindt* v. *Roberts* (3). This case is explained by Mr. Baron Parke, in *Young* v. *Moeller* (4), as establishing that the receipt of the cargo by an indorsee of the bill of lading is evidence of an agreement to be bound by its terms, whatever they may be. Thus in *Wegener* v. *Smith* (5) it was held that the acceptance of a cargo by the indorsee of the bill of lading, whereby the goods were deliverable to order "against payment of the agreed freight and other conditions as per charter-party," was a circumstance from which the jury might imply a contract on his part to pay demurrage stipulated for by the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. This case was expressly approved of and followed in *Porteous* v. *Watney* (6).

Is there, then, evidence in this case on which I ought to find that the defendants Coltart & Co. agreed to take delivery on the terms of the bill of lading. I am of opinion that there is. It seems to me that if the holder of a bill of lading, under which he is entitled to the delivery of goods on certain terms, presents that bill of lading and demands delivery of the goods, he thereby, *prima facie*, offers to perform those terms of the bill of lading on which alone the goods are deliverable to him. According to the evidence of Mr. Castle, which I do not find to be contradicted, Mr. Coltart said he had a right to name the dock according to the charter-party, and he had named the Canada Dock, and wanted delivery there. He named the Canada Dock, not because he refused to perform the conditions of the bill of lading, but because he conceived that, under those conditions, he was entitled to name the Canada Dock. It is true that at first the plaintiffs refused to accept Mr. Coltart's offer to fulfil the conditions of the bill of

(1) *Ante*, p. 428; Law Rep. 10 Q.B. D. 363.
(2) 13 East, 399.
(3) 5 Dowl. & L. 460; 17 Law J. Rep. Q.B. 166.
(4) 5 E. & B. 762; 25 Law J. Rep. Q.B. 94.
(5) 15 Com. B. Rep. 285; 24 Law J. Rep. C.P. 25.
(6) 47 Law J. Rep. Q.B. 643; Law Rep. 3 Q.B. D. 534.

lading and take delivery, but the jury have found in effect that afterwards the plaintiffs were ready and willing to deliver on the terms of the bill of lading, and that there was a delay caused by the refusal of Messrs. Coltart to accept delivery elsewhere than in the Canada Dock. Having regard to this finding of the jury, I think I ought to come to the conclusion that there was an agreement between the plaintiffs and the defendants Coltart & Co., that the former should give, and the latter should take, delivery under the terms of the bill of lading, and that there was a delay in such delivery by reason of the defendants Coltart & Co. refusing to take delivery elsewhere than in the Canada Dock.

This brings me to the second question in the cause, which is, whether under the terms of the bill of lading the defendants Coltart & Co. were justified in refusing to take delivery elsewhere than in the Canada Dock. If they were, they are entitled to judgment; if they were not, then the jury have found that they have broken their agreement to take delivery on the terms of the bill of lading, and have assessed the damages at 100*l*. Now, as I have said, the bill of lading introduces all the conditions of the charter-party, one of which is that the ship shall proceed to Liverpool, to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get always afloat. It is important to ascertain the meaning of the words actually used, and cases decided on the construction of charter-parties containing different language are not of much assistance. The controversy in this case turns on the meaning and application of the words "if sufficient water," and one method of arriving at their force is to consider what the construction of the charter-party would be if they were absent. The cases of *Parker* v. *Winlow* (7), *Bastifell* v. *Lloyd* (8) and *Dahl* v. *Nelson* (9) were cited as establishing that where a shipowner undertakes to proceed to a wharf in a tidal harbour (which cannot be reached during the neap tides), or as near as he may safely get, and the ship arrives during the low tides, the master must wait for the higher tides, on the ground that his contract is to go to the wharf if in the ordinary course of navigation it can be reached, and that the shipowner takes on himself the risk of delay from the ordinary course of navigation. In the cases cited the ships could have got to the wharves to which they had contracted to go at ordinary spring tides, and the delay did not exceed ten days. In this case there were but two or three days in the month when the *Bridgwater* could have got to the Canada Dock, and the time between the giving the order and the first day when the vessel could get into the dock was twenty-six days. Assuming, however, for the purposes of this case that such a delay is one arising from the ordinary course of navigation, it is necessary to ascertain the effect of the words "if sufficient water." Mr. Crompton contended that they mean "if sufficient water in the ordinary course of navigation," or, in other words, that they mean nothing more than the words "always afloat" at the end of the clause. This construction, however, would give no meaning at all to the words "if sufficient water." I can see no other way of construing them than to put on them a meaning which shall restrict what would be the meaning of the clause if they were absent. It seems to me that they are introduced in the interest of the shipowner, and restrict the generality of the power to name a dock; that the obligation of the shipowner is to proceed to the dock named if there is sufficient water to enter the dock when the order is given, and that if there is not then sufficient water, the ship is not bound to discharge in the dock named. It is contended that if this is the construction, the shipowner would be justified in refusing to go to the dock if there were not sufficient water at the time, although there might be sufficient water in two or three days. The answer to that I think is—first, that if the construction I have put on the charter-party is the only one that gives any meaning to the words "if sufficient water," it is no answer to say that that construction might

(7) 7 E. & B. 942; 27 Law J. Rep. Q.B. 49.
(8) 1 Hurl. & C. 388; 31 Law J. Rep. Exch. 413.
(9) 50 Law J. Rep. Chanc. 411; Law Rep. 6 App. Cas. 38.

in certain cases be productive of hardship on the shipper; and, secondly, that as the shipowner, if he cannot get to the dock named, must go as near thereto as he can safely get always afloat, he would find it to his advantage to exercise his rights reasonably, and rather to wait two or three days than to insist on delivery being taken at some place where possibly the discharge might occupy a longer time; while the charterer on the other hand would find it to his interest, if there was a convenient dock with sufficient water, to name that dock rather than one to which the ship could not get without a delay of two or three weeks. For these reasons I am of opinion that there must be judgment for the plaintiffs against the defendants Coltart & Co. for the sum of 100*l.*, assessed by the jury, with costs.

[Judgment was given for the other defendants at the trial.]

Solicitors—Gregory & Co., agents for Hill, Dickenson & Co., Liverpool, for plaintiffs; W. W. Wynne & Son, agents for T. & T. Martin, Liverpool, for defendant Coltart; W. W. Wynne & Son, agents for H. Forshaw & Hawkins, Liverpool, for defendants Dempsey & Harrison.

[IN THE COURT OF APPEAL.]

1883. June 26, 27. THE MIDLAND RAILWAY COMPANY *v.* THE WITHINGTON LOCAL BOARD.*

Public Health Act, 1875 (38 & 39 *Vict.* c. 55), *s.* 264—*Thing done under the Provisions of the Act—Notice of Action—Limit of Time for Bringing Action—Action to recover Money paid under Mistake of Fact.*

The defendants, an urban sanitary authority, believing that a certain lane was not a highway repairable by the inhabitants at large, required the plaintiffs, as owners of land abutting on it, to execute certain works upon it, pursuant to the provisions of the Public Health Act, 1875; *and on the plaintiffs failing to comply with the notice, the defendants did the work themselves, pursuant to section* 150 *of the Act, and charged the plaintiffs with their proportion of the expense thus incurred. The plaintiffs also believed that the lane was not a highway repairable by the inhabitants at large, and they therefore paid to the defendants the sum so claimed; but on discovering afterwards that the lane was such a highway, and that the defendants were not entitled to require them to execute the works specified, they brought an action to recover the amount so paid by them. They gave notice of action a month before issuing the writ, but this notice was given and the action was begun more than six months after the payment made by them:*— Held, *that the plaintiffs could not recover the money thus paid, inasmuch as they were suing the defendants in respect of something "done or intended to be done or omitted to be done" under the Public Health Act; that the provisions of section* 264 *of that Act applied, and therefore that the action could not be brought more than six months next after the accruing of the cause of action.*

Appeal from the judgment of North, J., on further consideration, after trial with a jury.

Action by the plaintiffs to recover money paid to and received by the defendants under a mutual mistake of fact.

The defendants denied that there was any mistake of fact; alleged that the money was paid to them for expenses incurred by them under the Public Health Act, 1875; that the cause of action did not arise within six months before the commencement of the action; and that the notice of action given by the plaintiffs was defective in that it did not state the name or place of abode of the plaintiffs' solicitor or agent in the action.

The plaintiffs, in their reply, alleged that they delayed the commencement of the action at the request of the defendants, and that the defendants waived the provisions of section 264 of the Public Health Act, 1875.

It appeared that the Midland Railway Company had made a line in the township of Withington, within the district of the Withington local board, abutting

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

upon an old lane in Withington, called Lapwing Lane, which had never been made into a road, but which had been used by the public. The local board resolved to pave, flag and sewer this lane, pursuant to the provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and accordingly they, as the urban authority for the district, pursued the provisions of that Act, and addressed to the plaintiffs, as owners and occupiers of land abutting upon the lane, notice requiring them to sewer, level, pave, flag and channel a portion of the lane within three months of the date of the notice. The plaintiffs did not comply with the requirements of the notice. On the 13th of September, 1880, the defendants addressed to the plaintiff further notice, stating that the defendants had executed the works themselves, and that the surveyor had apportioned the sum of 1,146*l.* 4*s.* 7*d.* as the plaintiffs' proportion of the expenses so incurred. Both the plaintiffs and defendants believed at that time that that portion of Lapwing Lane was not a highway repairable by the inhabitants at large, and the plaintiffs accordingly paid to the defendants the sum claimed. The plaintiffs afterwards discovered that the lane was a highway repairable by the inhabitants at large, and therefore that the defendants were not entitled to call on them to do the works specified, and they then brought this action to recover back the money so paid by them.

The plaintiffs paid the money on the 30th of October, 1880; they gave notice of action on the 2nd of February, 1882, and issued the writ on the 3rd of March, 1882. At the trial the jury found that the lane in question was a highway repairable by the inhabitants at large, and found that there was no agreement between the plaintiffs and the defendants that the plaintiffs would in any event pay their proportion of the expenses incurred.

It was also contended that there had been a waiver, in letters which were admitted by the defendants, of the provisions of the statute as to the time within which an action must be brought.

The money was paid by the plaintiffs on the 30th of October, 1880, so that the six months expired on the 30th of April next following. On the 13th of April the plaintiffs' secretary wrote to the defendants as follows:—"I see that in a recent action brought by the Withington local board against Mr. C. Pearson for his proportion of the cost of repairing Lapwing Lane, the local board were defeated. If the board intend to let the judgment go without appeal, or if on appeal they are again defeated, I must ask for the return of 1,146*l.* 4*s.* 7*d.*, paid in respect of this lane last October." On the 21st of April, 1881, the defendants replied:—"In reply to your letter . . . . we beg to inform you that the board will appeal." Afterwards the plaintiffs enquired when the appeal would be heard; and the defendants replied, telling the plaintiffs the date, and promising to inform them of the result.

North, J., on further consideration, gave judgment for the defendants, holding that the notice and action were out of time, and that there had been no waiver by the defendants.

The plaintiffs appealed.

Gully, Q.C., and *S. Taylor*, for the plaintiffs.—The money now sought to be recovered was paid under a mistake of fact; but the provisions of section 264 (1)

(1) 38 & 39 Vict. c. 55. s. 264: "A writ or process shall not be sued out against or served on any local authority or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and, unless such notice is proved, the jury shall find for the defendant.

"Every such action shall be commenced within six months next after the accruing of the cause of action and not afterwards, and shall be tried in the county or place where the cause of action occurred, and not elsewhere.

"Any person to whom any such notice of action is given as aforesaid may tender amends to the plaintiff, his attorney or agent, at any time within one month after service of such notice, and, in case the same be not accepted, may plead such tender in bar; and in case

of the Public Health Act do not apply, and therefore the plaintiffs are not out of time, nor was notice of action necessary.

If an action is brought for a *tort*, or for the consequences of a tortious act, that may be considered to be, in substance, an action for something done under the Act, and in such a case notice of action may be necessary; but in the present case, where nothing has been done under the Act, and where money paid is sued for—that is, where there is a mere civil debt—then the proceedings out of which that debt arises cannot be said to be proceedings under the Act.

To bring a case within the category of those cases in which notice is reserved, there must be an illegality or a *tort*, or there must have been duress which compelled submission.

In *Waterhouse* v. *Keen* (2) the decision proceeded on the ground that, although the action was brought substantially for a *tort*, yet the plaintiff had chosen to waive the *tort* and proceed in *assumpsit*; and, that being so, the Court held that the form of the action did not matter. That case also turned, as did *Greenway* v. *Hurd* (3), on the question whether the defendants did or did not think that they were acting under the statutes relating to the respective cases.

In *Davies* v. *The Mayor of Swansea* (4), which is a decision on 11 & 12 Vict. c. 63. s. 139, it was admitted in argument that notice of action only applies to a *tort* or *quasi tort*. *Judge* v. *Selmes* (5) was a case in which the defendants who had made the rate could have enforced it by distress, without the persons liable to pay being able to contest it; so that the action was for a *quasi tort*.

The insertion of the words "omitted to be done" does not alter the effect of the statute—*Newton* v. *Ellis* (6), *Poulsum* v. *Thirst* (7) and *Wilson* v. *The Mayor of Halifax* (8). They cited also *Irving* v. *Wilson* (9), *Umphelby* v. *McLean* (10) and *Wallace* v. *Smith* (11).

It is further submitted that the defendants waived their rights under section 264 of the Public Health Act by informing the plaintiffs, in answer to a letter from them, that they would appeal against a certain decision given in another case affecting the same question, and that they would inform the plaintiffs of the result.

Ambrose, Q.C., and *Heywood*, for the defendants, were not called on.

BRETT, M.R.—In this case an action was brought by the plaintiffs against a local board to recover a sum of money paid by them to the board under, as it is alleged, a mistake of fact. It is to be taken that the alleged mistake did really exist, and that if the plaintiffs have pursued the right procedure, they are entitled to recover the money which they have paid. The question is, whether the action has been brought within the time limited by section 264 of the Public Health Act, 1875 (1), and whether the time fixed by that section applies to this action. The answer to this question must depend upon the construction to be placed upon the section. It appears that the local board, the defendants, supposed that a certain road was a particular kind of road, and that they had a right to do certain things in respect of that road. This being so, they exercised the rights which they supposed existed; they accordingly required the plaintiffs to do certain works to or in connection with that road, and they gave them notice that if they did not

amends have not been tendered as aforesaid, or in case the amends tendered are insufficient, the defendant may, by leave of the Court, at any time before trial, pay into Court, under plea, such sum of money as he may think proper; and if, upon issue joined, or upon any plea pleaded for the whole action, the jury find generally for the defendant, or if the plaintiff be non-suited, or judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly."

(2) 4 B. & C. 200.

(3) 4 Term Rep. 553.

(4) 8 Exch. Rep. 808; 22 Law J. Rep. Exch. 297.

(5) 40 Law J. Rep. Q.B. 287; Law Rep. 6 Q.B. 724.

(6) 5 E. & B. 115; 24 Law J. Rep. Q.B. 337.

(7) 36 Law J. Rep. C.P. 225; Law Rep. 2 C.P. 449.

(8) 37 Law J. Rep. Exch. 44; Law Rep. 3 Exch. 114.

(9) 4 Term Rep. 485.

(10) 1 B. & Ald. 42.

(11) 5 East, 115.

execute these works the local board would execute them themselves and charge the plaintiffs with the expenses so incurred. The local board did execute the works themselves, and charged the plaintiffs with the costs thereof; and the plaintiffs, under a mistake as to the kind of road on which these works were done, paid the money so claimed. It is, I think, obvious that the defendants believed that they were exercising rights conferred by the statute, and that in all the steps they took they believed they were following the authority given by, and the provisions contained in, the statute; and it is also clear that unless they were acting under the statute they had no right to take any of the steps which they did take.

The mistake was afterwards discovered. The road in question was not the kind of road it was supposed to be, and the plaintiffs, accordingly, demand to be repaid the money thus paid to the defendants. I incline to think that the defendants who refused to repay this money believed they were acting under the statute; but it is not necessary to decide that.

The action brought by the plaintiffs is in form an action for money had and received; but the action so brought is brought more than six months after anything was done whence a cause of action could accrue. The whole question is, whether the defendants are entitled to rely upon the limitation of six months as an answer to this action. Section 264 of 38 & 39 Vict. c. 55 (1), provides that "a writ or process shall not be sued out against or served on any local authority or any member thereof . . . . for anything done or intended to be done or omitted to be done under the provisions of this Act until the expiration of one month after notice in writing has been served on such local authority, member, officer or person. . . Every such action"—that obviously means an action under the statute—"shall be commenced within six months next after the accruing of the cause of action and not afterwards. . . . Any person to whom any such notice of action is given as aforesaid may tender amends to the plaintiff . . . . at any time within one month after service of such notice; . . . and in case amends have not been tendered as aforesaid, or in case the amends tendered are insufficient, the defendant may, by leave of the Court, at any time before trial, pay into Court under plea such sum of money as he may think proper. . . ." The inclination of my opinion is that the person who drew that section was thinking more of an action in *tort* than of an action in contract when he inserted the provisions as to the tender of amends, for those provisions seem to have regard rather to an action which sounds in damages than to an action in which a specific sum is sought to be recovered as for a breach of contract.

I am prepared to hold that section 264 (1) applies to every case, whatever may be the form, in which the matter in dispute is something done or intended to be done or omitted to be done in the *bona fide* belief that it was done or omitted to be done under the statute. It has been said on behalf of the appellants that the section can only apply to cases in which the action might be framed and brought as on a *tort*, and in which the plaintiff has chosen to waive the right to bring that action, and to sue for money had and received. I think that such a rule would be too narrow, and that the Legislature intended to lay down the rule to the effect which I have expressed, that where an action is brought in respect of something done or omitted to be done, which thing was done or omitted to be done in the *bona fide* belief that it was an act done or omitted to be done under the statute, then the section applies. It was further said that the action was brought on a contract, and that if the action was in respect of a breach of that contract this section does not apply. I think it is true to say that where there is a specific previous contract under which the act is done, then the act so done or omitted to be done is not so done or omitted to be done by virtue of the statute.

It is urged that in this case there is an implied contract to repay the money paid, because the action is brought for money had and received. I think that there is a fallacy in that argument; I think that there never was a contract. In the old forms used in former days it was difficult

to say under which form of known writ an action was to be brought; and the Judges held that it might, in such a case, be brought as if there had been a contract between the parties; they did not hold that there was such a contract, but they said that the action might be brought as *ex quasi contractu*, thereby assuming that there was no real contract. It is called, indeed, sometimes an implied contract; but then that means that such a contract is considered to arise from the acts of the parties, although there was, in fact, no contract between them. The action for money had and received was used beneficially by the Courts for different purposes; it was used, for instance, in the case of a toll improperly demanded; but yet, in that case, no contract could be said to exist, and, in truth, the fact that the action is in form for money had and received does not shew that the matter in dispute arose out of contract.

The question is, whether the action arose out of something done or omitted to be done under the statute; if so, then the defendants were entitled to notice, and, although the use of the phrase "tender amends" does point somewhat in the direction of an action for a *tort*, yet I do not think it outweighs the considerations to which I have adverted, and which lead me to the conclusion that this appeal must be dismissed.

None of the cases cited are inconsistent with this conclusion, and the reasons given in *Waterhouse* v. *Keen* (2) shew that in this case the defendants were entitled to notice of action. The Act on which this case arises is to the same effect as the earlier Act on which that case was decided, although there is a fuller expression in this Act than in the earlier Act. The Judges were clearly of opinion in that case that the Court ought not to be bound by the form of the action, but that the real nature of the dispute ought to be considered; and if we were to decide this case adversely to the defendants we should have to overrule the case of *Selmes* v. *Judge* (5), for it is in exact accord with the present case. I cannot disagree with that case; I think it was rightly decided, and it was decided on a statute which was less full in its terms than the statute now under consideration, for it did not contain the words "or omitted to be done." Those words were added in the Act of 1875 after the decisions to which we have been referred. It is suggested that they have no particular force or meaning; but the framers of the Act were aware of the arguments which had been raised in those cases, and these words were probably introduced to meet and avoid the refinements of argument which were formerly used. The object has failed, but the arguments also fail; without these words they would have failed, with them they must also fail.

With regard to the suggested waiver, I can see no ground for the suggestion; the defendants gave a truthful answer to a question put to them, and I am of opinion that they did nothing to mislead the plaintiffs, or which can be construed as a waiver.

LINDLEY, L.J.—I am of the same opinion. There was a mistake as to the facts relating to the road on which the works were done. The road was supposed to be a highway not repairable by the inhabitants at large, and on that theory the defendants called on the plaintiffs to do certain works, and in the default of the plaintiffs, they did them themselves. The plaintiffs, on the real facts being discovered, sued to recover the money. The defendants raise two defences under section 264 of the Public Health Act, 1875 (1); they say they had no notice of action, and that the action was begun too late. Is, then, the action brought for anything done under the statute? The taking and the keeping the money gives the right of action; but I do not think that the keeping the money can be considered to give a separate cause of action from that arising from the taking the money; it is not like a continuing trespass. Now the taking the money was an act done under the statute, and if the keeping the money forms part of the cause of action, then I think that that also was done under the statute. That was an act done, and if it is said that the not returning the money was not an act done, then I think that the words "omitted to be done" cover that cause of complaint.

I think that the defendants intended to

act under the statute, and this view is supported by the cases of *Waterhouse* v. *Keen* (2) and *Judge* v. *Selmes* (5). I am not inclined to decide this question on a critical distinction between actions of *tort* and actions on contract. I do not think such minute distinctions can in this case be drawn, and I think the defendants are entitled to the protection given by section 264, unless they have waived their rights under that section. I do not think there was any such waiver, nor have the defendants done anything to deprive themselves of the right to set up the defences given by the statute, for more would be required than the letter written by them in reply to the question asked by the plaintiffs to oust their right to set up the want of notice and the limit of time reserved and fixed by the statute.

FRY, L.J.—I have come to the same conclusion. Section 264 (1) contains the words "done or omitted to be done"; that means done or omitted to be done under colour of the provisions of the Act, and it seems to me that the substance of the matter must be looked at. The substantial thing is that this is an action for unlawfully taking money from the plaintiffs under the Act, so that the case is within the words of the statute. The case of *Waterhouse* v. *Keen* (2) supports this view. Mr. Justice Holroyd there said, "The action in form is for money had and received to the plaintiff's use, but in substance it is brought to recover money alleged by the plaintiff to have been unlawfully taken by the defendant as toll, under colour of the authority of the Act. The demanding and taking the toll was an act done in pursuance of the Act. This is a case, therefore, within the words of the Act." Again, the case of *Judge* v. *Selmes* (5) is in accordance with this conclusion. Mr. Justice Blackburn there said, "The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him. In these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention." It is said that these cases do not apply to the present case; it is said that the unlawful reception of this money was not an act within the statute, as there was no exercise of either physical or legal power which would give rise to an action of *tort*; that is, as it seems to me, an argument addressed to the form and not to the substance of this matter. I agree also that there has been no waiver by the defendants of their rights under section 264 of 38 & 39 Vict. c. 55.

Appeal dismissed.

Solicitors—Beale, Marigold & Beale, for plaintiffs; Chester & Co., agents for H. T. Crofton, Manchester, for defendants.

[IN THE COURT OF APPEAL.]

1883. June 18. COVENTRY, SHEPPARD AND COMPANY *v.* THE GREAT EASTERN RAILWAY COMPANY.*

Railway Company—Common Carriers—Advice Notes—Negligence in issuing Two Notes referring to One Consignment—Estoppel.

The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "charges only"; the invoice number was different; the consignment was described as 151 *sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom*

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs, having lost the amount of one of the advances so made by them, sued the defendants for the amount:— Held, *that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat.*

Appeal from the judgment of Pollock, B., at the trial without a jury.

The statement of claim alleged that, on the 12th of December, 1881, Bowden & Co. indorsed and delivered to the plaintiffs a delivery order addressed by Birkett & Co. to the defendants, directing them to deliver to Bowden & Co. a parcel of 150 sacks of wheat, which was represented by the order to be in the custody of the defendants as bailees; that on the 13th of December the plaintiffs presented the order to the defendants, who accepted the same, and permitted the plaintiffs to take samples of the wheat; that on the 14th of December the plaintiffs received from Bowden & Co. a delivery order addressed to the defendants, directing the defendants to deliver to the plaintiffs a parcel of 151 sacks of wheat, more particularly described in an advice note signed by the defendants and addressed to Bowden & Co., which advice note acknowledged that the 151 sacks were at the defendants' station.

On the 14th of December the plaintiffs presented the advice note and delivery order to the defendants, who accepted them, and permitted the plaintiffs to take samples of certain wheat, which the defendants represented to be the 151 sacks mentioned in the advice note and delivery order.

The plaintiffs had made advances upon the security of the delivery order first mentioned, and they further, upon the faith of the conduct and representation of the defendants above mentioned, made other advances upon security of the second advice note and delivery order.

The defendants, by their conduct and representations, recognised the plaintiffs as persons entitled to the delivery of two several parcels of 150 and 151 sacks of wheat, and the position of the plaintiffs was changed by reason of the conduct and representations of the defendants.

The defendants delivered only 151 sacks, whereby the plaintiffs lost the money advanced by them on the 150 sacks. Alternatively, the plaintiffs say that the defendants have wrongfully converted the undelivered wheat, and deprived the plaintiffs of the possession thereof.

The statement of defence denied the allegations in the statement of claim, and alleged that on the 9th of December the defendants received certain trucks of wheat consigned to Bowden & Co., and that on that day they sent a preliminary advice note, and that on the 13th of December a further advice note containing full particulars was sent; that both the advice notes referred to the same 151 sacks of wheat, which was all the wheat in the possession of the defendants.

It appeared that on the 12th of December, 1881, Bowden & Co. obtained from the plaintiffs an advance of 330*l.* upon certain documents representing goods in the care of the Great Eastern Railway Company. They produced and gave to the plaintiffs the following document, addressed to the railway company, and signed by Birkett & Co.:—

"Deliver to Messrs. Bowden & Co. the 50$\frac{5}{8}$ qrs. of wheat, trucks 8,328, 8,752, 7,900; and 150 sacks, trucks 787–11,719–12,814, 4,538, containing wheat from Seagrave, as per orders lodged."

This delivery order was lodged by the plaintiff with the defendants on the 13th of December, and they accepted it. On the 14th of December Bowden brought to the plaintiffs another delivery order, made out upon one of the printed forms of the railway company, to the following effect:—

"M. Bowden & Co.,—The undermen-

tioned grain, consigned to you, having arrived at this station, I will thank you for instructions as to its removal hence as soon as possible, as it remains here to your order, and is now held by the company, not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges, in addition to the charges now advised.

"When you send for the grain please to send this note. No delivery effected after p.m. The directors require all charges to be paid on delivery unless the consignee has a ledger account with the company.

"For the Great Eastern Co.,
"*pro* E. Armstrong,
"Robert Farr."

Invoice No.	From Seagrave	Quantity and Description of Grain	Weight				Rate	Paid on	Total to pay
			tons	cwts.	qrs.	lbs.			
3,330	4,538 12,814 21,719 787	151 sacks of wheat (Midland Railway sacks)	16	14	1	12	5*s.* 10*d.*	6*s.* 4*d.*	£5 17*s.*

"NOTICE.—Please sign the undermentioned order, without which the goods cannot be delivered.

"*To the Great Eastern Railway.*

"Please deliver the above-mentioned goods to Coventry, Sheppard & Co., or bearer.

"Bowden & Co."

The words "charges only" were written across the general conditions printed at the head of this document. The plaintiffs advanced to Bowden a further sum of 190*l.*, and on the 14th of December lodged the above delivery order with the railway company, sending with it the following letter:—

"We hand herewith advice notes for 151 sacks wheat, dated Dec. 13/81, from Seagrave, *ex* trucks 4,538, 12,814, 21,719 and 787; also advice note for sacks wheat 1 truck (20 qrs.), No. 12,839, dated 13/12/81, which please hold to our orders —all charges to Messrs. Bowden & Co.; also corrected advice note. No. 3,329, for 12 qrs. wheat, dated 13/12/81, truck 6,214."

The plaintiffs took at different times samples of wheat, which, as they understood, were samples of the two different parcels.

In January, 1882, the plaintiffs desired to realise the securities for the purpose of recouping themselves the amount of the two advances made by them to Bowden, who had become insolvent; but when they tried to sell the two parcels of wheat, the defendants stated that there was in fact only one parcel of wheat, and that the two delivery orders related to the same parcel. They stated that 151 sacks of wheat came from Seagrave to the defendants' station in Devonshire Street. No invoice accompanied these goods, but the defendants took from the tickets on the trucks such particulars as they could get, copied them on to one of their printed forms similar to the one already set out, and sent it as a preliminary advice note to Messrs. Bowden & Co., the consignees of the goods. In this form they filled in the number of the invoice, and the description of the goods as "sacks wheat—4 trucks." They did not fill in the columns headed "Weight," "Rate," "Paid on," "Total to pay," but in these spaces wrote "Account to follow." This document was indorsed "Bowden & Co.,—Deliver to our printed order. Birkett, Sperling & Co." This document did not come to the knowledge of the plaintiffs.

The plaintiffs lost 113*l.*, which they sought to recover in this action.

Pollock, B., gave judgment for the plaintiffs.

The defendants appealed.

French (*Forbes, Q.C.*, with him), for the defendants.—There is no estoppel. The neglect must be in the transaction itself, and be the proximate cause of leading the third party into the mistake, and must be

the neglect of some duty owing to the third person or the general public—*Swan* v. *The North British Australasian Company* (1), *Arnold* v. *The Cheque Bank* (2) and *Baxendale* v. *Bennett* (3). Here there was no duty by the defendants to the plaintiffs, and no privity between them. The documents were not intended by the railway company to have the character of negotiable instruments; nor are they considered in business to be such; and their object is to inform the consignee of the arrival of the goods, and the documents are intended to be confined to the consignee, to whom alone, and not to any purchaser, the goods are to be delivered—*Carr* v. *The London and North Western Railway* (4) and *Farmeloe* v. *Bain* (5). It must therefore be shewn, as in *The Merchant Banking Company of London* v. *The Phœnix Bessemer Steel Company* (6), that the documents were used for the purpose for which they were intended. The company cannot be taken to have issued these notes as documents upon which money could be raised; nor were they to assume that Bowden & Co. would make fraudulent use of the documents—*La Société Générale* v. *The Metropolitan Bank* (7). Again, the advance was not made on the faith of the first document, for the plaintiffs never saw that, and it was not acted upon by them; and the second note was only a correction of the first, being only a note of charges. The dishonesty of Bowden & Co. was the cause of the loss to the plaintiffs. Nor was there misrepresentation by the defendants, for misrepresentation, to be actionable, must be fraudulent—*Dickson* v. *Reuter's Telegraph Company* (8); and carelessness will not raise an estoppel without fraud.

Finlay, Q.C., and *A. Gray*, for the plaintiffs.—The appellants' argument ignores the fact that the order was lodged with the defendants and accepted by them. They must have known that Bowden & Co. could obtain money on the order of the 13th of December, for they issued it "To ——, or bearer." It is not open to them to raise the point that money is not usually lent on such documents, for the only point suggested at the trial, and in the Divisional Court, was that the document of the 13th was a note of charges. The position of the plaintiffs was so altered by their relying on the second note that they could not get their money back—*Knights* v. *Wiffen* (9). The case of *Carr* v. *The London and North Western Railway* (4) is distinguishable, for the advice notes there were different from those now in question; and it does not appear from the report whether there was a delivery form at the foot, and the sale was not on the faith of the advice notes. The plaintiffs have been misled, to their prejudice, by the conduct of the defendants, within the principle of *Freeman* v. *Cooke* (10).

BRETT, M.R.—I am of opinion that the judgment appealed from should be affirmed. It can only be upheld on the ground that there is at law an estoppel between the plaintiffs and the defendants—that is, that the defendants are prevented from relying on the fact that there were not two parcels of goods. In this case there was one parcel of goods in the hands of the defendants, which, according to the contract with the consignor, they were bound to deliver to Bowden & Co. On the 9th of December they sent a document to Bowden & Co., which has been dealt with before us as if it contained only the particulars of the weight and description of the goods referred to in it. But it contains a great deal more. It is in the form of the document, which states to Bowden & Co. that certain goods have arrived and are in the hands of the railway subject to their

(1) 7 Hurl. & N. 603; 31 Law J. Rep. Exch. 425; 2 Hurl. & C. 175; 32 Law J. Rep. Exch. 273; 2 Sm. L.C. (8th ed.), p. 898.
(2) 45 Law J. Rep. C.P. 562; Law Rep. 1 C.P. D. 578.
(3) 47 Law J. Rep. Q.B. 624; Law Rep. 3 Q.B. D. 525.
(4) 44 Law J. Rep. C.P. 109; Law Rep. 10 C.P. 307.
(5) 45 Law J. Rep. C.P. 264; Law Rep. 1 C.P. D. 445.
(6) 46 Law J. Rep. Chanc. 418; Law Rep. 5 Ch. D. 205.
(7) 27 Law Times, 849.
(8) 46 Law J. Rep. C.P. 197; Law Rep. 3 C.P. D. 1.
(9) 40 Law J. Rep. Q.B. 51; Law Rep. 5 Q.B. 660.
(10) 2 Exch. Rep. 654; 18 Law J. Rep. Exch. 114.

order; and it goes on to say, "Notice.—Please sign the undermentioned order, without which the goods cannot be delivered." Then the form of that order is given, and those first words are a request to Bowden & Co. to sign it, if they think fit. That undermentioned order is, "To the Great Eastern Railway Company.—Please deliver the above mentioned goods to ———, or bearer." The first words are a request to Bowden & Co. to sign the document. The order is "Please deliver the above-mentioned goods to ——— or bearer." Now if I had to read that considering it is a document given in the course of business, I might be in doubt whether that meant "please to deliver to a mere servant of the person to whom it is sent"—that is, to Bowden & Co., and to no one else. But it is inconsistent with that view, it is "to ———, or bearer." If I might have been in doubt as to that upon the document as it stands by itself, I have means of reading what was the intention of the defendants, and what any one would suppose to be their intention, by the way in which they dealt with it. The document of the 9th of December was indorsed by Bowden & Co. in blank, but was handed over by them to Birkett, Sperling & Co., who used it as an order made in their favour by Bowden & Co. They gave notice of that to the railway company, who then held the goods for them; and therefore the railway company got from Birkett, Sperling & Co. that notice to hold the goods for them. No one would suppose that that was a notice to the company that Birkett, Sperling & Co. were mere carmen, who were going to take delivery for Bowden & Co. "Hold these for us,"—that does not mean that they were to take them as carters, but that was a dealing with the indorsement as if the notice was "Please deliver to Birkett & Co."

What did the railway company do? The evidence is clear that they undertook to hold them for Birkett, Sperling & Co. That shews at once that the meaning they have put upon their document is that which I should have put upon it—namely, that it means "Please sign this in favour of a person who shall not be a mere servant or agent ordered to take delivery for you," —and that is the way it was acted upon. The moment you find in business affairs that goods are to be delivered to a person, who will take delivery of them as his own, and not as a mere agent, it follows that the company will deliver to a person who has bought them or advanced money on them—for, in business, people are not in the habit of making gifts.

Birkett, Sperling & Co. indorsed this to the plaintiffs, and thereupon the defendants, having notice from the plaintiffs, obviously agreed to hold them for the plaintiffs. Therefore, by their conduct, they shew that if the plaintiffs handed over the document to another person, who handed it to a third person, they would deliver to that third person. That could only be if it was not to a mere servant, but to a merchant who has dealt with the goods by paying for them or doing something equivalent. If we take it that they themselves, forgetting, or not knowing, what had happened, dealt with the order of the 12th of December as an order for other goods, they dealt with it in precisely the same way—that is, they agreed to hold it for people who were getting a right from Birkett, Sperling & Co., and therefore twice over they acted upon their own interpretation of their own conduct. It was said that in the second case they did not act in that way, because it is said that they considered the second transaction did carry out the first, that is, that the second document was delivered as an account, that is, as an invoice. It seems to me that they did not think so in the first place, and certainly ought not to have thought that any one else would have thought so. The document contains a series of stipulations, with a delivery order at the foot, and because the words "charges only" are written upon it, a person, who knows nothing of what has occurred previously, is to suppose the document is equivalent to an invoice, when it has neither the appearance nor the likeness of an invoice. Nor do the company treat it as such, for when it was sent back indorsed, they did that which in mercantile business is equivalent to an acceptance of an order to hold the goods for the plaintiffs.

Let us see how the plaintiffs dealt with the matter. Upon the first document

being brought to them they took it as an order for goods, and advanced money; and in respect of that advance they took this order, which was that the company should deliver the goods to them; and they lodged that order with the defendants.

As to the first case it cannot be doubted that the railway company undertook to hold the goods for the plaintiffs. Upon the second document being taken to them, the plaintiffs treated it as representing an admission by the company that they were holding their goods, and as an undertaking by the company to the consignor of these goods that they would deliver them to the person to whom they were ordered by the document to deliver them. Therefore they advanced the money and sent the order to the company. They advanced the money because this document was presented to them, and it is clear that without it they would not have made the advance.

The question with regard to the second document is whether the defendants are estopped from saying to the plaintiffs, who had advanced money because of it, "It is true that might be taken to be an order and an undertaking by us that we would deliver to the person who should produce this order with an indorsement on it; but we never had the goods, and therefore we cannot deliver them to you." Whether they are estopped depends upon whether you bring the case within the admitted doctrine which raises an estoppel. In *Carr* v. *The London and North Western Railway Company* (4), the Court endeavoured to lay down certain propositions which had been before acknowledged to be those within which, if you can bring certain facts, they do raise in law an estoppel. The one which will govern this case, if any, will be the last, namely, "If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist."

Therefore, the first question is whether the defendants have been, within the meaning of that proposition, guilty of culpable negligence. If the documents would, as regards the plaintiffs, have a certain meaning, which I have already stated was that upon which the defendants themselves acted, then to send out two sets of documents with regard to one parcel of goods can hardly be said not to be negligent. It was said that there is no negligence without duty. That is true. But if the documents would in business have the meaning which I think the defendants themselves gave to them by their notice, and therefore shewed that in their view they would have that meaning in business, then the defendants did owe a duty to the person who would act upon that information given by the documents. Therefore the defendants were guilty of culpable negligence calculated to have the result which has happened—that is, that money was advanced on the faith of the second document. And such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake on such belief, to his prejudice. The word "proximate" is no doubt put in in pursuance of the judgment given by Mr. Justice Blackburn in *Swan* v. *The North British Australasian Company* (1). I should myself say that does not mean that which must be the *causa proxima* within the meaning of that phrase in insurance law, but it means it must be the immediate and direct cause. If the proper meaning of such a document to a business man is that it is an order upon sight of which he would be induced to do certain things, then when he does that thing this document is the immediate and direct cause of his doing that thing, and is therefore proximate within the meaning of that proposition. Therefore the negligence in respect of this duty, which the defendants owe to persons in the position of the plaintiffs, was the direct and immediate cause of the plaintiffs doing the thing which they did—that is, to advance money to the persons who had this document in their possession. And it certainly was to the prejudice of the plaintiffs, because they advanced their money by reason of this document to people who were, by reason of the negligence of the defendants, enabled to commit the fraud which

they did commit. Therefore, it seems to me that this case is within the last proposition in *Carr* v. *The London and North Western Railway Company* (4), and that the defendants are estopped as against the plaintiffs, by reason that their negligence was the immediate and direct cause of the plaintiffs advancing their money upon sight of this document which had been negligently issued.

I do not think that the fact of the defendants having afterwards accepted the second order, and agreed to hold for the defendants the goods which it represented, is a ground of estoppel in this case, because that was not the cause of the money being advanced, for it had already been advanced; and upon the evidence before us it cannot be said that they prevented the plaintiffs getting the money which they would otherwise have got, because I should have come to the conclusion that the fact of their saying they would hold the goods for the plaintiffs did not alter their position, for the moment the money was in the hands of Bowden & Co. it was as much gone from them as if it was thrown away into the sea. I think their having accepted the last document is fatal upon the point they have taken—that is, that the plaintiffs should have known that it was only an invoice, because they who issued it say it was to be considered to be an invoice. They did not treat it as an invoice. It is also fatal upon that point, because there is the strongest evidence of their treating these documents as documents which were to entitle people to believe that, if they did buy the goods mentioned in these documents, and if they got the order signed, the railway company would then act upon it and deliver the goods to them. I hold that those were not negotiable instruments, and not like bills of lading, and that no indorsement on them passes the property in the goods. This is not a question of passing property, but of estoppel; because, if the defendants were allowed to say the contrary, they would, by their negligence, have injured the plaintiffs. I am therefore of opinion that the appeal should be dismissed.

LINDLEY, L.J.—I am of the same opinion. Without going into the facts at any length, I may say that it is beyond all controversy, as a matter of fact, that the plaintiffs did advance money upon the faith of the second document of the 13th of December. The first thing is to look at that document, and to ascertain what it is and what it is not. It is not a document transferring property, but it is a document issued by the defendants, and containing certain statements of fact—namely, that the goods had arrived and were held by them, and that they would deliver them. That document of the 13th of December had marked upon it "charges only." One contention was that the plaintiffs, who had received a document of the 12th of December from Birkett, Sperling & Co., and which is now ascertained to have been in respect of the same goods, ought as business people to have seen that it was different from the other documents, and would convey an intimation that it was not what it would have been without those words. It seems to me that is not made out; and, as a matter of fact, the way in which the defendants acted upon it shews that it was not so. I cannot say, as a matter of fact, that the plaintiffs were in any way negligent or careless in not seeing that the second document must have referred to the sacks referred to in the order of the 12th of December. To go a step further, as to the consequence of the defendants having enabled Bowden & Co. to obtain money upon it, we find, when we look at the evidence as to what the defendants knew was done with these documents, they must be taken to have known that Bowden & Co. were persons who would use these documents to obtain money upon them.

The form of this document, and the way in which it was acted upon by the defendants, distinguishes this case from *Carr* v. *The London and North Western Railway Company* (4). The document there was of a different kind; and, so far as I can make out from the report, there certainly was no evidence shewing how the defendants themselves treated the documents. I think there is a distinction, in point of fact; and if we look at the principles applicable to the cases, this case is brought within the recognised doctrine of estoppel.

I will not restate them, as they are stated by Mr. Baron Wilde and by Mr. Justice Blackburn in *Swan* v. *The North British Australasian Company* (1), and in *Carr* v. *The London and North Western Railway Company* (4). Taking the law as there laid down, it appears to me that the case is within the recognised rule, and that the decision of Mr. Baron Pollock was right.

FRY, L.J.—I am of the same opinion. The first question is whether there was a custom in the trade to sell or pledge goods upon the faith of this document. It appears to me that the evidence leads to an affirmative answer.

Was there then a duty on the railway company to take any care at all? It appears to me that the moment you have established a custom to deal upon the faith of such a document, a duty arises upon the railway company to take reasonable care that the document so issued should be correct; therefore, there is here a duty which is an essential part of negligence. Was there culpable negligence? That turns upon a comparison of the documents of the 9th and the 13th of December. They appear to be so remarkably different that I should have come to the conclusion that they related to different property. The date of these documents is most material, because, by the rules at the end of the documents, this is to be deemed to determine the delivery of the goods. It determines the time from which, in three days, a claim is to be made for loss or damage, and creates an obligation to remove them within forty-eight hours after notice of arrival. The dates of the two documents are different, and therefore all the rules which run from that date apply differently to two classes of goods. The invoice number is also different, and therefore there is nothing to shew that the documents related to the same goods, except it be that the words "charges only" are written across the second document. If that was understood to be, in effect, an invoice, or a note of charges for some other goods of which the advice note had previously been sent, evidence should have been given of that; but none was. I observe that the second document requires the signature of the consignees before the goods can be delivered, and it is unreasonable to suppose that the railway company can require two separate signatures of consignees in respect of the same goods. It appears to me that the documents are so different, that no person looking at them, without special knowledge, could think that they related to the same goods. Therefore there was culpable negligence on the part of the defendants in issuing the document.

Was that the proximate cause of the loss sustained by the plaintiffs? It was said that it was not, because the first document did not reach the hands of the plaintiffs, but only a document which derived its origin from that document. But the real loss to the plaintiffs was the second advance, which was made in respect of the second document; and that, when signed and filled up, was that upon which they made the advance. Therefore, the second document was the one which was carelessly issued, and upon which the advance was made and the loss sustained. Therefore there was all the necessary evidence of duty, culpable negligence and proximate cause which brings the case within *Carr's Case* (4).

Judgment for the plaintiffs. Appeal dismissed.

Solicitors—Stibbard, Gibson & Co., for plaintiffs; W. F. Fearn, for defendants.

1883. June 9. } *Ex parte* SAUNDERS.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 95 *and* 96—*Notice to abate Nuisance—Order of Justices—Works necessary for the Purpose—Power to order Specific Works.*

[For the report of the above case, see 52 Law J. Rep. M.C. 89.]

[IN THE COURT OF APPEAL.]

1883.
March 5.
July 30.

HEAVEN *v.* PENDER.*

Negligence—Supply of Defective Article—Injury caused to Person using it with whom there was no Contract—Liability for Injury so caused.

The plaintiff was employed by G., who had contracted with a shipowner to paint a ship which was lying in the dry dock belonging to the defendant. The defendant had contracted with the shipowner to erect staging round the ship, for the purpose of having the ship painted. One of the ropes of the staging was defective, and while the plaintiff was standing on the staging and engaged in painting the ship, that rope broke, and the plaintiff fell into the dock and was injured. In an action against the dockowner for damages for the injury thus caused,—Held, *reversing the judgment of the Queen's Bench Division, that the defendant was liable for the injury thus caused to the plaintiff.*

Appeal from the judgment of the Queen's Bench Division making absolute a rule to enter judgment for the defendant.

The case is reported 51 Law J. Rep. Q.B. 465.

The owners of a steamship, which was berthed in the defendant's dry dock, engaged one Gray to paint her, and Gray engaged the plaintiff to carry out the work. The defendant contracted with the owners of the vessel to erect a staging, suspended by ropes and tackle, round the ship. While the plaintiff was standing on the staging, and engaged in painting the ship, one of the ropes broke, and the plaintiff fell into the dock. Evidence was given that the rope had marks of scorching upon it.

A County Court Judge held that the rope was defective and unfit for the purpose for which it was supplied, and that the plaintiff was entitled to recover.

A rule which had been obtained in the Queen's Bench Division, calling upon the plaintiff to shew cause why the judgment should not be set aside and judgment entered for the defendant, was afterwards made absolute.

The plaintiff appealed.

Charles, Q.C., and *C. Scott*, for the plaintiff.—The question is, whether the owner of the dock, who supplied and put up this staging, is responsible for the injuries received by the plaintiff. The contention is that he is responsible; because his servants either knew or were bound to know that the staging was not safe. The plaintiff was not a volunteer, and being there on lawful business he was entitled to rely on the tackle supplied for his use. The defendant was bound to keep the tackle in good condition; if he was negligent, or if there was a trap, then he is liable. The Divisional Court held that the case was within the principle of *Winterbottom* v. *Wright* (1); but that does not relieve the defendant from his liability, for if he supplied something to be used in connection with this ship by persons who had lawful business on the ship, he is liable for the consequences of the defective condition of the article supplied —*Smith* v. *The London and St. Katharine Docks Company* (2) That case is in point, for at the time when the plaintiff there was injured the gangway had been placed in an insecure condition by the negligence of the defendants' servants.

[BRETT, L.J.—The mischief there was caused, not by any defect in the gangway itself, but by the alteration in its position, and that was under the control of the defendants.]

Neither in that case, nor in the present case, were the defendants in actual possession of that through which the injury occurred. *George* v. *Skivington* (3) covers this case; and that decision extended the doctrine laid down in *Langridge* v. *Levy* (4) and *Longmeid* v. *Holliday* (5) to cases

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

(1) 10 Mee. & W. 109; 11 Law J. Rep. Exch. 415.

(2) 37 Law J. Rep. C.P. 217; Law Rep. 3 C.P. 326.

(3) 39 Law J. Rep. Exch. 8; Law Rep. 5 Exch. 1.

(4) 4 Mee. & W. 337; 7 Law J. Rep. Exch. 387.

(5) 6 Exch. Rep. 761; 20 Law J. Rep. Exch. 430.

where there was negligence without knowledge.

[BRETT, L.J.—Did not the defendant know in all those cases that some third person would use the article supplied? Here it was not so.]

Winterbottom v. *Wright* (1) only decided that a third party cannot take advantage of a contract. The duty there arose out of a contract to keep the coach in repair; so that it is not inconsistent with *George* v. *Skivington* (3); but if it be, then the latter case should be followed. *Collis* v. *Selden* (6) is to be distinguished, as the plaintiff in that case was only a licensee: he had no duty to perform which obliged him to enter the house; but in *Corby* v. *Hill* (7), where there was no contract, the defendant was held liable because he placed an obstruction on a way over which the plaintiff had a right to go. In cases between landlord and tenant, a liability is imposed on a landlord who demises premises in a dangerous condition — *Todd* v. *Flight* (8)—and the principle of these cases has been extended to cases of personal injuries.

[BOWEN, L.J.—Has the doctrine of *Farrant* v. *Barnes* (9) been extended to cases in which there was no knowledge that the goods shipped were dangerous?]

In *Brass* v. *Maitland* (10) Lord Campbell held that a person might not ship dangerous goods. It is said that *Blackmore* v. *The Bristol and Exeter Railway Company* (11) is adverse to the contention of the plaintiff; but in that case, as in *MacCarthy* v. *Young* (12), there was a gratuitous bailment by the lender. In such a case the lender must not lend what he knows to be defective and dangerous; and where the bailment is not gratuitous, a higher degree of care is required. The defendant had a duty imposed on him to have the staging fit for the purpose for which it had to be used. *Francis* v. *Cockrell* (13), *Indermaur* v. *Dames* (14) and *Gandy* v. *Jubber* (15) were also cited.

Bompas, Q.C., and *Dickens*, for the defendant.—The fact that the ship was in the dock of the defendant does not create any duty on the part of the defendant towards the plaintiff. The only liability which affects the defendant is one which arises out of a contract; and therefore the plaintiff, who is no party to this contract, cannot recover under it.

[BOWEN, L.J.—The allegation is that a duty arises out of what is done under a contract.]

Langridge v. *Levy* (4), and the cases which can be classed under that case, all shew that it makes no difference in principle that the person who supplies an article knows it is to be used by a class of persons, unless there is fraud or a representation which is acted upon, and therefore they are favourable to the defendant. It is said that in *Winterbottom* v. *Wright* (1) the defect was a latent one: the contract there was both to supply a coach and to keep it in repair; but the nature of the contract cannot affect the question. That case cannot be distinguished; and it lays down a clear principle that when the cause of complaint arises out of a breach of contract, only the parties to the contract can sue upon it.

[BOWEN, L.J.—The question of negligence did not arise in that case, as there was a breach of contract. The question is, whether that reasoning is applicable in the case of a duty which, it is alleged, arises under the contract. BRETT, L.J.—The liability which it is here sought to impose upon the defendants might arise, even if no contract existed.]

George v. *Skivington* (3) stands alone, and is not to be reconciled with a long series of cases, all of which tell in favour of the defendant. In *MacCarthy* v. *Young* (12) the defendant was found to have been

(6) 37 Law J. Rep. C.P. 223; Law Rep. 3 C.P. 495.

(7) 4 Com. B. Rep. N.S. 556; 27 Law J. Rep. C.P. 320.

(8) 9 Com. B. Rep. N.S. 377; 30 Law J. Rep. C.P. 21.

(9) 11 Com. B. Rep. N.S. 553; 31 Law J. Rep. C.P. 139.

(10) 6 E. & B. 470; 26 Law J. Rep. Q.B. 49.

(11) 8 E. & B. 1035; 27 Law J. Rep. Q.B. 167.

(12) 6 Hurl. & N. 329; 30 Law J. Rep. Exch. 227.

(13) 39 Law J. Rep. Q.B. 113 and 291; Law Rep. 5 Q.B. 184 and 501.

(14) 36 Law J. Rep. C.P. 181; Law Rep. 2 C.P. 311.

(15) 5 B. & S. 78 and 485; 33 Law J. Rep. Q.B. 151.

negligent, and yet he was not liable; and, unless negligence can be held to be equivalent to fraud, it is not possible to make the defendant liable in this action.

[COTTON, L.J.—Does not the principle by which a man is liable to a person who is injured by a public nuisance apply to cases in which an improperly constructed article causes damage to a limited class to whom it is supplied?]

The principles on which *Longmeid* v. *Holliday* (5) and *Blackmore* v. *The Bristol and Exeter Railway Company* (11) were decided are in point, and the latter case cannot be distinguished from the present case.

[COTTON, L.J.—There was no proof that the railway company intended that the crane should be used by other persons.]

The judgment of Willes, J., in *Collis* v. *Selden* (6) shews that there is no duty in such a case as this, unless there is a trap. The broad principle is, that if the damage complained of is, in effect, caused by a breach of contract, a person who is not a party to that contract cannot maintain an action—*Alton* v. *The Midland Railway Company* (16).

Cur. adv. vult.

The following written judgments were delivered on July 30:—

BRETT, M.R.—In this case the plaintiff was a workman in the employ of Gray, a ship-painter. Gray entered into a contract with a shipowner, whose ship was in the defendant's dock, to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use; that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff—a working ship-painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched, and were unfit for use, and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is, in form and substance, an action for negligence. That the stage was, through want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention, amounting to a want of ordinary care, is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is, whether the defendant owed such a duty to the plaintiff.

If a person contract with another to use ordinary care or skill towards him or his property, the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another, although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried, but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law, independently of the contract, by the facts with

(16) 19 Com. B. Rep. N.S. 213; 34 Law J. Rep. C.P. 292.

regard to which the contract is made, and to which it applies—an exactly similar but not a contract duty. We have not, in this case, to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not, in this case, to consider the question of a fraudulent misrepresentation express or implied, which is a well recognised head of law. The questions which we have to solve in this case are, What is the proper definition of the relation between two persons other than the relation established by contract or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property? and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought, by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage, the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property, other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers, it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite: you do not ask A B to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the

cases of collision and carriages. The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognised cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill, whereby injury happens, a legal liability arises, to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would, according to the rule above stated, imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge* v. *Levy* (4). It is not an easy case to act upon. It is not—it cannot be—accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated; and then it is said that a motion was made to enter a nonsuit, in pursuance of leave reserved, on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation, which is nevertheless a necessary question

in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect of it on a verdict in respect of which it is assumed that all questions were left to the jury. If this was the point taken, the report of the evidence and of the questions left to the jury is idle. The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the misrepresentation to be communicated to the son. Why he should have such an intention it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory one to act on as an authority. But, taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son and acted upon by him, such a decision upon such a ground in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of Baron Cleasby in the observations he made on *Langridge* v. *Levy* (4) in the case of *George* v. *Skivington* (3). In that case the proposition laid down in this judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly if the defendant, or any one in his position, had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the thing sold would endanger the personal safety of the wife. In *Corby* v. *Hill* (7) it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff; and Mr. Justice Willes stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Mr. Justice Willes, at p. 567, there is no mention of an allurement, or invitation, or trap. The facts suggested in that form are "that the plaintiff had licence to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that custom and probability, that the defendant negligently placed slates in such a manner as to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the licence lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment. In *Smith* v. *The London and St. Katharine Docks Company* (2) the phrase is again used of invitation of the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation between the parties which establishes the duty.

In *Indermaur* v. *Dames* (14) reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But again it is hardly possible to state facts which bring a case more completely within the definition of the present judgment.

In *Winterbottom* v. *Wright* (1) it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration; and the declaration does not seem to shew that the defendant, if he had thought about it, must have known or ought to have known that the coach would be driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff; the facts alleged did not bring

the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness, and it is as to too great remoteness that the observation of Lord Abinger is pointed when he says that the doctrine of *Langridge* v. *Levy* (4) is not to be extended.

In *Francis* v. *Cockrell* (13) the decision is put by some of the Judges on an implied contract between the plaintiff and the defendant; but Baron Cleasby puts it, at p. 515, upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words, he acts upon the rule above laid down. In *Collis* v. *Selden* (6) it was held that the declaration disclosed no duty. And obviously the declaration was too uncertain; there was nothing to shew that the defendant knew more of the probability of the plaintiff being near the chandelier than any other member of the public. There was nothing to shew how soon after the hanging of the chandelier any one might be expected or permitted to enter the room in which it was. The facts stated do not bring it within the rule.

There is an American case—*Thomas* v. *Winchester* (17)—cited in Mr. Smith's Treatise on the Law of Negligence (at p. 88) which goes a very long way. I doubt whether it does not go too far.

In *Longmeid* v. *Holliday* (5) a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule.

In *Gautret* v. *Egerton* (18) the declaration was held by Mr. Justice Willes to be bad on demurrer, because it did not shew that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there must be something like fraud. He says: "Every man is bound not wilfully to deceive others;" and then in the alternative he says, "or to do any act which may place them in danger."

There seems to be no case in conflict with the rule above deduced from well admitted cases. I am therefore of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true the proposition must be true. If it be the rule, the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was in a sense an invitation of the plaintiff by the defendant to use the stage. The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

Cotton, L.J.—Lord Justice Bowen concurs in the judgment I am about to give. In this case the defendant was the owner of a dock for the repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock owner as appurtenant to the dock and its use. After the stage was handed over to the shipowner, it no longer remained under the control of the dock owner. But when ships were received into the dock for repair, and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that at the time the appliances pro-

(17) 6 New York Rep. 397.

(18) 36 Law J. Rep. C.P. 1; Law Rep. 2 C.P. 371.

vided for immediate use in the dock were provided by the dock owner they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dock owner was decided in *Indermaur* v. *Dames* (14); and in *Smith* v. *The London and St. Katharine Dock Company* (2) the same principle was acted on. I think that the same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dock owner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to such repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dock owner.

Blackmore v. *The Bristol and Exeter Railway Company* (11) may be relied on as at variance with the opinion thus expressed by me, but I think that the objection is not well founded. If the plaintiff is to be considered as a volunteer, there would be no implied request or invitation to him by the defendant to use the dock and the appliances provided. But he was there for the purpose of work, for the due execution of which the defendant received the ship into his dock, and the defendant received payment as remuneration for allowing the work to be done in his dock, and for providing the necessary appliances for enabling it to be done. The plaintiff was therefore engaged in work in the performance of which the defendant was interested, and he cannot be looked upon in the light of a volunteer. Whether the Court was right in *Blackmore's Case* (11) in treating the plaintiff as a volunteer may be a question. But as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion at which I have arrived.

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take, for instance, the case of *Langridge* v. *Levy* (4), to which the principle, if it existed, would have applied. But the Judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to, Judges have treated fraud as the ground of the decision, as was done by Mr. Justice Coleridge in *Blackmore* v. *The Bristol and Exeter Railway Company* (11); and in *Collis* v. *Selden* (6) Mr. Justice Willes says that the judgment in *Langridge* v. *Levy* (4) was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis* v. *Selden* (6) and in *Longmeid* v. *Holliday* (5) (in each of which the plaintiff failed) are, in my opinion, at variance with the principle contended for. The case of *George* v. *Skivington* (3), and especially what is said by Baron Cleasby in giving judgment in that case, seems to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Baron Cleasby on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent for the purposes of that action to fraud, on which, as he said, the decision in *Langridge* v. *Levy* (4) was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that any one who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act. For the reasons stated I agree that the plaintiff is entitled to judgment, though I

do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.

Solicitors—E. J. Anning, for plaintiff; Watson, Sons & Room, for defendant.

1883. April 27.

FAWCUS *v.* CHARLTON.

Practice—Pleading—Demurrer—Notice in Lieu of Statement—Order XXI. rule 4.

The indorsement on a writ against the acceptor of a bill of exchange did not state the plaintiff's interest in the bill, nor whether it was a negotiable instrument. Notice in lieu of statement of claim having been delivered under Order XXI. rule 4, *the defendant demurred*:—Held, *no ground of demurrer; the defendant's proper course being to apply for a further statement to be delivered as provided by the rule.*

Robertson *v.* Howard (47 Law J. Rep. Q.B. 480) *not followed.*

This was an action on a bill of exchange against acceptor. The indorsement on the writ was—"The plaintiff's claim is against the defendant as acceptor of a bill of exchange. The following are the particulars:—Bill of exchange for 180*l.*, dated the 27th of March, 1882, drawn by Andrew M. Cohen & Co., upon and accepted by the defendant, payable three months after date—principal 180*l.*—interest 6*l.* 5*s.* 10*d.*—186*l.* 5*s.* 10*d.*"

Notice in lieu of statement of claim was delivered by the plaintiff under Order XXI. rule 4, whereupon the defendant demurred.

Poulter, for the defendant.—There is no allegation in the indorsement that the bill was indorsed to the plaintiff. As it is to be treated as a statement of claim, it is insufficient, as it does not shew the plaintiff's right to sue. In *Robertson* v. *Howard* (1) it was held that a notice was equivalent to an ordinary pleading, and a demurrer was allowed.

(1) 47 Law J. Rep. Q.B. 480; Law Rep. 3 C.P. D. 280.

[MATHEW, J.—The plaintiff had a right to use the indorsement in the form given in the appendix to the Judicature Act. If it was insufficient to enable you to plead, ought you not to have applied for a further statement?]

There was no necessity for the defendant doing so; the plaintiff gave a notice which should have been sufficient on the face of it when read with the indorsement.

Meysey Thompson, contra, was stopped.

WILLIAMS, J.—I am of opinion that this demurrer should be overruled. The intention of the Judicature Acts was to simplify the proceedings at the commencement of an action, and the rule was so framed that a plaintiff having indorsed his writ might treat it as a notice of his grounds of action, and might tell the defendant that he was not anxious to deliver a more formal statement of claim; his doing this being, however, subject to the defendant applying that he should deliver a fuller statement. So here, without saying that this indorsement shews a good cause of action as being a complete statement of everything necessary to be proved to render the defendant liable to the plaintiff, I think that a demurrer to the notice is not the proper course for the defendant to adopt who objects to the sufficiency of the information it contains. It may be a proper course in some cases, as, for example, where the indorsement sets forth exhaustively what is alleged to be the cause of complaint and that shews no right of action. But that is not this case. The defendant, if he wants more particulars, should apply to a Judge under the rule to order the plaintiff to amend and supply him with a further statement. We should defeat a beneficial provision were we to hold this demurrer good.

MATHEW, J.—I am of the same opinion. Rule 4 of Order XXI. only applies to writs specially indorsed, with respect to which it is of importance to defendants that the forms given should be generally adopted because they are inexpensive. The forms are applicable to cases where the defendant knows the particulars of the plaintiff's case, and they save expense in the matter of detail, and they are meant to be used as supplemented by the valuable

provision of giving the notice that they contain the plaintiff's claim. Then it is pointed out in the same rule what a defendant can do if he is prejudiced by the niggardliness of the statement: he can apply to a Judge to order a further statement. That course was not taken here. I think it should have been, and that it was not intended that a defendant should demur because an indorsement does not contain a full statement of claim.

Judgment for plaintiff.

Solicitors—Jackson & Evans, agents for Jackson & Jackson, Middlesborough, for plaintiff; H. W. Chatterton, agent for T. H. Ward, Middlesborough, for defendant.

1883. April 27. } HOLDER *v.* THE MAYOR, ETC., OF MARGATE.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Notice of Action—Action for Recovery of Land.*

Where an action was brought against a sanitary authority, to recover possession of some land of the plaintiff, which had been taken by the authority in the course of their operations, but without any consent given, or agreement as to purchase having been made,—Held, *that they were not entitled to notice of action under section* 264 *of the Public Health Act*, 1875.

This was an action brought to recover the possession of some land, claiming also mesne profits, and the statement of claim alleged that the defendants had taken and kept possession of the plaintiff's premises.

The 7th paragraph of the statement of defence set up that the defendants had got possession of the plaintiff's land as and being the urban sanitary authority for the borough of Margate, and that no notice of action had been served upon them as required by the Public Health Act, 1875, section 264.

The plaintiff demurred to this, on the ground that this was not a case in which notice of action was necessary.

H. D. Greene, for the plaintiff.—This action being to recover land, no compensation could be given nor amends made, so that the object of the section could not be attained, and therefore it is contended that it does not apply. In *Flower* v. *The Local Board of Low Leyton* (1), the Master of the Rolls in the Court of Appeal says that the section was intended to apply to an action for damages, not where an injunction is sought to restrain an immediate injury. So here the act of the defendants was not one done under the Act, which gives them no right to seize land with a liability only to make compensation, and the action is not for damages but for the land itself. In *Davies* v. *The Mayor of Swansea* (2), where a contractor sued a local board for breach of contract, it was held that no notice was required. Another consideration is, that if the section applies, then six months' possession of the plaintiff's land would be a bar to his ever recovering it again.

Prosser, contra.—The last-mentioned objection is ill-founded, because there would be a continuing trespass in respect of which the plaintiff could sue.

The ground of the decision in *Flower* v. *The Local Board of Low Leyton* (1) was that it was a case of pressing urgency, and irreparable injury was being done meanwhile. There is nothing of that sort here.

[MATHEW, J.—But it is said that the month's notice was to enable the party to make amends—how is that applicable here?]

We could make amends by reinstating the premises, or by paying whatever the plaintiff thought the fair value of the land.

WILLIAMS, J.—I think that this demurrer must prevail. The provision as to giving notice in the Public Health Act is inapplicable here. This is not an action for anything done under the Act, but to recover the land itself. I think further that the whole machinery of the section indicates that it can apply only where the

(1) 46 Law J. Rep. Chanc. 641; Law Rep. 5 Ch. D. 347.

(2) 8 Exch. Rep. 808; 22 Law J. Rep. Exch. 762.

wrongful act is the substance of the complaint in the action, so that amends may be tendered.

MATHEW, J.—I am of the same opinion. The section applies to actions brought to recover money compensation for acts done by the local authority in the course of their duty. The intention is that that body may offer a money compensation where it is suitable, and there is a month given within which to do it. But this is an action of ejectment, and nothing else (3).

Demurrer allowed.

Solicitors—Noon & Clarke, for plaintiff; Duncan, Warren & Gardner, agents for Foord-Kelcey, Margate, for defendants.

[IN THE COURT OF APPEAL.]

1883. June 23. } BEER *v.* FOAKES.*

Debtor and Creditor—Accord—Agreement to accept Less Sum than Debt—Payment to Creditor's Nominee.

An agreement by a debtor to pay to the creditor or his nominee a less sum than the debt payable to the creditor is not a sufficient consideration for an agreement by the creditor not to take further proceedings.

Judgment of Queen's Bench Division reversed.

Appeal by the plaintiff from the Queen's Bench Division. The case is reported *ante*, p. 426, where the facts and the written agreement, upon which the question turned, are fully set out.

A. P. B. Gaskell, for the plaintiff.

Holl, Q.C., and *Winch*, for the defendant.

Goddard and Son v. *O'Brien* (1) was referred to in the course of the argument.

BRETT, M.R.—Upon the true construction of this agreement, the plaintiff is not to take any proceedings to recover her judgment, and has not therefore any right to the interest thereon. In my opinion, however, the agreement is not binding on her. She had recovered judgment for a large sum of money against the defendant, who was bound to pay the judgment debt immediately. If he did not do so, the judgment debt would bear interest. Being so indebted, and unable to pay, he thereupon by this agreement got time to pay the debt by instalments. But the mere fact that the plaintiff gave time to the person who owed the money will not make the agreement binding, for she might have changed her mind, and then there would be no consideration for it. It was said that the plaintiff might not have recovered her debt at all if she had insisted upon being paid at once; but that is a matter of prudence and not of law. It was also said that the agreement binds the defendant to pay the plaintiff, or her executors or nominee. But, first of all, it is not binding upon him to pay the debt; although, no doubt, if he had paid the plaintiff, or her executors or nominee, he would have fulfilled the condition. I do not know what is the legal meaning of the word "nominee" in this agreement, which imposed no greater obligation upon the defendant than the law created. It has, in my opinion, no legal or practical meaning. The defendant was bound to pay the judgment debt, together with interest; and the rights of the plaintiff are the same as if the agreement never had existed. I am unable to agree with the decision of the Court below.

LINDLEY, L.J., and FRY, L.J., concurred.

Appeal allowed.

Solicitors—Mackreth, Bramall & White, for plaintiff; W. H. Hudson, for defendant.

(3) See *The Midland Railway Company* v. *The Withington Local Board*, *ante*, p. 689.

* *Coram* Brett, M.R.; Lindley, L.J., and Fry, L.J.

(1) Law Rep. 9 Q.B. D. 37.

[IN THE HOUSE OF LORDS.]

1883. May 1, 2. June 5. } YOUNG AND COMPANY *v.* THE MAYOR, ETC., OF ROYAL LEAMINGTON SPA.

Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 174—*Urban Authority—Municipal Corporation—Contract not under Seal—Executed Contract.*

The provision in the Public Health Act, 1875 (38 *& 39 Vict. c.* 55), *s.* 174, *requiring every contract made by an urban authority whereof the value exceeds* 50*l. to be in writing and sealed with the common seal of such authority, is mandatory, not directory, and applies, notwithstanding that the urban authority is a corporation independently of the Act, and that the contract was made by their agent appointed under their common seal, and has been performed by the other contracting party.*

Hunt *v.* The Wimbledon Local Board (48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48) *approved.*

The plaintiffs appealed from the decision of the Court of Appeal, reported 51 Law J. Rep. Q.B. 292; Law Rep. 8 Q.B. D. 579.

The plaintiffs had contracted to complete, and had completed, certain works for the corporation of Leamington, required by that body in its capacity of urban sanitary authority. The contract was above the value of 50*l.*, and was not under the seal of the corporation. The question was whether section 174 of the Public Health Act, 1875, barred their right to recover payment.

The facts are fully stated in Lord Blackburn's judgment.

Davey, Q.C., and *Edwyn Jones*, for the appellant.—Apart from the Public Health Act, 1875, an action may be maintained on an executed contract not under seal, if made for a purpose for which the corporation was created. The supply of water is such a purpose here—Public Health Act, 1875, s. 51.

[LORD BLACKBURN.—Do you say that where a contract is not *ultra vires* the seal is unnecessary?]

Unnecessary if the contract be to carry out an express purpose for which the corporation exists; necessary if the contract be merely ancillary—*Paine* v. *The Strand Union* (1).

The earlier authorities are not uniform; all are collected and examined in the judgment of Mr. Justice Wightman in *Clarke* v. *The Cuckfield Union* (2), which lays down principles since generally accepted. Of the earlier cases, *Church* v. *The Imperial Gaslight and Coke Company* (3) alone is irreconcilable with those principles. *Lamprell* v. *The Billericay Union* (4) and the case following it are distinguishable.

There are three classes of cases in which the seal is not required:—first, where the contract is necessary for the purposes for which the corporation exists and is executed; secondly, where it is for matters of small account necessarily of frequent occurrence in ordinary business; and, thirdly, where it is impossible to get the seal in time. *Clarke* v. *The Cuckfield Union* (2) has been followed in *Nicholson* v. *The Bradfield Union* (5), *Haigh* v. *The North Bierley Union* (6) and *Sanders* v. *The St. Neot's Union* (7). In *The London Dock Company* v. *Sinnot* (8) the contract was executory. In *Church* v. *The Imperial Gas Company* (3) there were *dicta* adverse to the view contended for, but the decision was that the case was not within class 2. In *The Mayor of Ludlow* v. *Charlton* (9), as in *Paine* v. *The Strand Union* (1), the contract was merely ancillary to the purposes of the corporation. *The Mayor of Stafford* v. *Till* (10), *The East London Waterworks Company* v. *Bailey* (11), *The London and Birmingham Railway Company* v. *Winter* (12), *Beverley*

(1) 8 Q.B. Rep. 326; 15 Law J. Rep. M.C. 89.
(2) 21 Law J. Rep. Q.B. 349.
(3) 6 Ad. & E. 846; 7 Law J. Rep. Q.B. 118.
(4) 3 Exch. Rep. 283; 18 Law J. Rep. Exch. 282.
(5) 7 B. & S. 774; 35 Law J. Rep. Q.B. 176; Law Rep. 1 Q.B. 620.
(6) E. B. & E. 873; 28 Law J. Rep. Q.B. 62.
(7) 8 Q.B. Rep. 810; 15 Law J. Rep. M.C. 104.
(8) 8 E. & B. 347; 27 Law J. Rep. Q.B. 129.
(9) 6 Mee. & W. 815; 10 Law J. Rep. Exch. 75.
(10) 4 Bing. 75; 5 Law J. Rep. C.P. 77.
(11) 4 Bing. 283; 5 Law J. Rep. C.P. 175.
(12) Cr. & Ph. 57.

v. *The Lincoln Gas Company* (13), *Horn* v. *Ivy* (14), and *Finlay* v. *The Bristol and Exeter Railway Company* (15).

Then has the Public Health Act, 1875, made the seal necessary where it would not have been before? It is submitted that it has not altered the law at any rate as to corporations existing independently of that Act. They retain their former powers with the addition of those conferred by the Act—*Nowell* v. *The Mayor of Worcester* (16) (a decision on the Public Health Act, 1848, 11 & 12 Vict. c. 63). Sections 173 and 174 are merely directory. It is nowhere said that a contract not under seal shall not be enforceable. If the law would imply a contract without resort to those sections the remedy is not taken away. In the cases of *Frend* v. *Dennett* in the Common Pleas (17) and in Chancery (18), decided upon section 85 of the Public Health Act, 1848, the corporations were creations of the Act, having no independent power of contracting. It is also submitted that the decisions were not correct. As to the difference between a municipal corporation and a local board, see *Andrews* v. *The Mayor of Ryde* (19). *Hunt* v. *The Wimbledon Local Board* (20), which has been thought to govern the present case, was rightly decided, because the contract there was not for the purpose for which the board existed; but the proposition laid down in the judgment that section 174 is obligatory is incorrect.

The Solicitor-General (*Sir F. Herschell, Q.C.*), *Mellor, Q.C.*, and *Dugdale, Q.C.*, were not called upon.

Cur. adv. vult.

Lord Blackburn.—This is an appeal against an order of the Court of Appeal dismissing with costs an appeal against the judgment of the High Court of Justice, Queen's Bench Division, in favour of the respondents, on a Special Case.

The arguments of the appellants' counsel were fully heard on the 1st and 2nd of May; and the further hearing of the cause was then adjourned *sine die*. I believe all the noble and learned Lords who heard the argument agree with me in thinking it unnecessary to call upon the counsel for the respondents to argue, as they all agree that the order appealed against must be affirmed.

By the Special Case it appears that the Municipal Corporation of the Royal Leamington Spa are, under the 6th section of the Public Health Act, 1875 (38 & 39 Vict. c. 55), acting by their council, the urban authority for the district, consisting of the borough. The defendants, as such urban authority, had made a contract under their seal with one Powis for the execution of works for supplying the district with water. Powis failed to complete this contract, and it was put an end to. The council, in their capacity of urban authority, as far as they could do so by resolutions not under seal, authorised their engineer and surveyor, Mr. Jerram, to enter into a contract for completing the works left not completed by Powis.

The Special Case then proceeds: "Thereupon the said Jerram, as the engineer, agent and servant of the corporation, and acting within and according to his duties, powers and authorities as such, and also acting in accordance with and in fulfilment of the provisions of the said condition 115 of the said contract with the said Charles Powis, employed the plaintiffs to execute, carry out and complete the said unfinished works according to the contract and specification aforesaid, and also to execute and complete the said additional works, upon certain terms then agreed upon between them; and the plaintiffs accepted and entered upon the said employment upon the said terms, and completed the whole of the works, including what has been described as the 'contract works' and the 'additional works,' to the entire satisfaction of the said engineer. The said employment of the plaintiffs was in fact an employment

(13) 6 Ad. & E. 829; 16 Law J. Rep. Q.B. 113.

(14) 1 Vent. 47.

(15) 7 Exch. Rep. 409; 21 Law J. Rep. Exch. 117.

(16) 5 Exch. Rep. 457; 23 Law J. Rep. Exch. 139.

(17) 4 Com. B. Rep. N.S. 576; 27 Law J. Rep. C.P. 314.

(18) 5 Law Times, N.S. 73.

(19) 43 Law J. Rep. Exch. 174; Law Rep. 9 Exch. 302.

(20) 48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48.

of them by the corporation through the said Jerram as their engineer, agent and servant, and the relation of employer and employed never in fact existed or was created between the plaintiffs and the said Jerram. A memorandum in writing of the said employment and of the agreement between the said Jerram and the plaintiffs was made on the 19th day of September, 1878, and was signed by both parties; and a copy of this memorandum marked 'A' is annexed to and forms part of this case. The plaintiffs and the said Jerram fully performed the said agreement on their several and respective parts; and the said Jerram gave to the plaintiffs certificates for the payment of the moneys due to them from the corporation for all the works completed by them as aforesaid. The execution of the said 'additional' works was necessary, and was incidental to the completion of the works left unfinished and incomplete by the said Powis; and the employment of the plaintiffs to execute them was within the duties, powers and authorities of the said Jerram as the engineer of the corporation. The defendants, the corporation, have taken possession of and accepted and received the benefit of all the works and materials the subject of this action, and still enjoy the benefit thereof. The corporation paid to the plaintiffs large sums of money from time to time upon the said certificates, but refused to pay other large sums, amounting to between 6,000*l.* and 7,000*l.*, which is the said balance now claimed by the plaintiffs as still due. The above-mentioned contract between the said Charles Powis and the defendants, the corporation, was made by them as an urban authority under the Public Health Act, 1875, 38 & 39 Vict. c. 55, and all the subsequent matters and things were done by them in that capacity. The corporation resist the plaintiffs' claim upon several grounds, some of which would involve a long and costly investigation; but they also resist the claim upon the ground that the employment of the plaintiffs was an employment of them not under the common seal of the corporation, and this Special Case has been stated to raise that point alone. It is agreed between the parties that either party shall be at liberty to refer to the pleadings and particulars in the action, and to the contract and specification with Powis, the appointment of Jerram as borough surveyor, and the printed particulars of duties therein referred to, and that the Court is to have power to draw any inferences of fact. The question for the opinion of the Court is, whether the absence of the common seal of the corporation in the employment of the plaintiffs under the circumstances above stated is fatal to the plaintiffs' right to recover against the corporation. If the Court shall be of opinion in the affirmative, then the judgment is to be for the defendants, the corporation. If in the negative, the judgment is to be for the plaintiffs."

The Queen's Bench Division answered the question in the affirmative, and gave judgment for the defendants. The Court of Appeal affirmed that judgment. Lord Justice Lindley ends his judgment by saying: "The last point urged for the plaintiffs was, that as the contract has been performed and the defendants have the benefit of the plaintiffs' work, labour and material, the defendants are at all events liable to pay for these at a fair price. In support of this contention cases were cited to shew that corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than 50*l.* and contracts for 50*l.* and under. Contracts for not more than 50*l.* need not be sealed, and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than 50*l.* are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament, and depriving the ratepayers of that pro-

tection which Parliament intended to secure for them. The case of *Frend* v. *Dennett* (17), and in Chancery before Vice-Chancellor Page Wood (18), is an authority in support of this view, and was, in my opinion, rightly decided. The additional works there in question had been executed, and there was the common count for work and labour and materials, as well as a special count on the alleged contract; but the defendant was held not liable either at law or in equity. It may be said that this is a hard and narrow view of the law, but my answer is that Parliament has thought expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute because it may lead to apparent hardship. For these reasons I am of opinion that the decision of the Court below was correct, and that this appeal ought to be dismissed with costs. I am requested by Lord Justice Cotton to say that he has read this judgment, and concurs in it."

Lord Justice Brett adds, "I should wish to say that I have come to the same conclusion after weeks spent in attempting to come to another. However, I come to the same conclusion as Lord Justice Lindley and Lord Justice Cotton in this case, upon the ground that, although this was a municipal corporation, yet in the transaction in question it was acting as a board of health, and that therefore it was bound by the statute, and that as to the construction of that statute we are bound by a former decision of this Court, which held that the enactment as to the necessity for a seal is mandatory and not merely directory. Therefore, assuming that everything was done according to the statute except the seal, and that the work was done after every enquiry had been made by the corporation which is directed by the statute, I am of opinion that the mere want of seal prevents the plaintiffs from recovering in this action. Further, after having read all the cases with regard to the doctrine of work done for and accepted by a corporation, I am bound to say that I have come to the conclusion that even if this were a municipal corporation not bound by the statute, the proper decision in point of law, according to the cases and principle, is that the want of seal prevents, in such a case as this, the plaintiffs succeeding."

The present Master of the Rolls has, I observe, in the revised report somewhat altered what I have taken from the short-hand note in the papers before this House, and in that revised report abstains from expressing an opinion as to how the law would have been if this had been the case of a municipal corporation not bound by the Public Health Act, 1875—I suppose because, on reflection, he saw that it was not necessary for the decision of the case to decide this, and that what he had said on that point was only *obiter dictum*. I agree in this latter view, and also in what Lord Justice Lindley says, that the cases are numerous and conflicting, and that they require revised and authoritative exposition by a Court of appeal. If I thought that this case now at bar gave an opportunity for such a review, I should certainly wish at least to hear the case fully argued. As it is I do not think it necessary, and therefore do not think it right, to examine the previous decisions and doubts further than is required for the purpose of construing the Public Health Act, 1875, s. 174, which is in the following terms:—"With respect to contracts made by an urban authority under this Act, the following regulations shall be observed—namely, 1. Every contract made by an urban authority, whereof the value or amount exceeds 50*l*., shall be in writing, and sealed with the common seal of such authority. 2. Every such contract shall specify the work, materials, matters or things to be furnished, had or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." The 3rd and 4th regulations are as to things to be done by the urban authority before entering into any contract.

It was pointed out that there were no negative words added to the first regulation; that it was not said, "shall be sealed with the common seal and not otherwise." And it was argued that, as the 3rd and 4th regulations clearly were only directory, and the 2nd might at least plausibly be argued to be only directory, the 1st regulation

should be construed as also only directory; that the common seal ought to be affixed whenever the subject-matter of the contract exceeded 50*l.*, but that if the contract was such as, but for the statute in question, to bind a corporation without seal, then it was said, "*Fieri non debet factum valet.*"

I think, however, that when we look at the state of the decisions existing in 1875, and what was the point on which, I think, there was a difference of opinion sufficiently marked to make it uncertain what the ultimate decision of the Supreme Court of Appeal upon them might be, and then enquire what was the intention of the Legislature in passing this enactment, it is impossible to construe it in the manner ingeniously suggested.

The Court of Queen's Bench had, in *Church* v. *The Imperial Gas Company* (3), thus expressed its view on the law:—"The general rule of law is that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Whenever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

This was said in 1838. In 1840 the case of *The Mayor of Ludlow* v. *Charlton* (9) was decided in the Court of Exchequer. The considered judgment of the Court, comprising on that occasion Barons Parke, Alderson and Rolfe, was delivered by Baron Rolfe. After reciting the passage I have just read from *Church* v. *The Imperial Gaslight Company* (3), he says, "To every word of this we entirely subscribe; and, applying the language of Lord Denman to the present case, it is quite clear that there was nothing to enable the Corporation of Ludlow to contract with the defendant otherwise than in the ordinary mode under the corporate seal."

So far there is no difference between the Courts of Exchequer and of Queen's Bench as to the law, though there was evidently room for considerable difference as to its application. I pass by many subsequent decisions, and only quote two. In 1852 Mr. Justice Wightman, sitting alone in the Bail Court, decided *Clarke* v. *The Cuckfield Union* (2), on the ground, I think, that a poor law union, created by statute for the purpose, amongst others, of supporting the paupers in a workhouse, could not be required to affix their seal to every contract for things necessary for that purpose without such inconvenience as would defeat the object within the principle laid down in *Church* v. *The Imperial Gaslight Company* (3).

In 1855, in *Smart* v. *The Guardians of the West Ham Union* (21), Baron Parke and Baron Alderson each expressed dissent from *Clarke* v. *The Cuckfield Union* (2). They could not, as they were not in a Court of error, overrule it, but undoubtedly questioned it. In 1866, in *Nicholson* v. *The Bradfield Union* (5), where the union had bought coals to keep the paupers warm, the Court of Queen's Bench, in a considered judgment, say, "The case of *Clarke* v. *The Cuckfield Union* (2) is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision, and, as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that, as far as it extends to such a case as the present

(21) 10 Exch. Rep. 867; 11 ibid. 867; 24 Law Rep. Exch. 201; 25 ibid. 210.

at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke* v. *The Cuckfield Union* (2) and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but, so far as those prior decisions are inconsistent with the decision in *Clarke* v. *The Cuckfield Union* (2), we prefer to follow the authority of *Clarke* v. *The Cuckfield Union* (2), which we think is founded on justice and convenience."

There was not, I believe, any decision on this question between 1866 and 1875. The Legislature in the earlier part of the Act of 1875 had incorporated all urban authorities which were not already corporations; those which were already corporations continued such; and then in Part V. of the Act it makes provisions as to contracts. We ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law; and in the present case I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. I think, bearing in mind this, it is not possible to construe section 174 as meaning anything else than that, when the subject-matter of a contract exceeds 50*l.* in value, the contract must be under seal; and that the distinctions and differences which, according to the opinions of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary corporation, should not do so when the contract was by an urban authority and related to a subject-matter above that value. This was the construction put upon the Act in *Hunt* v. *The Wimbledon Local Board* (20) as well as in the Court below. I think it is right, and it disposes of this appeal.

It is true that this works great hardship on the now appellants. They had an agreement, but it was not sealed; and though it is possible that if the agreement had been under seal the defendants might have established a defence on the merits to all or part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the Legislature to determine whether the benefits derived by enforcing a general rule are, or are not, too dearly purchased by occasional hardships. A Court of law has only to enquire, What has the Legislature thought fit to enact?

I therefore move that the order appealed against be affirmed, and the appeal dismissed with costs.

Lord Watson, who is unavoidably absent, has read, and desires me to say that he concurs in this opinion.

Lord Bramwell.—I agree that this judgment should be affirmed. It is clear, and is admitted by the appellants, that it must be affirmed if the Public Health Act, 1875, s. 174, is obligatory, and not directory merely. I have no doubt that it is obligatory, and I must say I think better reasons can be given for that opinion than I gave in the case of *Hunt* v. *The Local Board of Wimbledon* (20). In the first place, considering the state of the law as to contracts by corporations, it was desirable that some rule should be laid down as to how contracts could be made by urban authorities. Then we have plain and positive words in sub-sections 1 and 2—"Every contract made by any urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority. Every such contract shall specify the work and materials," &c. The only reason given at your Lordships' bar for holding that this is directory only was that it is in company with other provisions in sub-sections 3 and 4 which certainly are directory only, and that sub-section 5 says that every contract entered into by an urban authority in conformity with the provisions of this section, "and duly executed by the other parties thereto, shall be binding." And it was said that as the contract need not be in conformity with some of those "provisions" it need not be in conformity with any. But sub-sections 3 and 4 do not

deal with the contract or the making of the contract, but say, "Before contracting," and "before any contract of the value of 100*l.* or upwards is entered into," &c. These are things to be done before contracts are entered into, and done by the urban authority, the contractor having nothing to do with the matters mentioned. The contracts are "entered into" afterwards. If sub-sections 3 and 4 had been put before sub-sections 1 and 2, the matter would have been too plain for argument, if indeed it is not so as it stands.

As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the common law.

I must add that I do not agree in the regret expressed at having to come to this conclusion. The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say that there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion; but certainly the ratepayers of Leamington may well be astonished at the amount claimed of them. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.

LORD FITZGERALD.—At the close of the argument on behalf of the appellants I had reached the conclusion that the appeal must be dismissed upon the construction of the statute, on the ground shortly put by my noble and learned friend beside me (Lord Bramwell). I have since had the advantage of reading the elaborate judgment of my noble and learned friend opposite (Lord Blackburn), in which I entirely concur, and to which I have nothing to add.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors—John Mackrell & Co., for appellants; H. Tyrrell, agent for H. C. Passman, Liverpool, for respondents.

[IN THE HOUSE OF LORDS.]

1883.
May, 8, 9.
June 4.

HUGHES *v.* PERCIVAL.

Negligence—Principal and Agent—Adjoining Owners—Party Wall—Liability of Employer for Negligence of Contractor's Workmen.

The defendant employed a competent contractor to rebuild a house adjoining a house of the plaintiff's, from which it was separated by a party-wall. Before the rebuilding was completed a workman of the contractor employed to place a wooden staircase negligently cut into a wall which he had not been authorised to interfere with, and by so doing brought down the defendant's house. Some girders which in the rebuilding had been fixed in the party wall between the plaintiff's and defendant's houses falling with the defendant's house inflicted damage on the plaintiff's house:—

—Held, *affirming the judgment of the Court below in favour of the plaintiff, that the defendant, having used the party-wall in a way which involved risk to the plaintiff's house, was bound to see that all such precautions were taken as were necessary to prevent any injury happening to the plaintiff's house in the course of the operations, and could not escape that liability by employing a contractor to do the work for him.*

The defendant appealed from the decision in this case of the Court of Appeal, which affirmed one of the Queen's Bench Division. The case is reported below 51 Law J. Rep. Q.B. 388; Law Rep. 9 Q.B. D. 441.

Hughes v. *Percival, H.L.*

The defendant was the owner of Nos. 1 and 2 Panton Street, of which No. 1 was at the corner of Panton Street and the Haymarket. On the east side of No. 2, and separated from it by a party-wall, stood a house, No. 3, belonging to the plaintiff; and on the south side of No. 1, in the Haymarket, was a house belonging to one Barron. There was a party-wall between Barron's house and No. 1.

The defendant employed a competent architect and builders to pull down his houses and erect a new one on their site. The building contract provided that no deviations from the contract were to be made without the written consent of the defendant and his architect. The contractors were to have the entire charge of the works, and to indemnify the defendant from any claims for injuries happening from neglect, default, want of care, or misconduct on the part of the contractors or any one in their employ. The old houses were pulled down, and the new one nearly finished, the walls having been completed and the roof put on. Some workmen were employed to place a wooden staircase from the ground-floor to the basement. It was intended to be placed against the party-wall of Barron's house, but not to be let into or fixed to the wall. The workmen, however, without orders, in the course of their work, cut away part of the wall. The effect was that the wall fell, bringing down Barron's and the defendant's houses. Girders had been fixed in the party-wall between the plaintiff's house and the defendant's to support the upper part of the defendant's house. These in their fall cracked the party-wall and injured the plaintiff's house.

The plaintiff brought this action for damage caused by the defendant's negligence in the building operations.

The Queen's Bench Division decided in his favour, and their judgment was affirmed by the Court of Appeal (Baggallay, L.J., and Brett, L.J.; *dissentiente* Holker, L.J.).

The defendant appealed.

Philbrick, Q.C., and *Douglas Kingsford*, for the appellant.—This case is not within the decision in *Bower* v. *Peate* (1), for there was no interference with any right of the plaintiff. The plaintiff's house was a new one, and not entitled to support from the defendant's. The general principle laid down in *Pickard* v. *Smith* (2) applies, that one who employs an independent contractor to do a lawful work is not responsible for injury caused by the collateral negligence of the contractor or his servants. The workman employed to place the staircase was not authorised to cut into the wall. Until *Bower* v. *Peate* (1), the employer was held liable only—first, where the work contracted for was unlawful, as in *Ellis* v. *The Sheffield Gas Consumers' Company* (3); secondly, where if he did it himself he would do it at his peril, as in *Rylands* v. *Fletcher* (4); and thirdly, where the employer was bound by law to do the work, in which case he could not escape any liability by employing a contractor—*Gray* v. *Pullen* (5). *Bower* v. *Peate* (1) added the case where the work involved an interference with a right—see *Dalton* v. *Angus* (6), remarks of Lord Blackburn. *Allen* v. *Hayward* (7) was exactly like *Bower* v. *Peate* (1), except that there was no interference with a right, and there the employers were not held liable—*Steel* v. *The South Eastern Railway Company* (8) and *Gayford* v. *Nicholls* (9). It is not enough that work should be dangerous if carelessly done; to cast the liability on the employers it must be necessarily dangerous—*Milligan* v. *Wedge* (10). Here what risk there was in the work of building was safely over. The placing of the wooden staircase was an operation not in itself hazardous at all. Had it been contracted for by an independent contractor after the building had been completed the employer could not have been held liable. The injury arose through a highly improb-

(1) 45 Law J. Rep. Q.B. 446; Law Rep. 1 Q.B. D. 321.

(2) 10 Com. B. Rep. N.S. 470.

(3) 2 E. & B. 767; 23 Law J. Rep. Q.B. 42.

(4) 37 Law J. Rep. Exch. 161; Law Rep. 3 H.L. 330.

(5) 5 B. & S. 970; 34 Law J. Rep. Q.B. 265.

(6) 50 Law J. Rep. Q.B. 689; Law Rep. 6 App. Cas. 740.

(7) 7 Q.B. Rep. 960; 15 Law J. Rep. Q.B. 99.

(8) 16 Com. B. Rep. 550.

(9) 9 Exch. Rep. 702; 23 Law J. Rep. Exch. 205.

(10) 12 Ad. & E. 737; 4 P. & D. 714; 10 Law J. Rep. Q.B. 19.

able accident, which a man is not bound to guard against—*Pearson* v. *Cox* (11).

Webster, Q.C., and *McCall*, for the respondent.—The hazardous work was not over till the house was finished, and the house could not be considered as finished before the staircases were put up. The employer was responsible for the negligence of the workman, the damage having been caused by a *bona fide* mistake. The work was such that the workman might think it necessary to cut into the wall, and the risk of his doing so should have been provided against.

Gray v. *Pullen* (5), *Bower* v. *Peate* (1) and *Tarry* v. *Ashton* (12), shew that the liability is greater than is contended on the appellant's behalf.

D. Kingsford, in reply.

Cur. adv. vult.

LORD BLACKBURN.—This is an appeal against an order of the Court of Appeal dismissing an appeal from an order of the Queen's Bench Division discharging a rule obtained by the defendant to enter judgment on the ground that the Judge ought to have directed a verdict for the defendant, or that there should be a new trial.

The first point to be considered is, what was the relation in which the defendant stood to the plaintiff. It was admitted that they were owners of adjoining houses between which was a party-wall the property of both. The defendant pulled down his house, and had it rebuilt on a plan which involved in it the tying together of the new building and the party-wall which was between the plaintiff's house and the defendant's, so that if one fell the other would be damaged. The defendant had a right so to utilise the party-wall, for it was his property as well as the plaintiff's; a stranger would not have had such a right. But I think the law cast upon the defendant, when exercising this right, a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it; but I think that the duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party wall, exposing it to this risk. If such a duty were cast upon the defendant, he could not get rid of the responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled.

This is the law I think clearly laid down in *Pickard* v. *Smith* (2), and finally in *Dalton* v. *Angus* (6). But in all the cases on the subject there was a duty cast by law on the party who was held liable. In *Dalton* v. *Angus* (6) and in *Bower* v. *Peate* (1) the defendants had caused an interference with the plaintiff's right of support. Chief Justice Cockburn, it is true, in *Bower* v. *Peate* (1), after shewing this, says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground—namely, that a man who orders a work to be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

I doubt whether this is not too broadly stated. If taken in the full sense of the words, it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant, but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention—and, indeed, not being a Court

(11) Law Rep. 2 C.P. D. 369.

(12) 45 Law J. Rep. Q.B. 260; Law Rep. 1 Q.B. D. 314.

of error, had no power—to alter the law laid down in *Quarman* v. *Burnett* (13).

But if I am right in thinking that the defendant, in consequence of his using the party-wall of which the plaintiff was part-owner, had a duty cast upon him by law, similar to that which in *Dalton* v. *Angus* (6) was held to be cast upon the defendant in consequence of his using the foundations on which the plaintiff had a right of support, it is not necessary now to enquire how far this general language should be qualified.

I do not think the case of *Butler* v. *Hunter* (14) is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer I am obliged to differ from them.

If this be so, the question is, I think, narrowed to this—Was the operation, during which the defendant's duty required him to see that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party-wall between the defendant's house and Barron's? For it is not disputed that there was a want of skill in doing this, and that it caused the damage; and it is not disputed that the men who did it were intending to carry out the work on which they were employed.

The defence opened at the trial, I think, was directed to this, that the contractor was bound not to do anything without written authority, and that there was no authority at all to cut into the party-wall. I do not think that could prevent the act which was done from being in breach of the defendant's duty.

The late Lord Justice Holker, however, thought, as I understand him, that the whole of the operation connected with the use of the plaintiff's party-wall was over, and that the contractor's men were engaged in a subsequent independent job, and that the defendant was under no further duty then than he would have been if, after the house was finished, he had brought in carpenters to repair a wooden staircase. I cannot, however, take this view of the counsel's opening. I regret that the case was stopped on the counsel's opening, for I feel convinced that if the evidence had been gone into this view of the fact could not have been taken. As it is, I do not think it necessary to say more of the view of the law taken by the late Lord Justice than that I think it well worthy of consideration in any case where the facts are as he seems to suppose.

I think that the order appealed against should be affirmed, and the appeal dismissed with costs.

Lord Watson.—In this case I have had great difficulty in forming an opinion satisfactory to my own mind, not because of any doubt as to the law, but because I do feel doubtful whether I rightly apprehend the facts which I ought to assume as the basis of my judgment. It is very much to be regretted that the case was not submitted to the jury. Had that course been followed, it is certain that the facts would have been ascertained, and it is highly probable that no question of law would have arisen. As it is, we are left to discover the facts upon which our judgment must depend from a very long and argumentative statement made by the appellant's counsel; and in regard to the true import of that statement the parties at the bar widely differed. Accordingly, we heard quite as much argument about the meaning of what Mr. Philbrick said to the jury as upon the law of the case. In the Court of Appeal the result of this unsatisfactory state of matters was, that the late Lord Justice Holker took a somewhat different view of the facts from his colleagues, which led him to a different result in law.

Had your Lordships not thought otherwise, I should have been inclined to send the case back to the jury for their determination. It is, in my opinion, neither satisfactory nor expedient to decide important questions of law upon a hypothetical statement of facts; especially when the litigant parties are not agreed

(13) 6 Mee. & W. 499; 9 Law J. Rep. Exch. 308.

(14) 7 Hurl. & N. 826; 31 Law J. Rep. Exch. 214.

as to the meaning of the statement. Here the appellant says that his counsel meant to indicate to the jury that he was about to prove, or would try to prove, certain facts. The respondent, on the other hand, says the statement of the appellant's counsel, when carefully read and construed, indicates that he meant to prove something materially different from these facts. I feel a great dislike to criticising the oral statements of a counsel as if they were part of the record, and conceive that I am bound to construe them most liberally in favour of his client. I rather think that Lord Justice Holker must have been, to some extent, influenced by these considerations in putting a different construction upon Mr. Philbrick's language from that which was adopted by the other members of the Court of Appeal. Although I do not agree with the view taken by the late Lord Justice, I am not certain that I take precisely the same view of the facts with your Lordships; and it is on that account that I have thought it necessary to explain the grounds upon which I have come to the same result.

I agree with your Lordships that it was the duty of the appellant, in carrying out his building operations, to see that reasonable precautions were taken in order to protect from injury the eastern wall of his tenement, of which the respondent was part-owner. The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party-wall if no precautions were used; nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury, was that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house.

Now, looking to the terms of the contract and specification, I think it does appear that extensive structural operations fraught with obvious risk to the party-wall in question had been carefully and successfully executed; and if I had been able to come to the conclusion in fact that after these were completed there remained nothing to be done by the contractor which could reasonably be supposed to involve danger to the party-wall, I should have been disposed to agree with Lord Justice Holker. I do not think that the combination in one contract of operations hazardous, and operations in no reasonable sense hazardous, can affect the character of these operations, or impose upon the employer legal duties and liabilities to which he would not have been subject had he employed a different contractor for each operation.

But I am not satisfied that the fitting up of a wooden staircase from the basement floor of the appellant's tenement to the cellar below was an operation which could occasion no risk to the party-wall. It was an operation which might be executed in at least two different ways, either by cutting a groove in the south party-wall, and inserting in it one of the wooden stringers supporting the stair (which would probably make the neater job), or by leaving the wall untouched and fixing the staircase outside it. I see no reason to doubt that the latter method would have been unattended with danger to the wall against which the stair was to be placed, or to the party-wall in which the respondent is interested. The other method was, as the result shewed, attended with serious danger to both these walls; and I cannot find any suggestion in the statement made by the appellant's counsel to the effect that no one could have reasonably anticipated that a workman might cut the wall in order to let in a stringer. The statement which was very strongly and repeatedly made regarding it is, that the cutting of the wall was unnecessary, and was not only unauthorised, but positively forbidden. Unnecessary it certainly was, because the staircase might have been securely fixed without interfering with the wall. Unauthorised and forbidden it also was, in this sense, that by the terms of the contract and relative specification, the contractor was bound to leave the wall untouched. But the terms of the contract and specification are, in my opinion, of no relevancy as in a question with the respondent. If there were any reason to

suppose that an ordinary workman entrusted with the job might cut into the wall, the appellant took a very proper precaution when he bound his contractor not to cut it; but he failed in his duty to the respondent when he permitted the contractor, and his workmen, to neglect that precaution.

I am of opinion that the appellant could not establish a good defence to the respondent's claim, by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. It appears to me that he could not escape from liability unless he further proved that it could not have been reasonably anticipated that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamt of cutting the wall. I can find no allegation to that effect, nor do the statements made by the appellant's counsel appear to me to sustain the inference that the cutting of the wall was an act of that improbable description. It is not said that the contractor's workmen were deficient in ordinary skill, or that their act, however ill-judged, was dictated by any other motive than a desire to perform their work efficiently. In these circumstances, the only inference in fact which I can draw is that these men ought to have been specially directed not to interfere with the wall, and that care should have been taken that they obeyed the direction. These precautions ought, no doubt, to have been taken by the contractor; but, in accordance with the principle laid down in *Bower* v. *Peate* (1) and *Dalton* v. *Angus* (6), it was no less the duty of the appellant, as in a question with the respondent, to see that they were strictly observed.

Lord FitzGerald.—The question in this case seems to be rather one of controverted fact than of law. The defendant did not endeavour to escape from the principles to be deduced from *Dalton* v. *Angus* (6), *Tarry* v. *Ashton* (12), *Bower* v. *Peate* (1) and *Pickard* v. *Smith* (2), or deny their applicability; and, on the other hand, the plaintiff's counsel admitted the law as stated by the defendant's counsel.

For the defendant it was contended that the work on which the defendant was engaged, if originally hazardous, had ceased to be so, inasmuch as all that was hazardous had been completed, and that the particular work which was being done was not dangerous in itself or likely to produce danger, and that the wrongful or negligent act of the workmen, which it was said caused the calamity, was entirely collateral and wholly unauthorised.

I agree with the noble and learned lord (Lord Blackburn) in regretting the course taken at the trial, for I cannot help thinking that if the evidence had been fully gone into we would probably not have heard of the case. We are now obliged to take our view of the facts from the opening statement, at the trial, of the defendant's counsel, and I have considerable doubt whether the real cause of the fall of the defendant's new house is not traceable to another and different source than that which has been assumed, and which, if ascertained, as a matter of fact, might have exonerated the contractor, and rendered clear the liability of the defendant. The undertaking the defendant was engaged on was, no doubt, as a whole, perilous to his neighbours on both sides, and such as to render care and precaution necessary at every step until the whole of the new structure was substantially completed; or so far, at least, that nothing remained to be done which could affect the stability of either of the party-walls.

Part of the original design was that the party-wall at Barron's side should be taken down and rebuilt from top to bottom. Thus we find that the specification provides: "The contractor to take down the party-wall of adjoining building in the Haymarket, and cart away all the old bricks and rubbish, grub up old foundations, and prepare levels for rebuilding new party-wall."

The defendant's counsel, Mr. Philbrick, in one part of his statement, said, "Now I ought to mention to you one very important fact, and it is this: There was the party-wall which stood between Barron's house and the house here, which was to be rebuilt by Mr. Hughes. This party-wall, it was proposed by Mr. Wimble and assented to by Mr. Hughes on these plans

and specifications, should be entirely taken down and rebuilt. Mr. Hughes would have to be at the expense of doing so because he was the building owner."

In place of carrying out the specification, the plan was departed from as to this old party-wall; it was underpinned, and then up to the first floor (about fourteen feet high) left untouched; but from that point upwards a new party-wall was built on it, and necessarily of greater height and greater weight than the old wall. It was the old portion of this party-wall which gave way, and by its fall caused the fall of the defendant's house, and the displacement of the girder which was clinched into the plaintiff's party-wall, and caused the mischief of which the plaintiff complains.

If Barron's party-wall had been entirely rebuilt, as it ought to have been, it is not at all probable that the calamity would have occurred. A new brick wall has great cohesive power, and as it would be smooth, no chipping or hacking would be necessary to fit on the stairs, and it would probably be unaffected by chipping or hacking, and even cutting into it to fit the wooden staircase or the stone steps would not affect its stability so as to create danger. As to the old wall, it was different; it was of unknown antiquity, and the part that was left seems to have been weak, out of plumb, with an uneven and rough front, which, according to the specification, was to be hacked off and levelled, and it had a great superincumbent weight of new work placed on it. It yielded, from its inherent weakness, to the cutting and shaking it received in the process of fixing the wooden and stone steps, and came down. Mr. Philbrick thus describes it: "Then from the first floor, up to the second floor, it was intended to have a flight of stone steps, the ends to be let into the wall from which they depend, pinned into the wall; that involves, of course, cutting into the wall a sufficient depth, and plugging up the holes after you have got the end of the step in. But they began at the bottom, and got the bottom step with the door on the floor mortised, or let into the wall, pinning it into the wall properly at one end and filling that up with cement; and then the next step is fixed above it, and the next above that, and so you go on according to the slope at which your staircase rises. The men were fixing on the day of the accident this flight of stone steps. But independently of that, the men who were employed by Messrs. Newman & Mann, the carpenters, were also fixing a flight of steps which led down into the basement wooden steps; and without any knowledge of the foreman of the works, and without any order from him, without any knowledge at all of either of the architects, or anything shewn on the plan to that effect or prescribed in the specification, the workman had on his own head, and as it were utterly unauthorised, cut into the wall below the level of the ground-floor—that is to say, the lower portion of the party-wall which had been left—he cut into it." He then describes the fall: "The whole appeared to collapse in the centre, to go down, no doubt partly or chiefly set in motion by the fact that this party-wall had been, by the unauthorised act of the workman, unduly and improperly weakened; that had set the thing going, and the girders gave way, the wall gave way, and the collapse took place as I have described."

The act of the workmen may have been unauthorised and ill-judged, but it was an act no doubt done in the execution of the work entrusted to them, and can in no case be said to have been entirely "collateral"; and it is not to be forgotten that the contract provides that "complete copies of the drawings and specifications are to be kept on the buildings in charge of a competent foreman, who is to be constantly kept on the ground by the contractors, and to whom instructions can be given by the architects," and who is, of course, to direct the workmen in their operations, and who ought to see that what they are doing is necessary and lawful, and carried out in the safest manner.

Then was the perilous portion of the work completed before the doing of the act which it is said led immediately to the fall of Barron's party-wall and the consequent injuries to the plaintiff's premises? I should have answered that question in the negative without any hesitation, if it had not been for the opinion expressed by the

late Lord Justice Holker, which I receive with the utmost respect.

The event shews that the danger was not over, and I should have thought that it could not be as long as anything was being done that could affect the stability of either party-wall. Lord Justice Holker seems to have been of opinion that though the operation as a whole was perilous, yet the peril had ceased though the work was not completed. He says as to the particular portion of the work: "It seems to me perfectly clear that it was not hazardous work, and the workmen exceeded their duty; they made a mistake." But is it open to us to divide the work thus into sections, and say, "As to a particular part, taken by itself, it carried with it no special peril, and you the defendant are not responsible"? It seems to me that this cannot be done. We would not be justified in thus breaking it into parts, or considering the case as if the putting in the stairs or the stone steps was the sole work which the defendant was getting done. The conclusion I have reached is, that the defendant had undertaken a work which, as a whole, necessarily carried with it considerable peril to his neighbours. In the execution of that work the party-wall at Barron's side was so injured that it fell in, and its fall dragged down the new building and injured the plaintiff's party-wall and premises.

What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or as warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast on him by transferring that duty to another. He is not in the actual position of being responsible for injury, no matter how occasioned; but he must be vigilant and careful, for he is liable for injuries to his neighbours caused by any want of prudence or precaution, even though it may be *culpa levissima*.

It seems to me that the peril to the plaintiff's premises continued as long as there remained anything to be done which could interfere with the stability of the girder on which the defendant's house rested, and which the defendant had fastened into the plaintiff's party-wall, and that there was that want of due supervision and due precaution which makes the defendant liable.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors — Hughes, Hooker, Buttanshaw & Thunder, for appellant; T. R. Apps, for respondent.

1883. March 16. THE QUEEN *v.* THE GUARDIANS OF THE GARSTANG POOR LAW UNION.

Poor Law—Lunatic Wife—Separation from Husband—Place of Residence—Place of Settlement.

[For the report of the above case, see 52 Law J. Rep. M.C. 97.]

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. July 5. MUNSTER *v.* LAMB.*

Slander—Counsel—Advocate—Defamatory Words uttered by Advocate—Privilege of Advocate engaged in Judicial Enquiry.

The protection given by the law to an advocate with respect to defamatory words uttered by him as an advocate in the course of a judicial enquiry with reference to the subject-matter of that enquiry is absolute and unqualified. No action, therefore, can be maintained against him for such words,

* *Coram* Brett, M.R., and Fry, L.J.

even though they are irrelevant and are spoken maliciously and without reasonable cause.

This was an action, tried before Williams, J., and a special jury, against the defendant for defamatory expressions used by him while acting as an advocate for a woman of the name of Hill, against whom a summons was taken out by the plaintiff, and heard at Brighton on the 9th of June, 1878, charging her with administering certain narcotic drugs to a Mrs. Cartwright, in February, 1878, with a view to committing a burglary on the premises of the plaintiff, in whose house Mrs. Cartwright resided. At the trial, on the conclusion of the evidence for the plaintiff, the learned Judge held that there was no case to go to the jury, as the defendant was privileged while acting as an advocate, and no action would lie against him for any words spoken by him in the conduct of a case. The words complained of were used on two occasions on the first hearing of the summons. A remand was applied for by the advocate for the prosecutor, when the defendant, remarking on the inconvenience of remands, said that the plaintiff had shut up the sister of Ellen Hill in a convent with the view of keeping her away from being a witness. A remand was granted to the 17th, when the defendant again appeared on behalf of Ellen Hill, and during the further hearing of the case made the following statements: "I have my own opinion for what purpose all these young women may have been resident in the house of Mr. Munster"; and "I can believe that there may have been drugs in the house of Munster, and I have my own opinion for what purpose they were there, and for what they may have been used."

The plaintiff obtained a rule *nisi* for a new trial, against which cause was shewn on the 7th of May, 1883, by

F. Gore (with him *E. Clarke, Q.C.*), for the defendant.—The words spoken were relevant to the evidence. The words first complained of were spoken with reference to the adjournment, and suggested that other witnesses might be kept away. But that is not the true test—*Seaman* v. *Netherclift* (1)—if the words relate to the matter in hand.

The words spoken on the second occasion were used as suggesting the improbability of the prisoner having obtained the drugs, and the probability of the drugs being in the house. The cross-examination of the witnesses for the prosecution was as to how the prisoner obtained the drugs. Those words had reference to the case, and that is all that is requisite—*Hodgson* v. *Scarlett* (2) and *Dawkins* v. *Rokeby* (3). The privilege of counsel is parallel with that of a Judge.

Waddy, Q.C. (with him *Woollett*), for the plaintiff.—The words spoken must be relevant to the issue, as was said by Lopes, J., in granting the rule. Here they were an utterly irrelevant attack on the plaintiff's personal character. The jury is the judge of the relevancy. Lord Coleridge, C.J., says in *Seaman* v. *Netherclift* (1), "It has never been decided that counsel may not be liable even for words spoken in the course of the case, if the words were irrelevant, and spoken *mala fide* and with express malice, all which qualities in the words must be questions of fact and for the jury." The words spoken must have reference to the matter in hand; that in this case was the prisoner's guilt, not the conduct of the prosecutor. They must be used in the legal and necessary exercise of the advocate's function, and pertinent to the matter in dispute; if not, an action will lie—*Brook* v. *Montague* (4). The privilege is limited by relevancy—*Higginson* v. *Flaherty* (5), *Kennedy* v. *Hilliard* (6), *Seaman* v. *Netherclift* (1), *Flint* v. *Pike* (7) and *Hodgson* v. *Scarlett* (2).

MATHEW, J. (on May 8, 1883).—The circumstances that gave rise to this action were these:—On the 7th of June, 1881, the plaintiff prosecuted a woman named Hill, whose husband had already pleaded

(1) 46 Law J. Rep. C.P. 128; Law Rep. 2 C.P. D. 53.
(2) 1 B. & Ald. 241.
(3) 45 Law J. Rep. Q.B. 8; Law Rep. 7 H.L. 744.
(4) Cro. Jac. 90.
(5) 4 Ir. C.L. Rep. 125.
(6) 10 Ir. C.L. Rep. 195.
(7) 4 B. & C. 473.

guilty of burglary in the house of the prosecutor, on a charge of administering narcotic drugs to the prosecutor's servants, with the object of facilitating the burglary. On the first hearing a remand was asked for, in order to obtain further evidence, and in opposition to that application the defendant, while pointing out the danger to the prisoner incurred by such adjournment, used the words first complained of, no doubt imputing to the plaintiff that he had spirited away the prisoner's sister and shut her up in a convent, with the object of preventing her giving evidence in the prisoner's favour. As to this first complaint, however, counsel for the plaintiff virtually abandons it; but it is not beyond question whether the words are defamatory *per se*, and as they appear to have been within the defendant's instructions, they are within the privilege of an advocate. On the further hearing it was suggested by the evidence of the witnesses for the prosecution that a narcotic drug had been administered to several young women living in the plaintiff's house, in which house, however, he was not resident; and it was contended that enough had been shewn by that evidence to justify the magistrates in detaining the prisoner further. This it was the defendant's duty to resist, and in the course of his address to the magistrates he used the words which were the chief subject of complaint. He deemed it his duty in the interest of his client to account for the presence of any of the narcotic drug on the plaintiff's premises, and suggested that it might have been brought there by Mr. Munster himself, with the intention of using it for some immoral and criminal purpose, and in making this suggestion he used the words which are the principal ground of this action. There was no attempt on the part of counsel for the defendant to justify or excuse the expressions used; in fact, it would have been impossible to do so, as the imputation cast on the plaintiff was altogether unfounded, and, but for its gravity, absurd. Had such language been used in a superior Court, it would have elicited a sharp reprimand from the learned Judge. Doubtless the magistrates did not make any observations on these expressions because they thought them too unreasonable to deserve attention. But counsel for the defendant, while not denying the impropriety of the language used, argued that the language of an advocate, however unbecoming or ill-advised, is privileged from action, if he speaks in good faith and in discharge of what he honestly considers to be his duty to his client. For the defendant the decisions in the cases from *Hodgson* v. *Scarlett* (2) down to *Dawkins* v. *Rokeby* (3) were relied on as shewing that the privilege of an advocate is similar to that of the Judge and the witness, and as based on the principle that it is indispensable in the interests of suitors that those who conduct or take part in legal proceedings should be free and independent in the discharge of their duty, and that their conduct for that reason should not be subject to be brought in question before a jury upon a subsequent trial. For the plaintiff it was contended that it is the advocate's duty to state to the Court with critical accuracy what was contained in his instructions, and to comment fairly and reasonably upon the evidence given in the case; and that he is liable to an action for any departure from the line of his duty, as to the fact of which departure a jury, it was said, were the proper judges. To support this contention the cases of *Flint* v. *Pike* (7), *Hodgson* v. *Scarlett* (2) and a passage in the judgment of Lord Chief Justice Coleridge in *Seaman* v. *Netherclift* (1) were relied on; but I do not think there is any authority for it. It is true, as pointed out by counsel for the plaintiff—and it is greatly to the credit of the bar that it is so—that in no case has there been any difficulty in shewing that the words complained of in actions against advocates were relevant to the matter in hand in the strictest sense; but I am not satisfied that the advocate would not be protected in a case where this strict relevancy could not be proved. When the advocate is in the right, the privilege is not needed. As to the argument *ab inconveniente*, though it may be inconvenient that advocates should have the power, subject only to reprimand, or it may be punishment, from the Judge who presides, to abuse this right of freedom of speech, it would cause far greater

inconvenience to suitors if advocates were harassed and enfeebled in their endeavours to perform their duties to their clients by fear of subsequent litigation being entered into against them. In such a case advocates would not be so independent as those persons whose circumstances rendered it useless to sue them in an action. The passage in *Seaman* v. *Netherclift* (1) does not, it seems to me, qualify the principles laid down in the earlier cases, but only, as I think, lays down this, that for defamatory statements made by an advocate outside his office of advocate and with no reference to the subject before the Court, and therefore necessarily irrelevant and made in bad faith, an action will lie against the counsel who makes them. But here, I think, the expressions complained of were within the line indicated by the authorities as the boundaries of the advocate's privilege, and the ruling of the learned Judge was therefore right. This rule must therefore be discharged with costs.

SMITH, J., concurred.

The plaintiff appealed.

Waddy, Q.C., *Woollett* and *H. T. Atkinson*, for the plaintiff.—If the course of legal decision be examined, it will appear that the protection given by the law to advocates is by no means so wide as that given to Judges and witnesses. To protect an advocate from an action for defamatory words spoken by him in the course of a judicial inquiry, they must be relevant, and there must be an absence of malice. In the present case the words complained of were not relevant, there was no reasonable ground for the use of them, and the case should have been allowed to go to the jury on the question of express malice. *Brook* v. *Montague* (4), *Hodgson* v. *Scarlett* (2), *Flint* v. *Pike* (7), *Needham* v. *Dowling* (8), *Robinson* v. *May* (9), *Butt* v. *Jackson* (10), *Revis* v. *Smith* (11), *Higginson* v. *O'Flaherty* (5), *Henderson* v. *Broomhead* (12), *Kennedy* v. *Hilliard* (6), *Mackay* v. *Ford* (13), *Scott* v. *Stansfield* (14), *The King* v. *Skinner* (15), *Dawkins* v. *Lord Rokeby* (3), *Seaman* v. *Netherclift* (1), *Allardice* v. *Robertson* (16), *Kendillon* v. *Maltby* (17) and *Clark* v. *Molyneux* (18) were cited.

Clarke, Q.C., and *Gore*, for the defendant, were not called on.

BRETT, M.R.—An action for defamation was brought against a solicitor who was acting as an advocate for a person brought before a Court of justice on a charge. The action was brought for some words which he uttered while so acting as an advocate. I assume that the defendant to this action spoke the words maliciously, in the sense that he did not speak them for the purpose of doing anything that could really be useful; that he spoke them without justification; and that he spoke them from an indirect motive—that is, from a feeling of anger against the then prosecutor, the now plaintiff. I assume all this. I assume the words spoken were irrelevant as to any issue of fact then before the Court; and, assuming all this, I hold that no action will lie against the defendant for uttering these words, as they were spoken with reference to and in the course of the enquiry which was then being held.

It has been said that any person who is defamed has *prima facie* a cause of action, and that in such a case the person who speaks the defamatory words must shew that he has by law a defence to the action, and that he can have no defence unless he can shew he has, by statute or by decision given in a similar case, that which the Courts have held to be a defence to such an action. I am unable to agree with this proposition. I think that the common law consists of principles which are stated by Judges to have prevailed during the whole time through which the common law has existed. Judges do not make the

(8) 15 Law J. Rep. C.P. 9.
(9) 2 Smith, 3.
(10) 10 Ir. Law Rep. 120.
(11) 18 Com. B. Rep. 126; 25 Law J. Rep. C.P. 195.
(12) 4 Hurl. & N. 569; 28 Law J. Rep. Exch. 361.
(13) 5 Hurl. & N. 792; 29 Law J. Rep. Exch. 404.
(14) 37 Law J. Rep. Exch. 155; Law Rep. 3 Exch. 220.
(15) Lofft, 55.
(16) 1 Dow, 495.
(17) 2 Moo. & R. 438.
(18) 47 Law J. Rep. Q.B. 230; Law Rep. 3 Q.B. D. 237.

law; they only declare that to be law with regard to certain facts which has always been the law. They are obliged to apply the common law to meet different facts which may arise in different cases; and as new facts, or complications of facts, are continually arising, it may sometimes seem as though the Judges were declaring new law, when they are only applying the old common law to the new cases upon which they have to decide.

Is there, then, a principle of the common law of England which has always existed, and which now has to be applied for the first time, perhaps, to the exact facts which exist in this case?

There are decisions on cases which may be called analogous cases, and if there is a principle of law which has been applied to cases containing analogous facts, it must now be applied to the facts of this case.

Actions for written libel or spoken slander are subject to a well-known principle of law—that if the thing complained of is written or spoken on certain occasions, then no action can be maintained. It is not that the action is subject to a defence, but it is that, if the defamatory statement is written or spoken on an occasion which renders it privileged, there is then no libel or slander at all of which the law will take notice. Privileged occasions have been recognised by the law for sound practical reasons. In this case that which raises the privilege is that the defamatory words were uttered in the course of an enquiry with reference to the administration of the law. It has been admitted that an advocate or counsel has a privilege for some things which may be uttered in the course of an enquiry with reference to the administration of the law. It is admitted that if the advocate is acting *bona fide*, and if what he says is relevant to the enquiry, then there is a privilege. But it has been argued that if an advocate does not act *bona fide*, or if what he says is not relevant, then such an advocate is not a person to whom the privilege applies. Certain persons have been specified in decided cases as persons to whom this privilege does apply: they are Judges, advocates, parties and witnesses. With regard to three of these four classes—that is, to all except advocates—there are undoubtedly decisions to that effect; and it is clearly laid down that what those persons say with reference to the matter enquired into is privileged, and that against them no action for libel or slander can for such matters be maintained. But it has been said in argument on this appeal that those persons so specified are privileged only if they speak the words complained of without malice, and if the words are relevant to the enquiry; and that if these conditions do not exist, then that they are not privileged.

I am inclined to think that the law has not always been stated in the same way in all the decided cases, and that different Judges have expressed themselves in somewhat different terms.

With regard to witnesses, it was decided in *Revis* v. *Smith* (11) and *Henderson* v. *Broomhead* (12) that the general conclusion is that all words spoken with reference to the matter before the Court, whether relevant or not, whether malicious or not, cannot be the subject of any action, and that a privilege exists in respect of what is so affirmed by the witness, either *viva voce* or on affidavit.

It was suggested at one time that, although a witness who thus spoke was not liable to an action on the case for defamation for the defamatory words so uttered, yet that he might be liable to another action on the case—to an action analogous to an action for malicious prosecution. That has, no doubt, been suggested at different times by Judges of high authority; but it seems to me to be wholly untenable: for if there could be in such a case no action for libel or slander, how could an action be maintained for that which was the same thing in substance by merely altering the form of the action? The suggested action must be dealt with as it was dealt with by Mr. Justice Crompton, a master of pleading, in *Henderson* v. *Broomhead* (12), where he said: "The attempts to obtain redress for defamation having failed, an effort was made in *Revis* v. *Smith* (11) to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair."

Nothing could be more strong or more picturesque to shew his opinion that the

suggested cause of action could not exist. The answer was given in the time of Queen Elizabeth, and it has been given again in recent years, that no such action can be maintained, because such an action never has been maintained; and yet, if there could be such an action, occasion must have arisen for it. In *Henderson* v. *Broomhead* (12) Mr. Justice Crompton also said, with regard to witnesses: "My brother Martin held that, even if the slanderous matter was proved to be malicious and false to the knowledge of the defendant, the action would not lie. No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury"—that remark of course applies only to witnesses—"could turn his complaint into a civil action. By universal assent, it appears that in this country no such action lies. Mr. Justice Cresswell pointed out in *Revis* v. *Smith* (11) that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result if witnesses in Courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court."

The reason for the rule is not anything peculiar to a witness or a party, but the reason is that the rule is necessary for the due administration of the law and for the benefit of the public at large—that is, the reason of the rule is public policy.

The case of a Judge was especially considered in *Scott* v. *Stansfield* (14), and the principle was applied to all Judges, notwithstanding that the words complained of were spoken by them maliciously and without reasonable and probable cause. "This provision of the law," said Lord Chief Baron Kelly, "is not for the protection or benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that the Judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a Judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had commented judicially was or was not relevant to the case before him?" There, again, the privilege is put on the ground of public policy; and in the same case Baron Martin said: "The plea states that the defendant, at the time when he spake the words complained of, was sitting as the Judge of a Court of record, and spoke them while acting in his capacity of Judge and trying a cause within his jurisdiction in which the present plaintiff was defendant. If such words, spoken under such circumstances, were the subject of an action of slander, the most mischievous consequences would ensue. No Judge, as my Lord has pointed out, would then be able freely to administer justice; for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not *bona fide* in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What Judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented upon to a jury, and the propriety of it determined by them?"

That is a decision on the whole question, not merely on the question of relevancy. It is a decision that, taking the balance of convenience and inconvenience, and of benefit and mischief to the public, it is better that Judges should not be subject to the fear of an action for anything said by them in the course of their judicial duty. The conclusion therefore is direct, that witnesses and Judges are within the privilege, even though they may have acted from an indirect motive, and that even in such case words so spoken by them are not actionable.

The case of *Dawkins* v. *Lord Rokeby* (3) was before the Courts twice, and was afterwards heard before the House of Lords. In that case it was assumed, as a matter of logical assumption, that there was malice and falsehood; and on that purely logical assumption the case was decided. On this

assumption it was then held that no action could be maintained for statements, whether oral or written, made by a witness before a court-martial, even though made *mala fide* and with a direct malice. Nothing could be more strong and decisive than the judgment of the Court of error, the Exchequer Chamber, in that case. It was a written considered judgment of ten Judges, delivered by the Lord Chief Baron; but, as is well known, every phrase of such a judgment must have been submitted to each of the Judges, and each Judge must have signified his concurrence in the whole judgment. The ground of that judgment is that the privilege exists, not for the protection of the witness alone, but for the benefit of the public, in order that it may have justice administered perfectly free and unfettered.

The same principle was again laid down in this Court in *Seaman* v. *Netherclift* (1), and on the same ground. The same principle also applies to parties to a cause.

If it is right and wise that such a privilege shall be extended to a Judge, even though what he says is said with malice, even though it is irrelevant and spoken without reasonable and probable cause—and if the privilege is equally given to a witness who speaks or acts in a similar way, how can it be considered that it is not equally, I would say more, beneficial to the public that a counsel and an advocate should come to the performance of his duty with an equally free and unfettered mind? If any one needs to be free of all fear in the performance of his arduous duty an advocate is that person. His is a position of difficulty: he does not speak of that which he knows, but he has to argue and to support a thesis, which it is for him to contend for; he has to do this in such a way as not to degrade himself; but he has to do it under difficulties which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client; and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage of the public. If this be so, then most certainly the reason of the rule covers an advocate more than it would a witness, as it is of the last importance that he should be able to keep his mind clear, calm and free. It is illogical to say that the protection is not wanted for an advocate who maliciously and deliberately does utter defamatory words in the course of a judicial enquiry; that is not the ground of or the reason for the rule; the reason of the rule is that an advocate who is innocent of malice or recklessness would be the one to suffer; he would be put to trouble, and the public would thereby suffer, so that the rule must on that ground be large in its terms.

The judgment in *Dawkins* v. *Lord Rokeby* (19), to which I have referred, lays down the rule that "the authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law." Lord Mansfield in *The King* v. *Skinner* (15) observes: "Neither party, witness, counsel, jury or Judge, can be put to answer civilly or criminally for words spoken in office." Lord Mansfield was a great enunciator of principles, and was careful to lay down a principle in terms which he thought would cover every case to which the principle ought to be applied, and that principle of his is adopted in the unanimous judgment of the Exchequer Chamber in *Dawkins* v. *Lord Rokeby* (3), which was afterwards affirmed in the House of Lords. I am of opinion that the principle and the reason of the rule applies with even more force to the case of advocates than to any of the other cases mentioned.

In *Kennedy* v. *Hilliard* (6), elaborate and learned judgments were delivered, in which all the cases were referred to and discussed, and in which the same conclusion was come to with regard to a witness as had been arrived at in this country. It was there said by Chief Baron Pigot: "Upon a review of the authorities, it appears to

(19) 42 Law J. Rep. Q.B. 63, at p. 69; Law Rep. 8 Q.B. 255, at p. 263.

me that the law is correctly laid down in the following proposition with which Mr. Starkie, in his *Treatise on Libel and Slander*, closes his description of this part of his subject—namely, 'that an action of slander cannot be maintained for anything said, or otherwise published, by either a Judge, a party or a witness in a due course of a judicial proceeding, whether criminal or civil.' I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a Judge in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence oral or written in a Court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel."

Into the rule so laid down and adopted with regard to witnesses, it is I think clear that the word counsel or advocate must be introduced, and then that the rule of the common law is truly expressed. In such a case, then, the question of malice cannot be raised, the question of *bona fides* cannot be raised, the question of relevancy cannot be raised; the only question which can be raised is whether what was said was said in the course of the administration of the law; and if that be so, then the action against an advocate must be stopped, since for words so uttered neither civil action nor criminal prosecution can be maintained.

It is obvious from our judgment that we do not agree with what was said by Lord Denman at Nisi Prius in the case of *Kendillon* v. *Maltby* (17).

The appeal must accordingly be dismissed.

FRY, L.J.—I am of the same opinion, and, agreeing as I do with the Master of the Rolls, I will add but little.

It is said that there has hitherto been no direct decision on the point raised by the facts in this case; and that is true, for in the cases cited the question does not appear to have been necessarily raised whether an advocate has the privilege accorded to Judges, witnesses and parties; but in those cases there have been several highly important and very weighty *dicta* which bear directly on this question. I will refer first to the case of *The King* v. *Skinner* (15), decided now more than a century ago, in which Lord Mansfield said that "neither party, witness, counsel, jury nor Judge, can be put to answer civilly or criminally for words spoken in office." Then again in the Exchequer Chamber, in *Dawkins* v. *Lord Rokeby* (3), the Lord Chief Baron says that, "the authorities are clear, uniform and conclusive" that counsel have the privilege accorded to witnesses, Judges and parties; and again, at p. 268, he said, "But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that, by reason the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by Judges upon the bench, whether in the superior courts of law or equity or in county courts or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the Legislature in either House of Parliament, or by ministers of the Crown in advising the sovereign, is absolutely privileged, and cannot be enquired into in an action at law for defamation." These *dicta* are of high value, and are, as I think, a judicial declaration of the common law on the question; and besides these there are numerous cases which are analogous to the present case, cases in which it is established that a Judge who makes a defamatory statement falsely, maliciously, and without reasonable and probable cause, cannot be sued for that cause of action; and the same is established with regard to witnesses. Why is this? It is not because such conduct ought not to be actionable, but because, if such actions could be maintained, it would be the innocent Judge and the innocent witness, those who were not false or malicious, who would suffer; the protection is given for the benefit of the public, not for the benefit of any who may fail to act as they

Munster v. *Lamb*, *App.*

ought to act in the positions which they may respectively occupy.

I am of opinion that this action cannot be maintained, and that this appeal must fail. It would be highly inconvenient were the law other than it is, and the public would be the sufferers. The Courts can control all the proceedings and persons before them, and safeguards are thus provided against licence and excess; but if such an action as this were allowed, no person would be free from fear, arduous duties could not be efficiently performed, and the public would be injured. That is the true reason and ground of the rule of law and of the judgment.

Appeal dismissed.

Solicitors—W. Brewer, for plaintiff; Palmer & Bull, agents for Lamb & Evett, Brighton, for defendant.

1883. July 5.

THWAITES *v.* WILDING.

Landlord and Tenant—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *ss.* 1 *and* 2—*Declaration by Lodger—Subsequent Distress.*

The declaration by a lodger required by the Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79), *s.* 1, *must be served on each occasion of a distress being levied or threatened, and a superior landlord cannot be made liable as for an illegal distress under section* 2, *by reference to a notice given on the occasion of a prior distress.*

This was an action, under the Lodgers' Goods Protection Act, 1871, for damages for an illegal distress. The defendant W. J. Wilding was superior landlord of the house 143 Kingsland Road, in which the plaintiff was a lodger within the meaning of the Lodgers' Goods Protection Act, 1871 (1). On the 1st of September, 1881, the defendant distrained upon the plaintiff's goods, in the part of the house occupied by her, for arrears of rent and expenses, amounting to 8*l.* 3*s.* On the 5th of September the plaintiff served the defendant with a proper declaration under the Act, and on the following day the landlord withdrew, the tenant having paid 1*l.*, and promised to pay the balance by weekly instalments. On the 21st of Sep-

(1) 34 & 35 Vict. c. 79. s. 1: "If any superior landlord shall levy or authorise to be levied a distress on any furniture, goods or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that such furniture, goods or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour."

Section 2: "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff or other person the rent, if any, which by the last preceding section such lodger is authorised to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the lodger, such superior landlord, bailiff or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a Justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two Justices in places where there is no stipendiary magistrate, and such magistrate or Justices shall enquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be enquired into."

tember, 1881, there having accrued due a fortnight's rent, amounting to 1*l.*, from the tenant, the landlord re-entered for the same amount—namely, 8*l.* 3*s.*—as on the 1st of September. No further declaration under the Lodgers' Goods Protection Act, 1871, was given, and the plaintiff's goods were sold by the defendant Wilding. For this seizure and sale the plaintiff brought an action for damages, which was tried on the 8th of June, 1883, before Mathew, J. The man who took possession for the defendant Wilding was made a formal party to the action. The learned Judge declined to nonsuit the plaintiff, on the ground that there was evidence of a sufficient declaration, under the Lodgers' Goods Protection Act, 1871, having been given by the plaintiff, and the jury returned a verdict in her favour, assessing the damages at 14*l.* The defendant obtained a rule *nisi*, calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict and judgment be entered for the defendant on the ground that there was no evidence to go to the jury of illegal distress on the 21st of September, 1881, no declaration having been served under the Lodgers' Goods Protection Act, 1871, on that date, or why a new trial should not be had on the ground of misdirection of the learned Judge, in that he directed the jury that there was evidence of a declaration having been served under the Lodgers' Goods Protection Act, 1871, and of illegal distress on the 21st of September, 1881.

McClymont shewed cause.—The declaration given on the 5th of September enured to the benefit of the plaintiff, and should be referred to the second distress. The second distress was illegal. 7*l.* of the amount distrained for had been already distrained for by the distress of the 1st of September, 1881—*Dawson* v. *Cropp* (2). It should be assumed that circumstances remain in the same state until the person alleging a change proves it. If the defendant acted legally in the present circumstances, there is nothing in the Act to prevent his distraining again next day.

(2) 1 Com. B. Rep. 961; 14 Law J. Rep. C.P. 281.

H. Kisch, in support of the rule.—The rent was not wholly the same, and though part of it may be the same, that does not constitute an illegal distress; it is only at most an excessive distress. There is no trespass, as the distress was not illegal, and the defendant had a right to enter in respect of the 1*l.* rent accrued due subsequently. Section 1 of the Lodgers' Goods Protection Act (1) is in terms of the present tense, and refers only to one declaration and one distress. If there be a second legal distress there must be a second declaration under the Act. The onus of proving that the circumstances have changed cannot lie on the landlord. He cannot give affirmative evidence, for instance, of more rent having accrued due from the lodger since the former distress, or of the property in the goods having passed from the lodger, or of the lodger having ceased to occupy that position—all of which may have happened between the 5th and 21st of September, 1881, and must be negatived in accordance with the Lodgers' Goods Protection Act on each occasion of a legal distress being levied or threatened in order to deprive the superior landlord of his common law right to distrain upon the goods in question.

DENMAN, J.—In this case it is alleged that the plaintiff was a lodger in a house, of which her immediate landlord, S. Thwaites, the brother of the plaintiff, was tenant to the defendant Wilding, and that, there being no rent due from her to her immediate landlord, at the time, nevertheless the defendant illegally distrained upon and converted her goods, whereby she sustained damage for which she claims 140*l.* The defendant denies that the plaintiff's brother was immediate landlord to the plaintiff, or that the plaintiff was a lodger at the time of the alleged trespass, and says that at such time—namely, on the 21st of September, 1882—there was due and owing to him from his immediate tenant, the said S. Thwaites, the sum of 8*l.* for rent of the said premises, and that his entry thereon was justifiable and in exercise of his right of distress as superior landlord. The plaintiff bases her case mainly on the Lodgers' Goods Protection Act, 1871, and claims that the defendant seized the goods after he had proper

notice that they were her property as a lodger, and is therefore liable to her in damages for a wrongful distress. It appears that about the 1st of September, 1881, there was due and owing to the defendant from S. Thwaites the sum of 8*l.* for rent, for which (in addition to 3*s.* for expenses) a distress was put in. Verbal notice that the plaintiff claimed the goods seized as a lodger was given at the time, and on the 5th of September a formal and proper declaration in writing under the Act was given by the plaintiff to the defendant. This declaration contained all that is requisite to conform to the provisions of the Act. Between the 5th of September and the 21st of September a further amount of rent accrued due from the immediate landlord to the defendant Wilding, and on the last-named day a second distress was put in for 8*l.*, being 7*l.* for the balance of the rent in respect of which the first distress was put in, and 1*l.* rent accrued due subsequently. The question in this case is, whether this second distress and the sale thereunder constitute a trespass, because a notice under the Lodgers' Goods Protection Act had been given on the 5th of September, 1881. Looking at the requirements of that Act, I have come to the conclusion that the notice early in September is not applicable to the distress of the 21st of September. It is necessary that the notice given should be applicable to the particular distress. That this is so is reasonably clear from the language of the Act. It is all in the present tense. The declaration is to set forth that the immediate tenant has no right of property or beneficial interest in the goods distrained upon; that such goods are in the lawful possession of such lodger, and so on—all shewing that the declaration must be given, if not after seizure, a sufficiently short time before the seizure, to prevent the possibility of any change of the right of property or the possession. The plaintiff relies on the Lodgers' Goods Protection Act, s. 2 (1), as making the distress illegal. But I do not think the words "after being served with the beforementioned declaration and inventory" warrant a lodger in referring to a declaration given some two or three weeks before the seizure. The declaration setting forth the particulars required in section 1 must be served on each occasion of a distress being levied or threatened, and a superior landlord cannot be made liable as for an illegal distress under section 2 by reference to a declaration given on the occasion of a prior distress.

It is said, however, that this distress was illegal because part of the amount distrained for consisted of a sum for which the first distress was levied. No doubt if a landlord voluntarily abandons a distress he cannot again distrain in respect of the same rent. But here the defendant did not voluntarily abandon the first distress; he was compelled to withdraw by reason of the notice given him, which prevented him realising anything on his distress excepting the 1*l.* paid under the arrangement. The learned Judge at the trial, however, seems to have held that, although 1*l.* was lawfully due, and for that the landlord had a right to enter, yet the mere fact that he also distrained for the 7*l.*, part of that for which he had already distrained, gave a cause of action. This is contrary to *Tancred* v. *Leyland* (3), which decides that the mere taking or selling on a claim of more than is due is not *per se* actionable. Here there was no evidence of special damage, and therefore it was a misdirection to hold that the defendant was liable for a wrongful distress. The defendant, therefore, having a perfect right to distrain, the agreement to pay off the 7*l.* never having been carried out, was within his right in distraining, and, no declaration under the Lodgers' Goods Protection Act having been given, had a right to sell. This action therefore, in my opinion, is not well founded, and judgment must be entered for the defendant.

MANISTY, J.—I am of the same opinion. There are two questions involved in this case. First, whether this distress was unlawful as between the superior landlord and his immediate tenant; secondly, if it be not a distress for which an action would lie, will the fact that the plaintiff is a lodger enable her to maintain this action? The defendant had a right to distrain on the 1st of September, 1881, but the distress was put an end to by the declaration and the agreement to pay by instalments. Even if no

(3) 16 Q.B. Rep. 669; 20 Law J. Rep. Q.B. 316.

more rent had accrued due there would have been a right to distrain, for *Dawson* v. *Cropp* (2) and *Bagge* v. *Mawby* (4) decide that if the first distress is withdrawn by arrangement or on lawful compulsion, a second distress for the same amount is not illegal. Here, although the sum is of a like amount, owing to the fact that between the 5th of September and the 21st of September 1*l.* had accrued due, yet it is not a distress wholly in respect of the same rent. Even if the defendant had no right to enter in respect of the 7*l.*, he had a right to distrain for 1*l.*, and that he distrained for more is not actionable unless special damage can be shewn. That is decided in *Tancred* v. *Leyland* (3).

Although it is not desirable in all cases to bind parties too closely to their pleadings, yet if the true facts had been stated in the statement of claim, judgment would at once have been entered for the defendant. It was not a fact, as pleaded there, "that after the said distress"—that is, the distress on the 21st of September, because the distress on the 1st of September was admittedly lawful—"the plaintiff had due notice" under the statute. There was a proper notice on the 5th of September, which stated, amongst other things, that no rent was due from the plaintiff to her immediate landlord. But from the 5th of September to the 21st of September fresh rent would have accrued due, and if this had not been paid, the notice would be wrong, and the plaintiff guilty of a misdemeanour under the statute, if the plaintiff's contention be right. Then, again, the declaration has to set forth that the immediate landlord has no beneficial interest in the property. Between the 5th of September and the 21st of September the property may have changed. The superior landlord is entitled to have the declaration as to the interest of the lodger's immediate landlord and as to the rent, and unless such a declaration is given on each occasion of distress the lodger cannot be protected. The plaintiff, therefore, has not supported her pleas, because she has not shewn that she gave a proper notice under the statute, "after the said distress" of the 21st of September. There must therefore be judgment for the defendant, with costs.

Judgment for the defendant, with costs.

(4) 8 Exch. Rep. 649; 22 Law J. Rep. Exch. 236.

Solicitors—Weall & Barker, for plaintiff; George A. Haynes, for defendant.

1883. June 19. } NEWTON *v.* THE JUSTICES OF THE WEST RIDING, YORKSHIRE.

Licensing Acts, 1828 *and* 1874—*Forfeiture of Licence by Holder—Application of Owner of Premises—Refusal of Licence—Appeal to Quarter Sessions*—37 *&* 38 *Vict. c.* 49. *s.* 15—9 *Geo.* 4. *c.* 61. *ss.* 14 *and* 27.

[For the report of the above case, see 52 Law J. Rep. M.C. 99.]

[IN THE HOUSE OF LORDS.]

1883. April 17, 19, 20, 23. June 4. } MADDISON *v.* ALDERSON.

Contract—Verbal Agreement to devise Realty — Part Performance — Statute of Frauds.

The appellant was induced to serve A. as his housekeeper for many years, and to give up other prospects of advancement in life, by a verbal promise made by A. to leave her a farm for her life. A. signed a will, leaving the farm in accordance with his promise; but the will was not duly witnessed:—Held, *that, assuming a contract in fact between A. and the appellant, there was no part performance unequivocally referable to a contract, so as to exclude the operation of the Statute of Frauds; and that the appellant could not recover the farm from A.'s heir.*

Loffus v. Maw (3 Giff. 592; 32 Law J. Rep. Chanc. 49) *disapproved.*

Parker v. Smith (1 Coll. 608) *questioned.*

Maddison v. *Alderson, H.L.*

This was an appeal from a judgment of the Court of Appeal, which reversed one of Stephen, J. The case is reported in the Courts below, 49 Law J. Rep. Exch. 801; 50 ibid. 466; Law Rep. 5 Ex. D. 293; ibid. 7 Q.B. D. 174.

The facts sufficiently appear in the headnote and the judgment of the Lord Chancellor.

Rigby, Q.C., and *W. D. Rawlins*, for the appellant.—That there was a contract in fact cannot be disputed. There may be a part performance of such a contract as this by such acts as are here proved, sufficient to bind the conscience. The doctrine of part performance is based on fraud. Courts of equity will not allow the Statute of Frauds to be set up to support a fraud.

[THE LORD CHANCELLOR referred to *Jorden* v. *Money* (1)].

Loffus v. *Maw* (2) is in the appellant's favour. The appellant has altered her position in consequence of the verbal promise. To repudiate a contract after accepting the consideration is against conscience, and will not be allowed except in the two cases where the statute is express—that is, where the consideration is marriage or payment of purchase-money—sections 4 and 17, *Clinan* v. *Cooke* (3), *Lester* v. *Foxcroft* (4), *Watt* v. *Evans* (5) and *Nunn* v. *Fabian* (6). The contrary view restricting the part performance recognised in equity to the single case of delivery of the possession of land is taken by Cotton, L.J., in *Britain* v. *Rossiter* (7), and has to be met by the appellant—*Lacon* v. *Mertins* (8) and *Parker* v. *Smith* (9). *Hammersley* v. *De Biel* (10) shews that a representation as to an intention to make a will in another's favour may be treated as a promise. Part performance need not relate to the subject-matter of the contract. If it is necessarily referable to a contract, inconsistent with there being no contract at all, the nature of the contract may be shewn by other evidence.

[THE LORD CHANCELLOR.—At what precise time and by what precise acts was there part performance?]

The case is analogous to a building contract, which can only be enforced specifically by the builder when he has finished the houses. Specific performance could not be granted till the appellant had completed her part of the contract, because she could not have been compelled specifically to perform the residue on her side—*Whaley* v. *Bagnel* (11), *Bond* v. *Hopkins* (12), *Podmore* v. *Gunning* (13), *Buckmaster* v. *Harrop* (14), *Frame* v. *Dawson* (15), *Morphett* v. *Jones* (16), *Mundy* v. *Jolliffe* (17), *Wilson* v. *The West Hartlepool Railway Company* (18).

In *Ungley* v. *Ungley* (19) delivery of possession of a house by a father to his daughter on her marriage was treated as part performance of a contract to give it. The doctrine of part performance cannot be rested, as by Jessel, M.R., in that case, on the cogency of the evidence it affords—see observations of Sir W. Grant in *Buckmaster* v. *Harrop* (14). It must be put upon the ground of fraud in accepting a benefit at the expense of another—*Coles* v. *Pilkington* (20).

A contract to leave by will may be specifically enforced—*Hammersley* v. *De Biel* (10), *Goylmer* v. *Paddiston* (21) and *Goilmere* v. *Battison* (22).

(1) 5 H.L. Cas. 185; 23 Law J. Rep. Chanc. 865.
(2) 3 Giff. 592; 32 Law J. Rep. Chanc. 49.
(3) 1 Sch. & Lef. 22.
(4) 1 Colles P.C. 108.
(5) 4 You. & C. Exch. 579.
(6) 35 Law J. Rep. Chanc. 140; Law Rep. 1 Chanc. 35.
(7) 48 Law J. Rep. Exch. 362; Law Rep. 11 Q.B. D. 123.
(8) 3 Atk. 1.
(9) 1 Coll. 608.
(10) 12 Cl. & F. 45.
(11) 1 Bro. P.C. 345.
(12) 1 Sch. & Lef. 413.
(13) 7 Sim. 644; 5 Law J. Rep. Chanc. 266.
(14) 7 Ves. 341.
(15) 14 Ves. 386.
(16) 1 Swanst. 172.
(17) 5 Myl. & Cr. 167; 8 Law J. Rep. Chanc. 62.
(18) 2 De Gex, J. & S. 475; 34 Law J. Rep. Chanc. 241.
(19) 46 Law J. Rep. Chanc. 189, 854; Law Rep. 4 Ch. D. 73.
(20) 44 Law J. Rep. Chanc. 381; Law Rep. 19 Eq. 175.
(21) 2 Vent. 353.
(22) 1 Vern. 48.

Maddison v. *Alderson, H.L.*

[THE LORD CHANCELLOR referred to *Maunsell* v. *White* (23).]

There the testator in making the alleged promise had said that he would never settle the property so as to put it out of his power during his life.

[THE LORD CHANCELLOR. — Can you have specific performance after a man's death of a contract to make a will?]

The substance of the contract is that the appellant is to have the land after Alderson's death. The Court cannot, in fact, compel specific performance of a contract to convey by deed. It can only make a vesting order—*Needham* v. *Smith* (24), *Coverdale* v. *Eastwood* (25), *McCormick* v. *Grogan* (26), *Walker* v. *Walker* (27) and Gilbert, C.B., *Lex Praetoria*, p. 241.

Davey, Q.C., and *Gainsford Bruce* (*W. Barber, Q.C.*, with them), for the respondent.—The House will not go further than Courts of equity have already gone in avoiding the effect of the Statute of Frauds. In fact, there was no contract, for the appellant did not bind herself to continue in Alderson's service without wages. But, assuming that there was a contract in fact, there can be no specific performance. The decision in *Loffus* v. *Maw* (2), which the appellant relies on, cannot be supported. It is founded on a confusion between representation and contract, and the Vice-Chancellor went upon a misunderstanding of observations of Lord Cottenham in *Hammersley* v. *De Biel* (10), which he thought were inconsistent with *Jorden* v. *Money* (1).

Assuming the verbal contract, there are two legal grounds of objection to the appellant's case:—first, there was no sufficient part performance. Acts of part performance, to be relied on, must be such as necessarily to lead to an inference of some contract affecting land. This rule underlies and explains all the cases.

[THE LORD CHANCELLOR referred to *Parker* v. *Smith* (9) and *Walker* v. *Walker* (27)].

When *Walker* v. *Walker* (27) was decided, it was thought (as decided in *Lacon* v. *Mertins* (8)) that payment of purchase-money was sufficient.

[THE LORD CHANCELLOR.—Do you say that the doctrine of part performance only applies to contracts about land?—*Britain* v. *Rossiter* (7).]

There is no case applying it to any other contracts, though there are expressions in *Hammersley* v. *De Biel* (10) in favour of doing so. In all cases, delivery or continued possession of land was the part performance—*Gunter* v. *Halsey* (28), *Clinan* v. *Cooke* (3), *Frame* v. *Dawson* (15), *Morphett* v. *Jones* (16), *Nunn* v. *Fabian* (6), *Wills* v. *Stradling* (29), *Ungley* v. *Ungley* (19), *Surcome* v. *Pinniger* (30), *Britain* v. *Rossiter* (7), *Pain* v. *Coombs* (31). *Parker* v. *Smith* (9) is peculiar, but was intended to be decided on the same principle.

Secondly, a contract to devise land by will cannot be specifically enforced in equity; it can, at most, give rise to an action for damages. In *Goylmer* v. *Paddiston* (21)—probably the same case as *Goilmere* v. *Battison* (22)—the contract was to "give," not to "leave." In *Needham* v. *Smith* (24) the contract was to settle by will, or otherwise—*Logan* v. *Wienholt* (32). There is no case where a covenant to leave by will has been held to bind land. The fact that a man agrees to make a will, and does not settle, shews that he did not mean to bind the land. If he became bankrupt, the trustee would take the land; if he married, his wife would be entitled to dower; if he does leave the land as agreed, it would be subject to his debts. How, then, can the appellant be placed in a better position by his not performing his agreement? To hold for the appellant would be to make a will for a man by estoppel, and would overrule the Wills Act. *Podmore* v. *Gunning* (13) and *McCormick* v. *Grogan* (26) were cases of secret trusts enforced to prevent fraud.

Rigby, Q.C., in reply.

Cur. adv. vult.

(23) 4 H.L. Cas. 1039.
(24) 4 Russ. 318; 6 Law J. Rep. Chanc. 107.
(25) 42 Law J. Rep. Chanc. 118; Law Rep. 15 Eq. 121.
(26) Law Rep. 4 H.L. Cas. 82.
(27) 2 Atk. 98.
(28) Amb. 586.
(29) 3 Ves. 378.
(30) 3 De Gex, M. & G. 571; 22 Law J. Rep. Chanc. 419.
(31) 1 De Gex & J. 34.
(32) 1 Cl. & F. 611.

Maddison v. *Alderson, H.L.*

THE LORD CHANCELLOR (THE EARL OF SELBORNE).—The appellant in this case lived for many years as housekeeper in the service of Thomas Alderson, who died on the 16th of December, 1877. She originally entered his service in 1845; and, having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about 137*l.* per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate; for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The appellant having possessed herself of the title-deeds, the heir-at-law, to whom the estate descended, brought the present action to recover them; and she, by her statement of defence and counter-claim, insisted that she was entitled to the same benefit which she would have taken under the will, if duly executed, by virtue of a parol agreement alleged to have been made with her by her master for sufficient consideration, and to have been, on her part, performed. I do not think it necessary to read the averments contained in the third, fourth and fifth paragraphs of her pleadings; because, so far as the facts are concerned, they must now be taken from the verdict of the jury, together with the Judge's notes of the evidence at the trial, if, as seems to have been assumed in both the Courts below, that evidence, as well as the verdict, may be regarded. Whether that assumption was correct or not is, in my view, immaterial; because, in either view, my own conclusion would be the same.

The question which, at the instance of the appellant's counsel, and without objection from the respondent, was left by Mr. Justice Stephen to the jury, was "whether the defendant was induced to serve Thomas Alderson, as his housekeeper, without wages for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life interest in Moulton Manor Farm, if and when it became his property?" That question the jury answered in the affirmative. The evidence on which the verdict proceeded was that of the appellant herself, without any corroboration other than the unattested will, which made no mention of any such inducement. I abstain from stating her evidence in detail; because, in the condensed form in which it appears upon the Judge's notes, it certainly does not go beyond, if, indeed, it is sufficient to justify, the verdict. The material parts of it were to this effect: That the appellant having been long, as already stated, in Thomas Alderson's service, contemplated leaving him, and had some idea of being married, in May, 1860, and so informed him. She had, ten years before, "begun to leave wages in his hand"; the arrear went on from that time, owing to his straitened circumstances; and in May, 1860, 23*l.* 7*s.* 6*d.* remained due to her. He told her of his expectations from his uncle, and that his uncle wished her to stay with him as long as he lived, and wished him to "make her all right" by leaving her the Moulton Manor Farm, which he promised to do if she lived with him. "And so, therefore," she said, "I took his advice, and I remained on by his promises"; in another place, "I did not leave because he advised me not." She did not afterwards "press him" for wages; but, after his death, she brought an action against his administrator for them, which was dropped, as I understand, before or at the time when the present action was commenced. When he signed his will he read it over to her, and asked whether it was right, and "whether she was satisfied."

The case, thus presented, was manifestly one of conduct on the part of the appellant—affecting her arrangements in life and pecuniary interests—induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by

voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her I do not see how she could have brought any action at law, or obtained any relief in equity.

It was admitted, in the argument at the bar, that the appellant had endeavoured to bring her case within the supposed authority of *Loffus* v. *Maw* (2), decided by the Vice-Chancellor Stuart (under circumstances not dissimilar) on the doctrine of representation; for which purpose the Vice-Chancellor relied upon some expressions used by Lord Cottenham in *Hammersley* v. *De Biel* (10), and considered himself at liberty to disregard the reasons assigned by Lord Cranworth and Lord Brougham for the later decision of this House in *Jorden* v. *Money* (1). Mr. Justice Stephen and the Court of Appeal (rightly, in my opinion) took a different view. I have always understood it to have been decided in *Jorden* v. *Money* (1) that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts—a distinction which is illustrated by such cases as *Prole* v. *Soady* (33) and *Piggott* v. *Stratton* (34). *Hammersley* v. *De Biel* (10) was a case of contract for valuable consideration, duly signed so as to fulfil the requirements of the Statute of Frauds, in the view both of Lords Langdale and Cottenham in Chancery, and of Lord Campbell in the House of Lords (35). These decisions are consistent with each other; *Hammersley* v. *De Biel* (10) does not justify, and *Jorden* v. *Money* (1) is irreconcilable with, the reasons stated by the Vice-Chancellor for his judgment in *Loffus* v. *Maw* (2).

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), in which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." It has been recently decided by the Court of Appeal, in *Britain* v. *Rossiter* (7), that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land—an opinion which seems to differ from that of Lord Cottenham (see *Hammersley* v. *De Biel* (35) and *Lassance* v. *Tierney* (36). That equity has been stated by high authority to rest upon the principle of fraud: "Courts of equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it, and I agree with an observation made by Lord Justice Cotton, in *Britain* v. *Rossiter* (7), that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation, either of the precise grounds, or of

(33) 2 Giff. 1; 29 Law J. Rep. Chanc. 721.

(34) 1 De Gex, F. & J. 33; 29 Law J. Rep. Chanc. 1.

(35) 12 Cl. & F. 63–4*n*, and 87; 3 Beav. 474–6.

(36) 1 Mac. & G. 551.

the established limits, of the equitable doctrine of part performance.

It has been determined at law (and, in this respect, there can be no difference between law and equity) that the 4th section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced—*Crosby* v. *Wadsworth* (37), *Leroux* v. *Brown* (38) and *Britain* v. *Rossiter* (7). *Crosby* v. *Wadsworth* (37) was an action of trespass, brought by the purchaser against the vendor of a growing crop. The contract was by parol, and it was held to be concerning an interest in land within the 4th section of the statute. "But" (said Lord Ellenborough) "the statute does not expressly and immediately vacate such contracts, if made by parol; it only precludes the bringing of actions to enforce them, by charging the contracting party, or his representatives, on the ground of such contract, and of some supposed breach thereof; which description of action does not properly apply to the one now brought —namely, a mere general action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise. But although the contract for this interest in or concerning land may not be in itself wholly void under the statute, merely on account of its being by parol (so that, if the same had been executed, the parties could have treated it as a nullity), yet, being executory, and as for the non-performance of it no action could have been, by the provisions of the 4th section, maintained, we think it might be discharged, before anything was done under it which could amount to a part execution of it."

From the law thus stated, the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land completely performed on both sides as to everything except conveyance: the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from enquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered, unless the contract is regarded. The choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that, when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved in an executed conveyance, founded upon an unsigned agreement.

It is not in England only that such a doctrine prevails; a similar (perhaps even

(37) 6 East, 602.

(38) 12 Com. B. Rep. 801, 824; 22 Law J. Rep. C.P. 1.

a larger) equity is also recognised in other countries whose equitable jurisprudence is derived from the same sources as our own. By the law of Scotland "written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity—as obligations relative to land, or obligations agreed to be reduced to writing, or those required by statute to be in writing."

To constitute any such contract there must be a "final engagement"; and, as a corollary to that rule, a "*locus penitentiæ* is given—that is, a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is required, and has not yet been adhibited in an authentic shape." But to this, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obliger to take place on the faith of the contract, as if it were perfect: provided they are unequivocally referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable" (39).

This must, I think, have been the principle on which the House of Lords proceeded in 1701, when it reversed the decree of Lord Somers in *Lester* v. *Foxcroft* (4). Lord Redesdale, in *Clinan* v. *Cooke* (3) and *Bond* v. *Hopkins* (12), referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases, before Lord Guildford—*Hollis* v. *Edwards* (40) and *Butcher* v. *Stapely* (41)—decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds; in the earlier of which the Lord Keeper had refused, and in the latter had granted, relief. *Butcher* v. *Stapely* (41) was a strong case upon its circumstances, for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase-money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guildford "declared that, inasmuch as possession was delivered according to the agreement, he took the bargain to be executed."

Among later cases I may refer to *Pengall* v. *Ross* (42), decided by Lord Cowper in 1709, *Lockey* v. *Lockey* (43), by Lord Macclesfield in 1719, and *Potter* v. *Potter* (44), by Strange, Master of the Rolls, in 1750. "There must be something," said Lord Cowper (42), "more than a bare payment of money on the one part to induce the Court to decree a performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party performing his part, as beginning to build, or letting the other into possession, &c.; in such case where the agreement hath proceeded so far on one part, the statute never intended to restrain this Court from decreeing a performance of the other." Lord Macclesfield said (43) that an unwritten agreement, "if executed on one part, had been always looked upon as so far conclusive as to induce the Court to decree an execution on the other part, not to destroy or avoid the agreement so far as it was already carried into execution." Sir John Strange (44) said: "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution, as such, in equity."

The doctrine, however, so established has been confined by Judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some *evidentia rei* to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse

(39) Bell's Principles, sections 18, 25, 26.
(40) 1 Vern. 159
(41) 1 Vern. 363.
(42) 2 Eq. Ca. Abr. 46.
(43) Prec. in Chanc. 518, at p. 519.
(44) 1 Ves. sen. 438, at p. 441.

to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke, in *Gunter* v. *Halsey* (28), said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). He thought it, indeed, consistent with that rule to treat the payment of purchase-money in whole or in part as a sufficient part performance—*Lacon* v. *Mertins*, 1743 (8), and *Owen* v. *Davies*, 1747 (45). This, Lord Cowper, in *Pengall* v. *Ross* (42), and Lord Macclesfield, in *Seagood* v. *Meale*, 1721 (46), had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase-money is not enough; and Judges of high authority have said the same even of payment in full—*Clinan* v. *Cooke* (3), *Hughes* v. *Morris* (47) and *Britain* v. *Rossiter* (7). Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and, in their own nature, referable to some such agreement as that alleged—*Cooth* v. *Jackson* (48), *Frame* v. *Dawson* (15) and *Morphett* v. *Jones* (16). "The acknowledged possession," said Sir T. Plumer, in *Morphett* v. *Jones* (16), "of a stranger in the land of another is not explicable except on a supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an enquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure."

"It is, in general," said Sir James Wigram—*Dale* v. *Hamilton* (49)—"of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute an act of part performance taking the case out of the Statute of Frauds—as, for example, the payment of a sum of money alleged to be purchase-money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not, in general, give relief." (See *Britain* v. *Rossiter* (7), *per* Lord Justice Cotton.) The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use or tenure of the land. The law of equitable mortgage by deposit of title-deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in—first, *Clerk* v. *Wright* (50) and *Whaley* v. *Bagnel* (11), where acts preparatory to the completion of a contract were held not to be part performance; secondly, *Wills* v. *Stradling* (29), where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be "enough even to call for an answer"; thirdly, *Lamas* v. *Bayly* (51), where the plaintiff, being engaged in a treaty for the purchase of land, desisted in order that the defendant might buy it, on an agreement that he should have part of it, when so bought, at a proportional price, but his "desisting from the prosecution of his purchase" was held to

(45) 1 Ves. sen. 82.
(46) Prec. in Chanc. 560.
(47) 2 De Gex, M. & G. 349; 21 Law J. Rep. Chanc. 761.
(48) 6 Ves. 12, at p. 38.
(49) 5 Hare, 369, 381; 16 Law J. Rep. Chanc. 126.
(50) 1 Atk. 12.
(51) 2 Vern. 627.

be no part performance; and, fourthly, *O'Reilly* v. *Thompson* (52), where the agreement alleged was that, upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying: "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract"—meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in *Lamas* v. *Bayly* (51). The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part; their performance was—as in *O'Reilly* v. *Thompson* (52)—a condition precedent, without the fulfilment of which the promise, which the jury found to have been made by Thomas Alderson, could not, on his part, become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant as favourable to their argument—*Walker* v. *Walker* (27) and *Parker* v *Smith* (9).

In *Walker* v. *Walker* (27) Lord Hardwicke did not execute any parol contract on the ground of part performance or otherwise; all that he did was to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A and B that A would surrender a copyhold belonging to him to C, charged with annuities in favour of B, if B would surrender another copyhold of his own to C. A surrendered his copyhold accordingly, charged with the annuities, and died; B did not surrender, but he sought nevertheless, by his bill, to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying that "he was not clear that the agreement might not have been established by cross bill," upon the principle of part performance. To such a *dictum*, not even the authority of so great a Judge can give much weight. It does not appear how, if there had been a binding agreement, C, who was no party to it, could have claimed specific performance. The true equity was that which was actually administered—namely, to relieve A's copyhold, in the hands of C, from the charge which B unconscientiously sought to enforce.

Of the other case—*Parker* v. *Smith* (9), before Vice-Chancellor Knight-Bruce—I think it enough to say that it was dealt with in an extraordinary manner, and is difficult to reconcile with *Cooth* v. *Jackson* (48). The acts to which the Court gave the effect of part performance were done before any definite terms of agreement had been (even by parol) concluded between the parties. It might well have been held that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time, and, until then, everything as to the terms of the intended new lease remained unsettled. I cannot, therefore, regard *Parker* v. *Smith* (9) as a satisfactory authority.

I am sorry for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would

(52) 2 Cox, 271.

be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal. I should have been glad if that Court had dealt differently with the costs, as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal, and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

LORD O'HAGAN.—I have had the advantage of perusing the opinion which has just been delivered by the Lord Chancellor, and it has dealt so exhaustively with the case, and with all the authorities which bear upon it, that, concurring as I do with the conclusions of my noble and learned friend, and the reasons on which they are grounded, I do not feel justified in occupying time by any lengthened repetition of them, but I shall briefly indicate the grounds of my concurrence.

It seems to me impossible without a dangerous extension of the principles on which the operation of the Statute of Frauds has been held to be avoided as to certain parol contracts, on the ground of part performance, that your Lordships can refuse to affirm the unanimous judgment of the Court of Appeal.

There have been, I think, two errors in the conduct of the case, which have created difficulty and contradiction in the decision of it.

In the first place, the reliance of the plaintiff on the ruling of the Vice-Chancellor in *Loffus* v. *Maw* (2), and the consequent effort to shape the evidence so as to make that ruling applicable, tended to raise a false issue, and place her controversy on an untenable foundation. I quite agree that the authorities on which that ruling was based do not sufficiently sustain it. This case must be dealt with, not on the ground of representation, but as one of contract, having relation to some binding engagement for future conduct, and not to a responsibility created by any misleading averment of existing facts. The result of the argument has made this mistake apparent, and it is now confessed.

Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this—that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, the order of the contention was reversed. The Court was asked, from the findings of the jury and the testimony supporting them, to say there was a contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained. Too much attention was bestowed upon the proof of the contract and too little on the sufficiency of the performance, which was the more substantial part of the burthen on the appellant in supporting her claim. The alleged agreement regarded an interest in lands, and the statute nullified it for the purpose of the action. *Per se* it was of no account, and could have no value given to it, unless in the first instance it was evidenced by acts to be accounted for only on the supposition of its existence. The allegation of it could not be made the subject of judicial consideration as founding any right of suit, in the absence of such acts satisfactorily ascertained.

In this case, the learned Judge who presided at the trial and the Judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a Court of equity on the fulfilment of the proper conditions was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other. For my own part, I have some hesitation in holding upon it with the appellant from the want of definiteness in the supposed arrangement, and the obscurity of the proof as to some of its material elements. If, at any time, as I conceive, consistently with the proved agreement, during the life of Thomas Alderson, he might at his will have dismissed the appellant from his service, and

if she reciprocally might have declined to serve him further, and so have prevented the fulfilment of the alleged condition of his promise, which could only have had effect on the continuance of her service until he died; and if, as the Lord Chancellor has, in my opinion, correctly stated, there is no evidence to shew that she agreed to serve without the wages which she claimed and sued for after her master's death, I do not clearly see that a bargain so obscure in its terms, so uncertain in its effect, and so doubtful in its intention, could have been properly enforced. I do not see that we have before us that "certain proof" of the agreement which the authorities appear to require.

But I do not deem it necessary to discuss further the grounds of the view adopted by the learned Judge. The previous question as to the sufficiency of the part performance must be settled before the construction and operation of the unwritten contract can be legitimately approached. "The principle of the cases is," says Sir William Grant (15), "that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement, and then parol evidence is admitted, to shew what the agreement is." Then, but not till then.

I confess I have found it hard to follow the reasoning of the Judges in some of the cases to which the Lord Chancellor has referred, to reconcile the rulings in others of them, and to regard as entirely satisfactory the state of the law in which the taking of possession or receipt of rent is dealt with as an act of part performance, and the delivery and acceptance of any amount of purchase-money, confessedly in pursuance and affirmance of a contract of sale, is not. As to some of the judgments, prompted no doubt by a desire to defeat fraud and accomplish justice, I am inclined to concur with the present Master of the Rolls in *Britain* v. *Rossiter* (7) when he called them "bold decisions."

But there is no conflict of judicial opinion, and, in my mind, no ground for reasonable controversy, as to the essential character of the act which shall amount to a part performance in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other. It must be such, in Lord Hardwicke's words (28), "as could be done with no other view or design than to perform that agreement." It must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances created and the relations formed, that they are only consistent with the assumption of the existence of a contract, the terms of which equity requires, if possible, to be ascertained and enforced.

The appellant's case fails in the fulfilment of this indispensable condition. It seems impossible to say that the mere statement of the acts on which she insists of necessity implies the existence of the agreement which she is bound to establish. Those acts are manifestly capable of an explanation in no degree involving the assumption that such an agreement ever was made. Briefly summarised, in the way suggested by Sir William Grant, and most favourably for the appellant's contention, they may be taken to represent her service in Alderson's house, her abandonment of a purpose, as she describes it, of "making a home of my own," and her continuance to serve from 1860 until the death of her master without the wages she had theretofore claimed and partially received.

And though her long service is consistent with her present case, it is not demonstrative of any contract to give her the life estate she claims. She might unquestionably have remained with her master in the enjoyment of some present comforts and the expectation of some future provision, though no such contract had been ever dreamt of. There have not been wanting recorded cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would, in the long run, ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract and compel any payment, although such service had been performed.

In such circumstances, and even where there may have been a general undertaking to afford a suitable acknowledgment, there

would be no ground for inferring a contract for the conveyance or devise of landed estate to the person rendering the service, however valuable it might have been, and however clear might be the right to remuneration for it in another way, the rendering of it not being necessarily referable to any such contract.

Then, as to her service without wages, I repeat that there is no proof of any engagement so to serve, or anything to shew that she might not have demanded and recovered them at any time in a Court of law. But, even if the appellant had made such an engagement, she might have done so from motives and with hopes, such as those just indicated or others of a like kind, strong enough and persuasive enough to induce her for the time to labour gratuitously without any agreement to give her, in return, an interest in land. The fact that her master designed and strove to give her such an interest at the close of his life cannot be taken to establish the existence of such an agreement a dozen years before.

As to her continuance in a state of celibacy, the evidence does not shew that she ever had a real purpose to abandon it. She only "thought of" "making a home"; and that she failed to make it may have been attributable to very many reasons, having no relation whatever to the contract on which she would now rely. She may have taken other views of life, or found such a connection as she had "thought of" undesirable or impossible. Her case does not appear to me to be helped by the suggestion that at one period she contemplated an arrangement of the kind.

I have come very reluctantly to the conclusion that the judgment of the Court of Appeal was right, and that the appeal must be dismissed; and I should be disposed to concur entirely with the noble and learned Lord Chancellor, sympathising, as I do, with his sorrow at a result which deprives this woman of the benefit which her master intended for her; but I cannot see anything in the case sufficient to justify a departure from the usual rule. It appears to me that the judgment of the Court of Appeal being proposed to be affirmed, and the error (if error there was) in the conduct of the proceedings having been, as I have indicated, not on the part of the respondent, but on the part of the appellant, it is extremely difficult to withhold the costs of this appeal.

Lord Blackburn.—I have great difficulty in understanding how Mr. Justice Stephen came to the conclusion that there was a contract between Thomas Alderson and the defendant to the effect alleged. It seems to me impossible to say that the jury found that there was such a contract by their answer to the question asked.

I do not think that the course taken at the trial amounted to a reservation to the Judge of power to draw inferences of fact from the evidence; and, if it had amounted to such a reservation, I do not think that the evidence appearing on the notes would have justified such a finding. It is not merely that the sole witness is a person deeply interested, giving testimony as to what took place between herself and a person deceased; and that no Judge sitting in equity and deciding both the law and fact would have acted on such evidence without confirmation, and that the causing of a draft will to be prepared in 1872 in favour of the defendant cannot be considered as confirmation of a promise alleged to have been made at least twelve years earlier. I do not think there is any rule of law which prevents such unconfirmed evidence from being admissible, or that would prevent a jury from believing and acting on such evidence, though it ought to be strongly pointed out to them how dangerous it would be to do so. The risk of a jury coming to such a decision, and the consequent practical change in the doctrine of specific performance, is one of those which the Legislature in amalgamating law and equity did not perhaps sufficiently provide for.

But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the defendant could have stood, though perhaps it might have been neces-

sary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not denied that there was no note or memorandum of the contract signed by Thomas Alderson.

And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction. It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction, and sales negotiated through brokers, were by some thought for this reason not to be within the statute. Lord Mansfield intimates such an opinion in *Simon* v. *Motivos* (53). I do not think it can be said to have been finally settled that such sales were within the statute till *Kenworthy* v. *Schofield* (54), as late as 1824. And there are indications that great equity Judges, on a similar principle, thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute, and the only question was the sufficiency of the proof of what the contract was. I so understand some of Lord Hardwicke's remarks in *Gunter* v. *Halsey* (28) and *Lacon* v. *Mertins* (8). This principle would apply whether the unequivocal act was a giving possession of the land, or paying the price in whole or in part.

As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged, or otherwise unexceptionally proved, I think this class of cases ought to have been considered overruled; but though I speak with diffidence as to the effect of decisions in equity, it seems to me that, to some extent at least, they were not. Those which tended to shew that payment in whole, or in part, would take the case out of the statute, are overruled by the authorities cited by the Lord Chancellor; but there are cases that, for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is, I think, in effect to construe the 4th section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate, if it was *res integra*, in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra*, and I think that the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as, to some extent at least, established. If it was originally an error, it is now, I think, *communis error*, and so makes the law.

There are many rules laid down as to what should guide a Judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a Court which has the facts found by a jury, in applying these to a trial by jury; but that is a question not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession.

(53) 1 W. Black. 599.

(54) 2 B. & C. 945; 2 Law J. Rep. (o.s.) K.B. 175.

The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Whenever that is the case I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party. The moral justice of the case was completely with the appellant in *Lester* v. *Foxcroft* (4), and as that case was decided more than one hundred and eighty years ago by this House, it is too late now to enquire whether the decision there overruled was not more consistent with technical equity. If there was proof of the allegation that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. Lord Redesdale doubts whether the cases founded on it have been as well considered.

But the cases where this is given as the ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, they should be extended to a case where there has not been such a change. I do not doubt that without any such change actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the defendant's favour, or actually contracted so to make his will, did mean to make it. There can be no fraud upon his part, therefore, unless it is said that in equity it amounts to fraud not to complete a contract when the consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored nor compensated for; where a parol promise is to answer for the default of another, and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle would render the statute a nullity, and it has been decided in *Britain* v. *Rossiter* (7) that this principle does not apply to contracts not to be performed within a year. And it would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case in which the policy of the Statute of Frauds clearly applies, it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it.

I have therefore come to the conclusion that the judgment below should be affirmed. The costs are entirely in the discretion of this House; I do not myself see any sufficient reason for departing from the usual rule as to costs; but if the rest of your Lordships are of a different opinion I will not contest the point.

Lord FitzGerald.—I entirely concur in the judgment pronounced by the Lord Chancellor, affirming the judgment of the Court of Appeal.

The decision of your Lordships' House is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th section of the Statute of Frauds. I have had the advantage of reading the judgment of the Lord Chancellor on this question, and I adopt his reasons. The Lord Chancellor has well laid down that the acts relied on as performance, to take the case out of the statute, must be unequivocally and in their own nature referable to some such agreement as that alleged, and, I may add, must necessarily relate to and affect the land the subject of that agreement. I quite agree that the doctrine of part performance, whatever may have been its foundation, has been too long established to be now questioned. We are bound to follow, but should rather confine than enlarge its limits. There was no part performance in the case before us such as has been defined as necessary, and I may add that the peculiar character of the alleged agreement does not admit of such a part performance by the defendant as could affect the operation of the statute.

If there was such an agreement as the defendant alleges, she had done all that was to be performed on her part —that is to say, she remained in the service of Alderson up to the time of his

death, and there is no proof that she received any wages, or was paid the arrears due to her in 1860. Mr. Justice Stephen thus deals with this part of the case :— "As it was a contract relating to land it obviously falls within the 4th section of the Statute of Frauds; but as it is obvious that it was completely performed on the part of the defendant, it is equally clear that, according to the well-known doctrine of equity, the application of the statute is barred." But it is equally obvious that the acts of the defendant had no necessary reference to any contract such as is relied on, or, indeed, to any contract whatever, or to the land, and would be properly accounted for by some expectation of bounty from her master. At an early stage of the discussion I had satisfied my mind that there never had been any such agreement as that relied on, and that the jury did not find that there had been any such agreement.

The case made by the defendant at the trial would not probably have lasted many moments, had it not been for the document called the will, which was supposed to afford confirmation of the defendant's story, but is not such in reality. There is not to be found in it any allusion to any agreement or promise or representation; nor is the intended devise for her benefit said to be as a reward for her services; and whilst she alleges a promise to leave her the Manor Farm, the will gives her a life estate in it and in all other the intended testator's real estate and in all his personal estate. The intended will does indicate a desire to benefit the defendant very largely, but contains not a word that is referable to such an agreement as is alleged.

The agreement relied on by the defendant in her defence is thus put forward in the third paragraph of her defence :—"And it being inconvenient to him, or he being unable to pay the said arrears of her said wages, he, in order to induce her to continue so to serve him, proposed to the defendant, and represented to her that, if she would not press him for payment of her wages, and would continue to serve him and remain with him whilst he lived, he would leave her a life estate in the property which he expected his uncle would leave him, and in any property of which he might die possessed"; and in the fourth paragraph : "that it was agreed between the said Thomas Alderson and the defendant that, in consideration of the defendant remaining and continuing so to serve him during his life, and of the defendant forbearing to press him for payment of the said arrears, and in lieu of wages for the future, the said Thomas Alderson would by his will leave to the defendant a life estate in his property, to take effect at his death, and that he would duly secure to her the said life estate." It is obvious that these two paragraphs were taken from the dispositions found in the intended will, and that there was no evidence to sustain either; but without intending to confine the defendant to the technical statement put forward by the pleader, and giving her the full benefit of her evidence and of the verdict of the jury, it seems to me that the correct view is that, although Alderson probably made representations to her of the benefits he intended to confer on her if she remained with him during his life, there never was any agreement binding on him to do so.

I concur in the observations which have been made in the course of the case as to the inexpediency of giving effect to an agreement of the character in question alleged by the defendant to have been verbally entered into over twenty years since, not binding on her, and not to come into effect, so far as Alderson was concerned, until after his death, and resting on the unaided testimony of the defendant. If an instance was wanted to justify the wise provisions of the Statute of Frauds and of the Wills Act we find it in the case now before us.

On the question of costs I confess that I have some difficulty. My view at the commencement was that the costs should follow the event; but, on reflection, considering that the defendant succeeded in obtaining the judgment in the primary Court, and that she has lost everything—not only the intended provision made for her by the imperfect will, and the benefits conferred upon her by it, but also her wages; and further, taking into account that the Court of Appeal has in the exercise of its discretion, with which we cannot interfere, given against her the costs in

the primary Court and in the Court of Appeal, I think that here we may, under these circumstances, exercise our discretion in favour of the defendant in the manner indicated by my noble and learned friend the Lord Chancellor.

Order appealed from affirmed, and appeal dismissed; no costs of this appeal.

Solicitors—Harvey, Oliver & Capron, agents for J. Proud, Bishop Auckland, for appellant; Ridsdale & Son, agents for W. W. & W. J. Watson, Barnard Castle, for respondent.

1883. April 27, 28, May 10. } TAYLOR (*appellant*) *v.* SMETTEN (*respondent*).

Lottery—Sale, with Added Right to a Prize—42 *Geo.* 3. *c.* 119. *s.* 2.

[For the report of the above case, see 52 Law J. Rep. M.C. 101.]

[IN THE COURT OF APPEAL.]

1883. July 3. } *In re* SUTTON AND ELLIOTT.*

Solicitor—Bill of Costs—Delivery and Payment of—Application for Delivery of Bill more than Twelve Months after Payment—6 *& 7 Vict. c.* 73. *s.* 41.

The provisions of 6 *& 7 Vict. c.* 73. *s.* 41, *which provide that "the payment of any such bill as aforesaid" is not to preclude the referring of the bill for taxation, provided that the application for such reference be made within twelve calendar months after payment, do not refer only to bills of costs duly signed, but to all bills of costs mentioned in the Act, and therefore an unsigned bill which has been paid cannot be referred for taxation more than twelve months after payment.*

Appeal by Sutton & Elliott, solicitors, from an order of the Queen's Bench Division ordering them to deliver to J. Bleackley their bill of costs in all matters in which they had acted for him.

It appeared from the affidavits that during the years 1877, 1878, 1879 and 1880 Bleackley had received three bills of costs from Sutton & Elliott. These bills were not signed, and he had not paid them; but Sutton & Elliott had applied to the payment of these bills certain sums of money which they had received on behalf of Bleackley.

In August, 1881, Sutton & Elliott ceased to act as Bleackley's solicitors, and a Mr. Hill then became his solicitor.

On the 1st of November, 1881, Sutton & Elliott delivered four bills of costs against Bleackley to Hill, and also a cash account giving credit for moneys received by them. These bills amounted to 109*l.* 19*s.* 6*d.*, and after debiting Bleackley with that sum there appeared to be due to Bleackley from Sutton & Elliott a balance of 162*l.* 1*s.* 5*d.*, which sum Sutton & Elliott paid on the 1st of November, 1881, to Hill, as solicitor for Bleackley, and in Bleackley's presence.

None of these four bills were signed, and one of the questions raised by the appeal was whether Sutton & Elliott could be ordered to deliver these bills at the present time, inasmuch as the summons requiring them to deliver their bills was not taken out till February, 1883.

The Queen's Bench Division ordered Sutton & Elliott to deliver all the bills of costs.

Sutton & Elliott appealed.

Smyly, for the appellants.—The application is too late. More than twelve months have elapsed, so that taxation cannot now take place—6 & 7 Vict. c. 73. s. 41 (1) and *In re Pender* (2).

(1) 6 & 7 Vict. c. 73. s. 41, enacts that "The payment of any such bill as aforesaid shall in no case preclude the Court or a Judge to whom application shall be made from referring such bill for taxation if the special circumstances of the case shall, in the opinion of such Court or Judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such Court or Judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(2) 2 Ph. 69; 16 Law J. Rep Chanc. 25.

* *Coram* Brett, M.R., and Fry, L.J.

In re Sutton, App.

Murphy, Q.C., and *Tatlock*, for the respondent.—The payment referred to in 6 & 7 Vict. c. 73. s. 41 (1), must be payment of a bill properly signed by the solicitor in accordance with the requirements of the statute, so that the limitation of time within which such an application as this must be made does not apply to this case.

BRETT, M.R.—With regard to the first three bills, I see no reason why the Court should not order them to be delivered. They have not been signed, they have not been properly delivered, and they have not been paid. With regard to the last four bills, it appears that an account was handed to the client or to his new solicitor in his presence; that this was a debtor and creditor account in which these four bills were included; that a balance was drawn out which comprised these four bills; that the new solicitor accepted the balance; so that the effect of the transaction is the same as though the amount of the bills had been handed over and the balance given back. These bills, therefore, were paid, and more than twelve months have elapsed since that payment; and, in my opinion, this fact prevents the Court from ordering these bills to be delivered.

This question depends upon 6 & 7 Vict. c. 73. s. 41. The earlier part of the statute deals with both signed and unsigned bills, so that the words "any such bill as aforesaid" in section 41 include, as it seems to me, all bills; and therefore, if an unsigned bill has been paid, and more than twelve calendar months have elapsed, delivery of such a bill cannot be demanded; for I am of opinion that both the sense and the grammar of the section shew that it applies to all bills, whether signed or unsigned.

As I have some doubt on the merits of this case, we will reserve the question of costs until the result of the enquiry into these bills is made known.

FRY, L.J.—I am entirely of the same opinion. I agree that the first three bills were never signed or paid; but with regard to the four bills I think that payment has been shewn, and therefore that, as twelve months have elapsed, taxation of these bills cannot be ordered. Section 37 of 6 & 7 Vict. c. 73, introduces the subject of bills and of the taxation of bills. This section deals with unpaid bills, whereas section 41 deals exclusively with paid bills. Section 37 enacts that no solicitor shall commence any suit for the recovery of any charges for any business done by him until the expiration of one month after he shall deliver to the party to be charged a bill of such charges, which shall be either subscribed with his hand or enclosed in or accompanied by a letter subscribed in like manner referring to such bill. That is, as I have said, the first introduction of the subject of bills of costs in this statute, and then section 41 carries back the mind to the first introduction of the subject, and the words "any such bill as aforesaid" mean any bills already mentioned; and it appears to me that if a bill of costs has been paid, it can, whether signed or unsigned, only be opened if the circumstances specified in the statute exist.

Judgment varied accordingly.

Solicitors—Chester, Mayhew & Co., for appellants; S. E. Lambert, agent for W. H. Connor, Manchester, for respondent.

[IN THE HOUSE OF LORDS.]

1883. May 10. June 11. } THE GREAT EASTERN RAILWAY COMPANY *v.* THE BOARD OF WORKS OF THE HACKNEY DISTRICT.

Metropolitan Management Acts, 18 & 19 *Vict. c.* 120. *s.* 105—25 & 26 *Vict. c.* 102. *s.* 77—*Railway Company—Expenses of Paving New Street on Bridge over Railway—"Land Bounding or Abutting on a Street."*

[For the report of the above case, see 52 Law J. Rep. M.C. 105.]

1883. June 13. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY AND THE GREAT WESTERN RAILWAY COMPANY *v.* E. PRICE AND SON.

Company—Contract—Ultra Vires—Railway Company—Weighing at Station Goods carried on Railway.

Weighing goods carried on a railway at a railway station for the convenience of the consignees is incidental to the statutory powers of the railway company and not ultra vires, and an action may be maintained by the company to recover charges for weighing them.

CASE stated by a County Court Judge in an action by the plaintiff companies against the defendants for 1*l.* 11*s.* 2*d.*, charges for weighing coal on the joint companies' machine at Minsterley Station.

The station in question was on a branch line of the Shrewsbury and Welshpool Railway, constructed under a local Act, and transferred to and made the joint property of the plaintiff companies by a further local Act. The defendants were coal-merchants, occupying a part of the yard of the station, at a rent paid to the plaintiffs. The plaintiffs had a weighing-machine in the station used for their own purposes. Previously to April, 1882, the defendants and other wharf-holders used the machine for weighing coals brought by the plaintiffs' railway, free of charge; but in February, 1882, the plaintiffs affixed a notice in the station that after the 1st of April one penny per ton would be charged. The defendants had knowledge of the notice, used the machine, and down to the end of May paid the charges; but did not pay the charges due since that time, for which charges down to November the action was brought. The County Court Judge held that the services and charges in respect of which the action was brought were *ultra vires*, and gave judgment of nonsuit against the plaintiff companies, with leave to appeal.

Wightman Wood (*J. V. Austin* with him) contended that the services were either expressly authorised or incidental to the powers authorised, and cited *The Ashbury Railway Carriage Company* v. *Riche* (1) and *The Attorney-General* v. *The Great Eastern Railway Company* (2).

K. Digby, for the defendants, contended that the services were *ultra vires* of the statutory powers of the company, and therefore that the contract to pay for them, if any, was void and not enforceable. Weighing goods purely for the purposes of the consignees was not incidental to the powers of carrying them.

WILLIAMS, J.—I am clearly of opinion here that this nonsuit was wrong, and that the judgment of the County Court Judge must be reversed. The action was brought by the railway company to recover a sum of money, at the rate of a penny a ton, for the use of a weighing-machine by the defendants, who carry on the business of coal-merchants. The defendants have their coals carried in the trucks of the railway company, and they deposit their coals upon land which they hire from the railway company at the Minsterley Station at a shilling a yard for the purpose of carrying on their business of coal-merchants. The railway company are bound for their own purposes—for the working of their line, and for matters incidental to their business as a railway company—to have a weighing-machine, which is situated conveniently for the defendants' purposes near the land where their coal is stored; and I assume that, by arrangement between the railway company and the defendants, the defendants are permitted, if it does not interfere with the use of the weighing-machine by the railway company, to weigh the coal upon sale and delivery to their customers. A most astounding proposition it seems to me is raised by the defendants, namely, that having used this machine and having consented to pay for it—because I must assume that for this purpose to-day—having agreed to pay a penny a ton for it, they now turn round and say that they will not pay because the contract is *ultra vires*, and void, and therefore cannot in any

(1) 44 Law J. Rep. Exch. 185; Law Rep. 7 E. & Ir. App. 653.

(2) 48 Law J. Rep. Chanc. 428; 49 ibid. 545; Law Rep. 11 Ch. D. 449; ibid. 5 App. Cas. 473.

shape or way be made the foundation of an action at law. No doubt it is perfectly true that if this contract were void and *ultra vires*, and incapable of being enforced by a Court of law, however unworthy the defence might be, it would prevail. According to the case of *Young* v. *The Corporation of Leamington Spa* (3), which is almost the latest case in the House of Lords, if it is void it must be treated as void, and it is not for a Court of law to travel into the merits of the question or go beyond the legal point.

It seems to me we have only to look at what Lord Justice James says in the case of *The Attorney-General* v. *The Great Eastern Railway Company* (4), and apply that to this case. He says, "Where is this notion of *ultra vires* to extend? Is it *ultra vires* for a railway company to make a profit from the sale of meat and drink at its refreshment-rooms? would it be *ultra vires* for two companies whose lines are connected to have joint workshops for the construction or repair of their rolling-stock, or joint depôts of coals and other stores, or to enter into a joint contract with such persons as the relators for the hire of rolling-stock, and to apportion the cost and expenses between them according to the respective train-miles run on their several lines? would it be *ultra vires* for one company to let another company have the use of part of its offices, warehouses and ground?" It appears to me that covers this case, and still more, and I shall be quite content to rest upon the authority of those observations, and to say that this railway company, possessing this machine for the purposes of their railway and as incidental to their business as carriers, have a perfect right to let not only these people who deal with them but the public at large from time to time have the occasional use and the convenience of this machine, and to make them a fair charge for the use of it. I cannot distinguish this case from the cases put of a urinal and other conveniences at stations, refreshment-rooms and other things not strictly connected with the business of a railway company as carriers, but connected with their business and conveniently provided by a railway company for the advantage of those with whom they come into contact for the purposes of their business. It seems to me it is a perfectly clear case, and that our decision ought to be in favour of the railway company.

SMITH, J.—I am also of opinion that the London and North Western and Great Western Railway Companies are right in this action. I decide this case solely upon the facts before us, which are these. The companies carried for the defendants Messrs. Price & Son certain coals upon their railway, and at the termination of the transit they warehoused these coals for them. They are in bulk and in large quantities. Messrs. Price & Son, for the purpose of distributing this coal to their different customers, go to the railway company, and say, "We wish you would weigh this coal for us on your machine." Messrs. Price & Son know perfectly well what the charge for the machine is, namely, a penny a ton; the coal is weighed, and Messrs. Price & Son then refuse to pay; and when an action is brought, they say the whole thing is *ultra vires* and that the company cannot recover. That is the case which is brought before us.

Now, in the first place, it is said by Messrs. Price & Son it is *ultra vires* because the charge for this weighing-machine is not within the terms of the statute. The defendants' counsel has convinced me that the charge is not within the express terms of the statutes cited on behalf of the railway company; but the question arises whether the action can be maintained on the ground that the service is incidental to what the company are permitted to do. It seems to me what they have done is not *ultra vires*, and is incidental to what the company have to do, and most convenient that they should do. It has been argued that the notice which is set forth in the case is invalid. I give no opinion upon that question, but decide this case apart altogether from that notice, because it seems to me the company have a perfectly good cause of action here by saying that at the request of Messrs. Price & Son the company weighed

(3) 51 Law J. Rep. Q.B. 292; *ante*, p. 713.
(4) 48 Law J. Rep. Chanc. at p. 434.

the coal, and they knew of the notice and the tariff of charge posted up, and that it was a reasonable sum, a penny a ton, and according to that tariff. I am of opinion that this case comes clearly and directly within the decision of the Lord Chancellor in the case of *The Attorney-General* v. *The Great Eastern Railway Company* (5), in which case, in dealing with what Lord Justice James said in the Court below, the Lord Chancellor says this: "But I agree with Lord Justice James that this doctrine"—that is, the doctrine laid down in the case of *The Ashbury Railway Carriage Company* v. *Riche* (1)—"ought to be reasonably, and not unreasonably, understood and applied; and that whatever may fairly and reasonably be regarded as incidental to or consequential upon those things which the Legislature has authorised ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*." It is quite manifest that this charge is not prohibited. It seems to me that the charge which was made for the work and service rendered was incidental to and consequential upon those things which the Legislature had authorised, and, in my judgment, the action is maintainable.

Judgment for the plaintiffs.

Solicitors—R. R. Nelson, for plaintiffs; Paterson, Snow & Co., agents for Edwards, Shrewsbury, for defendants.

1883. April 16. } *In re* MAURER.

Habeas Corpus—Extradition Crime—Committal by Magistrate—Jurisdiction—Sufficiency of Evidence—33 & 34 *Vict. c.* 52, *ss.* 9 *and* 10.

[For the report of the above case, see 52 Law J. Rep. M.C. 104.]

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(5) 49 Law J. Rep. Chanc. at p. 547.

1883. July 4, 5. } BRUNSDEN *v.* HUMPHREY.

Action—Negligence—Damages—Injury to Carriage—Subsequent Action for Personal Injuries—Effect of Previous Proceedings—Res Judicata.

The plaintiff brought an action, and recovered a sum of money in the County Court, against the defendant in respect of injuries caused to the plaintiff's carriage by the negligence of the defendant's driver The plaintiff having subsequently brought an action in the High Court to recover damages for personal injuries arising out of the same act of negligence,—Held, *that inasmuch as the injuries in question resulted from one and the same cause of action, and the plaintiff had had the opportunity of making a claim and recovering damages in respect of such injuries in the County Court, the earlier action was a bar to the later one.*

This was an action tried before Grove, J., and a special jury in Middlesex on the 24th of May, 1883, when a verdict was found for the plaintiff for 350*l.* damages, and judgment entered accordingly.

The action was brought by the plaintiff for injuries sustained on the 4th of July, 1881, through the negligence of the defendant's servant in driving a van, which came into violent collision with the plaintiff's cab, whereby the plaintiff was thrown from his box and seriously injured in the legs. The defendant raised the following, among other defences, in his statement of defence:—

"In the alternative, the defendant says, in answer to the statement of claim, that the plaintiff heretofore, in the Whitechapel County Court of Middlesex, holden at Great Prescot Street, Whitechapel, then being a Court duly constituted and holden under the statutes relating to the County Court, and then having jurisdiction in respect of the causes of action in the statement of claim mentioned, levied a plaint against the defendant for the same cause of action as in the declaration mentioned; and the defendant paid the sum of 4*l.* 3*s.* into Court, and the further sum of 6*s.* for costs, and the plaintiff agreed with the defendant to accept and receive, and did

accept and receive, the said sum of 4*l.* 3*s.*, together with the said costs, in satisfaction and discharge of the said cause of action, and discontinued the said plaint."

In his reply the plaintiff admitted having brought an action in the County Court against the defendant, but contended that his present claim was not thereby merged in the claim made in the said action, as under the particulars delivered therein, which were for damages in respect to his cab, he was precluded from giving evidence as to personal injuries.

The plaintiff further alleged that at the time he brought the said action he was ignorant of the personal injuries he had suffered through the negligence of the defendant's servant.

It appeared at the trial that the action in the Whitechapel County Court had been brought on the 22nd of December, 1881, to recover the amount of damage to the cab. The following were the particulars annexed to the summons:—

"July 4, 1881.

"Arthur Humphrey
"To James Brunsden.

"For carelessly driving a van into cab, 4*l.* 3*s.*

"Repairing wood-work .	£1	8	0
Painting . . .	1	5	0
Three weeks' hire of cab	1	10	0
	£4	3	0"

On the 29th of June, 1882, the plaintiff wrote to the defendant for the first time that he had received a personal injury, as follows:—

"16 Dod Street, Burdett Road,
"Limehouse.

"Sir,—On the 4th of July last your van was so carelessly drove into my cab with such force as to throw me off my seat, and very much injure my legs. I have been confined to my room nearly ever since; and as my legs are a little better now, I ask you for some compensation for injury done to my legs, and so long loss of time.

"James Brunsden."

It appeared at the trial that the plaintiff had called in a doctor to see him a few days after the accident. He stated on cross-examination, however, that the reason he did not put in a claim for personal injuries before was that he did not think that his legs were seriously injured until some considerable time after the accident; then they began to get worse and worse.

A rule *nisi* was afterwards obtained for a new trial, and to enter judgment for the defendant, on the ground, *inter alia*, of misdirection on the part of the learned Judge.

Crispe (*Waddy, Q.C.*, with him) shewed cause.—The money paid in the County Court was for damage caused to the plaintiff's cab, not for the personal injuries which he had sustained. Under the particulars filed in the County Court proceedings, it would have been perfectly impossible to give evidence of any personal injury. There were two causes of action arising from one breach of duty. The injury was of a twofold character, and entirely different, and gave rise to two separate causes of action. Moreover, the injury to the cab and person did not happen quite at the same instant, though they followed one another very rapidly. He cited *Outram* v. *Marwood* (1), *In re Morris* (2) and *Nelson* v. *Couch* (3).

Murphy, Q.C. (with him *Hannen*), for the defendant, appeared in support of the rule, but were not called upon to argue.

POLLOCK, B.—In this case I am clearly of opinion that the rule should be made absolute and judgment entered for the defendant. The action was brought by the plaintiff to recover damages for injury sustained by negligence on the part of the defendant's servant. Evidence was given at the trial to shew that the plaintiff had been considerably hurt, and had incurred expenses by reason of the injury from which he was suffering. The defendant's answer to the action was twofold. He first of all denied the negligence of his servant, and then, alternatively, pleaded the following plea:—"In the alternative, the defendant says, in answer to the statement of claim, that the plaintiff heretofore, in the Whitechapel County Court of Middlesex, holden

(1) 3 East, 346.
(2) 36 Law J. Rep. M.C. 84; Law Rep. 1 C.C. R. 90.
(3) 15 Com. B. Rep. N.S. 99; 33 Law J. Rep. C.P. 46.

at Great Prescot Street, Whitechapel, then being a Court duly constituted and holden under the statutes relating to the County Courts, and then having jurisdiction in respect of the causes of action in the statement of claim mentioned, levied a plaint against the defendant for the same cause as in the declaration mentioned; and the defendant paid the sum of 4*l.* 3*s.* into Court, and the further sum of 6*s.* for costs, and the plaintiff agreed with the defendant to accept and receive, and did accept and receive, the said sum of 4*l.* 3*s.*, together with the said costs, in satisfaction and discharge of the said cause of action, and discontinued the said plaint." Now the material allegation in the plea is that the plaint was levied in respect of the same cause of action; and if the old authorities are looked into, it is clear that the matters alleged in this plea could have been given in evidence, and would have defeated the action. In the present case, is there a single fact, as proved, which is not correctly described in this plea? I think not. The plaintiff in the first instance recovered for the damage which occasioned injury to his carriage, and the money was paid in respect of the cause; and the question is whether this action is not brought for the same cause of action. The question is an important one, and is not always very easy to solve, and I do not intend to go beyond what is necessary for the purpose of deciding this particular case. The rule of law is "*Interest reipublicæ ut sit finis litium.*" As Mr. Justice Lush said in *Cummings* v. *Heard* (4): "The reason why a matter once adjudicated upon is not permitted to be opened again, is because it is expedient that there should be an end to litigation." There must, of course, have been a real suit as distinguished from a collusive one, and a real decision. The old authorities are collected in *Com. Dig.* Tit. Action, K. 1, and from them it is clear that, as between the same parties, where the plaintiff seeks to recover in a second action damages which were recoverable in a previous action brought by him, the former action is a bar to the later one. One important part is to be observed—not only that a second action is barred in respect of matters for which a plaintiff has recovered in the first, but also in respect of matters for which a plaintiff could have recovered. If the rule were otherwise, a party might bring a number of separate actions and greatly harass a defendant. The real test is whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second—see the observations of Mr. Justice Willes in *Nelson* v. *Couch* (3). It has been argued before us in the present case that the plaintiff had no such opportunity, because he did not know the exact nature and extent of his injuries. That is, however, no excuse; if it were, the consequences would be very serious, and would oftentimes entail great hardships and inconvenience on both plaintiffs and defendants.

(4) 39 Law J. Rep. Q.B. at p. 11; Law Rep. 4 Q.B. at p. 673.

Lopes, J.—I think that judgment should be entered for the defendant. Unless all authority is to be disregarded, the maxim "*Interest reipublicæ ut sit finis litium*" applies here. What was the plaintiff's cause of action? Undoubtedly the negligence of the defendant's servant, which was the matter in dispute and adjudicated upon in the first suit, when damages were given to the plaintiff for the injury occasioned to his cab. True he had no damages given him for the personal injuries which he sustained; still, he had the opportunity of making a claim and recovering for personal injuries. It is said that it is only since the County Court proceedings that the plaintiff has discovered that he has been seriously injured. Injured by what? Why by the very same act of negligence as has been investigated in the County Court. The plaintiff is seeking to recover for personal injuries, and is now bringing his action, not for any new act of negligence, but for a consequence of the very same act of negligence in respect of which he has already recovered damages in the former suit. It is clear from the authorities he cannot do this. I think, therefore, that judgment ought to be entered for the defendant.

Rule absolute to enter judgment for defendant.

Solicitors—Noon & Clarke, for plaintiff; Arkcoll & Cockell, for defendant.

1883. June 5. } *In re* BRADFORD AND THURSBY. *In re* BRADFORD AND FARISH.

Practice—Appeal—Costs—Order on Solicitor to pay personally—Judicature Act, 1873, *s.* 49.

An order that the costs of an application at chambers should be paid by the applicant's solicitor personally is an order "as to costs only," within the Judicature Act, 1873, *s.* 49, *and no appeal from such order lies without leave.*

This was an appeal from an order of Day, J., at chambers, dismissing, with costs against G. S. Hare, the solicitor, personally, an appeal from a Master's order dismissing, with costs against the said solicitor personally, an application for an order that the respondent's bill of costs should be referred for taxation.

Augustus Mirams, for G. S. Hare, moved to set aside the order on him to pay costs personally.—This is not within section 49 of the Judicature Act, 1873 (1), although it is "as to costs only"—*Witt* v. *Corcoran* (2). An appeal has been allowed by the Court of Appeal from an order on a solicitor to pay costs personally —*In re Clements* v. *Erlanger* (3). These are not costs between the parties, but a penalty on the solicitor. The Master, therefore, has no discretionary power. In *Taylor* v. *Dowlen* (4) and *In re Hoskin's Trusts* (5) the trustees ordered to pay costs were parties. If there be a discretion it is not absolute, to be used irrespectively of any principle: the solicitor must have been guilty of some misconduct.

Morton Daniel, for Bradford; *Ernest Page*, for Farish; and *Cecil Maurice Chapman*, for Thursby, were not called upon to argue.

POLLOCK, B.—In this case a solicitor named Hare made an application on behalf of a client that a solicitor's bill should be delivered by another solicitor, in which credit should be given for certain sums of money paid, &c., and that the bill should be referred for taxation. The Master dismissed the application, with costs as against the solicitor Hare personally. This he had power to do, for he has the same power as a Judge at chambers, whose jurisdiction is co-extensive with that of the Court, which, of course, can make such an order as against one of its own officers. This order was affirmed by Mr. Justice Day, and it is now sought to review his decision. But it is objected that there is no appeal. That depends upon the question whether this is an order as "to costs only which by law are left to the discretion of the Court," within the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49 (1). Now that section does not merely forbid appeals from orders as to costs which by that Act are left in the discretion of the Judge. Had those been the words, the contention of the appellant would have had much weight; but the words are "costs only which are by law left to the discretion of the Court," which would cover any costs the subject of judicial discretion. The right to order a solicitor to pay costs is purely discretionary, and is commensurate with the discretion as to costs between party and party. If an order for the payment of costs form part of, and is in pursuance of, a general order, and there is an appeal as to the general order, the question of costs is included in the appeal. There are also cases where an appeal lies in which the question is whether, according to the practice of the Court of Chancery, certain costs are payable out of certain funds. It is doubtful whether since the Judicature Act those cases where an appeal lay as to an absolute rule of practice as to costs would now admit of appeal. There have been cases where trustees have been ordered to pay costs out of their own pockets, and no

(1) 36 & 37 Vict. c. 66. s. 49: "No order made by the High Court of Justice, or any Judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or Judge making such order."

(2) 45 Law J. Rep. Chanc. 603; Law Rep. 2 Ch. D. 69.

(3) 46 Law J. Rep. Chanc. 375.

(4) 38 Law J. Rep. Chanc. 680; Law Rep. 4 Chanc. 697.

(5) 46 Law J. Rep. Chanc. 817; Law Rep. 6 Ch. D. 281.

In re Bradford.

appeal has been allowed—*Taylor* v. *Dowlen* (4) and *In re Hoskin's Trusts* (5). The present is a case in which the Master and Judge have exercised their discretion under the rule, and there is no appeal. This appeal will therefore be dismissed with costs.

LOPES, J.—There is no doubt in my mind as to the power of the Master, as representing the Court, to make the order appealed from, because the solicitor against whom it is made is an officer of the Court. The sole question, therefore, for us is, whether an appeal will lie, having regard to section 49 of the Judicature Act, 1873 (1). It appears to me that this is an appeal "as to costs only," and in respect of "costs left by law to the discretion of the Court," and within the very words of that section. But it was argued that this section applies only to costs as between the parties. This is a limited construction that cannot, I think, be put on the words. Had the Legislature intended so to limit them, the words used would have indicated more clearly that that was the intention. The Legislature has not so limited them, and they are, in their natural sense, sufficient to include the present case. We also find an authority against this appeal in *Taylor* v. *Dowlen* (4), which is, I think, an analogous case. There certain trustees, who, though parties to the suit, were not personally interested in it, were ordered to pay costs out of their own pockets. It was held that such an order formed no exception from the general rule which prevailed before the Judicature Act, that no appeal will be allowed for costs. Since the Judicature Act this case has been recognised in the case of *In re Hoskin's Trusts* (5). Lord Justice James in that case says: "It is settled by *Taylor* v. *Dowlen* (4), which has never been disputed or overruled, that a case where a trustee has been deprived of costs for impropriety of conduct is no exception from the general rule that an appeal for costs alone will not lie." This rule is also recognised by Lord Justice Brett, who in the same case says: "If this had been a case in which an appeal would lie before the Judicature Act I think that the Act would have prevented the appeal. But the case, apart from the Act, is governed by *Taylor* v. *Dowlen* (4)."

These are strong decisions against the appeal, which must be dismissed.

Appeal dismissed, with costs as against Mr. Hare.

Solicitors — Bradford & Thursby, in person; James, Son & James, for Farish; G. S. Hare, in person.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. July 24. } NOTTAGE *v.* JACKSON.*

Copyright — Registration — Photograph — "Author" — 25 & 26 Vict. c. 68. ss. 1 and 4.

The plaintiffs, a firm of photographers, trading under the name of the L. S. and P. Co., registered themselves as the "authors" of a photograph, the negative of which had been taken at the instance of one of their managers by another of their employés, who made use of their machinery and materials for the purpose, copies being printed off at a different establishment by a totally different set of employés of the plaintiffs. The plaintiffs themselves had nothing to do personally either with the idea or the execution of the photograph:—Held, *that the registration was insufficient; that the plaintiffs were not the authors of the photograph within the meaning of section* 1 *of* 25 & 26 *Vict. c.* 68; *and, consequently, were precluded by section* 4 *of that Act from bringing an action to restrain the infringement of their copyright in the photograph.*

Semble, — *The "author" of a photograph within section* 1 — *the person on whose life the duration of the copyright depends—is the person who superintends the arrangement of the picture, the pose or grouping of the object or objects, and who is most nearly the effective cause of the photograph when completed; and who that person is, is a question of fact.*

This was an appeal by the plaintiffs from a decision of Field, J., dismissing the

* *Coram* Brett, M.R.; Cotton, L.J., and Bowen, L.J.

action on the ground that they were not the "authors" of a photograph, within the meaning of section 1 of 25 & 26 Vict. c. 68 (1).

The plaintiffs, Messrs. Nottage & Kennard, are a firm of photographers, carrying on business in Regent Street and Cheapside, London, under the style of the London Stereoscopic and Photographic Company.

The defendant lived at Leeds, and there carried on the business of selling photographs, that business being to purchase photographs from large photographic publishers, and to sell such purchases.

It appears that a foreman in the employ of the plaintiffs conceived the idea of taking a photograph of the Australian cricketers, and sent down an *employé* to the Oval for the purpose of taking such photograph. According to the practice of the firm, the negative was brought to Regent Street, then sent to Barnet, where the copies were printed off by different workmen, and when finished were sent back to the shops, and put up for sale.

The plaintiffs registered the photograph by entering a memorandum of copyright in the Register of Proprietors of Copyright kept at the Stationers' Hall in the subjoined form:—

Time of making the Entry	Description of Work	Name and Place of Abode of Proprietor of Copyright	Name and Place of Abode of Author of Work
July 1, 1882	Photograph of Australian Cricket Team, &c.	George Swan Nottage, and Howard John Kennard, 54 Cheapside, and 110 Regent Street, London.	George Swan Nottage, and Howard John Kennard, 54 Cheapside, and 110 Regent Street, London.

The defendant, after the date of registration, bought a copy of the photograph and sent it to a firm of photographic publishers at Berlin, and ordered copies to be made, and on the receipt of the copies so ordered he sold them.

The plaintiffs brought this action to restrain the defendant from infringing the copyright in the photographs, and from repeating and selling them; and also for the statutory penalties, and for an account and delivery up of all copies in his possession.

Petheram, *Q.C.*, and *Shortt*, for the plaintiffs.

Crump, for the defendant.

FIELD, J.—This was a case tried before me without a jury. It is an action brought by George Swan Nottage and Howard John Kennard, who allege that they carry on business as the London Stereoscopic and Photographic Company, and they sue the defendant, averring that they are the

(1) 25 & 26 Vict. c. 68. s. 1: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing and photograph, which shall be or shall have been made, either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof . . . . for the term of the natural life of such author, and seven years after his death. . . ."

Section 4: "There shall be kept at the Hall of the Stationers' Company by the officer appointed by the said company . . . . a book or books, entitled 'The Register of Proprietors of Copyright in Paintings, Drawings and Photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of every such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work . . . . and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration; and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration."

proprietors of subsisting copyrights in certain photographs — one the Earl of Derby, and the other the Australian cricketers of 1882. They say that the memorandum was duly entered, and that the defendant colourably imitated the same. The defendant's answer to that is this: he says, "I did not colourably imitate." Then he says, "You have no right to maintain this action, because you have not complied with the statute under which you seek to sue me." Now in this respect he says, "You have not complied with the Act in that your register is wrong; you have registered two things wrongly; you have, first of all, wrongly registered your place of abode as the proprietors of the copyright." I think there is no practical dispute about the copyright being vested in the plaintiffs; but he says, "You have not properly described yourselves, because you have not put in your place of abode; what you have put in is 54 Cheapside and 110 Regent Street; that is not your place of abode—because you, Nottage, live somewhere, and you, Kennard, live somewhere, and neither of you live or abide in Regent Street." It is not necessary for me to give any decision on that point, though I entertain no doubt myself about its being sufficient within the Act. I give no decision upon it, simply because it is not necessary, and I never do that which is unnecessary.

The second objection is one of great weight, and one with which I am obliged to deal. Certainly it is technical, and does not go to the merits in any way, and I am always sorry when I have to decide a case on a ground like that; but I must decide according to the law, whatever the effect may be. The second defence is this: "that you are not the author of the work." Now the work in question is the negative of a photograph, and there is no doubt that by the statute the plaintiffs are bound to shew, before they can maintain any action, that they have entered the memorandum, at the proper office, of the name and place of abode of the author of the work in which there shall be a copyright. Now the evidence as to how this copyright came into existence is this:—Nottage and Kennard called themselves the London Stereoscopic Company; they are not a company in the sense of being a limited corporation, or anything of that kind. They are an ordinary common law partnership. Instead of trading as Nottage & Co., they trade as the London Stereoscopic Company. There is no evidence at all that either Nottage or Kennard took any interest personally in the management of the business. I dare say they do, as prudent men, examine the accounts and see to the expenses, and that the proper profits are made; but it does not appear that they have photographic minds at all. They do not appear to have studied in any photographic school, if there is one, or to have taken any degrees in photography, if there are any. They do not appear to have any particular skill in that way.

Now what they do is this: the plaintiffs have an establishment in Regent Street, also an establishment in Cheapside, and their business consists of taking photographs of Lord Derby, or Sir Hardinge Giffard, or anybody else who goes there. They have a general manager, who has been called as a witness, and they have a manager of the Regent Street branch, who was also called as a witness, who superintend the taking of photographs. Then it appears that the negative in question was taken under these circumstances: the Australian cricket team was in England, and it was thought by the manager to be a subject that would be likely to sell well. He therefore went and saw Captain Murdock, the captain of the team, and obtained his consent, without the team paying anything, to take the photographs of the whole team. Having obtained that consent, and having got an appointment at the Oval for taking the photograph, the manager directed Mr. Reynolds to go and take the negative, and accordingly he did so. The negative having been obtained, it went in due course of business to the proper office of the plaintiffs, wherever that may be, and from there it went to Barnet to be mounted, and having been mounted, was put in a proper state for sale, and was exhibited in the different shops. Therefore there was a certain amount of united or joint action, as Mr. Petheram reminded me, as shewing they came within the words as to joint authors. Now, under these circumstances, the question is whether or not the plaintiffs are

the "authors." We have not to find out who was, if they are not; it does not matter whether it was Mr. Reynolds or anybody else. But the plaintiffs can only succeed if they are the authors; therefore the question is, what is the meaning of the word "author" in the statute? The statute speaks of paintings, drawings and photographs. Who is the author? We must judge of the meaning of the word by its associates. Who is the author of a painting? I suppose a painter would be the author of his picture, and so with regard to drawings or anything else. Photographs are put in the same way, and one would expect that the man who did the painting, whose idea originated and determined the subject, was the author; but not of necessity—other people may determine the subject; it does not follow that the author determines the subject. We know perfectly well that if I go to an artist, and ask him to take my picture, I determine the subject, but he determines how I shall sit and pose. He arranges the pose of the dress; he puts a great patch of black or blue or red, as he thinks may be artistic—it is his art, and not mine. It is true I give him instructions to take my picture; but he is the author. I am not. I may be the proprietor, and have a copyright in it, but I am not the author. What is the meaning of the Copyright Act? It is a reward, a monopoly, given by the State to some one person in consideration of some service rendered by that person. When I say "one person" I do not mean to deny that it may be joint; several persons may combine together, as Mr. Besant and Mr. Rice did; they may imagine *The Chaplain of the Fleet*, if you like, or any other book of that kind; and one may write a certain class of incidents, and another another class, though both may be joint authors. It need not be a single individual.

Now, that a difference exists between an author and a proprietor is very clear indeed from the 1st section, because that section says the author shall have the sole and exclusive right of multiplying such photographs, and the negative thereof, for the term of the natural life of such author and seven years after his death. There you have the exclusive right of multiplying vested in a person for his life and for seven years after his death, and that "person" may include, as I said just now, more than one person. Then it says, "provided that where the negative of any photograph shall be made for or on behalf of any other person for valuable consideration, the person making the same shall not retain the copyright unless it be expressly reserved to him by agreement in writing." That, as clearly as possible, points to this—there is first of all the authorship, which is vested in the person during his life and for seven years afterwards; there is then the property, not necessarily existing, because if an individual goes to a photographer and pays him for his picture, unless the photographer says, "Now, mind, I am to keep this," the copyright would not exist, there would be no property in it, and he cannot retain it. That being so, it was contended by Mr. Petheram, for the plaintiffs, that this was to be looked upon as a case of joint authorship; and Mr. Shortt also argued it very powerfully that this is to be looked upon as a joint authorship—in other words, that what Mr. Nottage and Mr. Kennard then did was that they were the persons who, by setting the establishment in motion, by keeping a staff for the purpose of making pictures, by employing their servants in making those pictures, by their taking the negative, mounting it and selling it, were engaged in a sort of joint undertaking, and so would fulfil the word "author" as described in the statute.

I am unable to yield to that contention. The first point, as it strikes me, seems to be conclusive against it. If that were so, I see no reason why a limited company or corporation could not be authors; it would only be necessary for a certain number of shares to be subscribed for, and for the company to get registered. There is no natural life in existence, and therefore I cannot come to the conclusion to which I am asked to come. Moreover, it seems to be negatived by authority. The case of *Shepherd* v. *Conquest* (2) was cited, and the basis on which it proceeded seems to be further against it. This is the statement of the case by Chief Justice

(2) 17 Com. B. Rep. 427; 25 Law J. Rep. C.P. 127.

Jervis :—" The plaintiffs, being the proprietors of the Surrey Theatre, agreed by word of mouth with one Courtney that the latter should go to Paris for the purpose of adapting a piece there in vogue for representation upon the English stage; that the plaintiffs should pay all Courtney's expenses, and should have the sole right of representing the piece in London, Courtney retaining the right of representation in the provinces. Courtney accordingly proceeded to Paris, produced the piece in question, and was paid by the plaintiffs as agreed. The piece was brought out at the Surrey Theatre by the plaintiffs, and afterwards at the Grecian Saloon by the defendant, who had obtained an assignment from Courtney. The question is whether the plaintiffs by the transaction between them and Courtney became entitled to the sole right of representation of this piece in London, so as to be able to maintain the action." Then he states that that depends upon the construction of the Act, which I need not trouble about; and then he says, " The 2nd section, in rendering a consent in writing necessary to justify a single representation, involves this consequence—that an assignment conveying the exclusive right to represent throughout Her Majesty's dominions or (if it be possible) in some definite part of them must, in order to be valid, be in writing, and there was no such assignment to the plaintiffs. The plaintiffs have no right therefore, unless it can be established that by reason of the relation between them and Courtney this right devolved upon them at the moment when the piece was composed. Accordingly it was contended on their behalf that, under the circumstances, Courtney was to be considered as merely their servant, the produce of whose labour became the property of his masters at the moment of production, so that no assignment was necessary to vest the property in the latter; and the case was likened to those relating to patent inventions, in which suggestions of a servant employed in perfecting a discovery tending to facilitate its practical application may be adopted by his employer and incorporated into his design without detracting from the originality necessary to sustain a patent for the entire." Then he refers to the case of *Barfield* v. *Nicholson* (3), which is also referred to in Mr. Shortt's excellent book, in which Sir John Leach suggested the application of a similar principle of copyright in the following words (4):—" I am of opinion that under that statute (8 Anne, c. 19) the person who forms the plan and who embarks in the speculation of a work, and who employs various persons to compose different parts of it adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning, of the statute of Anne, which, being a remedial law, is to be construed liberally." Then he says, " To this it was answered that literary productions stand upon different and higher ground from that occupied by mechanical inventions; that the intention of the Legislature in the enactments relating to copyright was to elevate and protect literary men; that such an intention could only be effectuated by holding that the actual composer of the work was the author and proprietor of the copyright; and that no relation existing between him and an employer who took no intellectual part in the production of the work could, without an assignment in writing, vest the proprietorship of it in the latter. To this might be added as to literary property and patents for inventions that they are both creatures of the statutes; that the enactments upon which they are respectively founded differ widely in their origin and in their detail; and that, in order to shew that the positions and rights of an author within the Copyright Acts are not to be measured by those of an inventor within the patent laws, it is only necessary to bear in mind that, whilst on the one hand a person who imports from abroad the invention of another previously unknown here, without any further originality or merit in himself, is an inventor entitled to a patent; on the other, a person who

(3) 2 Sim. & S. 1; 2 Law J. Rep. (o.s.) 90.
(4) 2 Law J. Rep. (o.s.) at p. 102.

merely reprints for the first time in this country a valuable foreign work without bestowing upon it an intellectual labour of his own, as by translation, which to some extent must impress a new character, cannot thereby acquire the title of an author within the statute relating to copyright. We do not think it necessary in the present case to express any opinion whether under any circumstances the copyright in a literary work, or the right of representation, can become vested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject and has no share in the design or execution of the work, the whole of which, so far as any character or originality belongs to it, flows from the mind of the persons employed. It appears to us an abuse of terms to say that in such a case the employer is the author of a work to which his mind has not contributed an idea, and it is upon the author in the first instance that the right is conferred by the statute which creates it."

That case was followed afterwards by a case of *Levy* v. *Rutley* (5), in which observations were made, if I remember rightly, which bear also pertinently upon the argument addressed to me on behalf of the plaintiffs. It was said there by Mr. Justice Keating: "There may, no doubt, be a plurality of authors; the statute in section 1, dealing with the duration of copyright, speaks of the author or authors or the survivor of the authors." But I fail to discover any evidence that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvement either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue, so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to re-arrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So if two persons undertake jointly to write a play, agreeing in the general outline and design and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But to constitute joint authorship there must be a common design." Mr. Justice Montagu Smith makes some observations which are very pertinent to the present case. It was as to whether a certain receipt was binding, and he says, "If the rights of the author may be affected by such a document as this, the consequence might be an inconvenient multiplication of rights and remedies which never could have been contemplated. Undoubtedly the statute does contemplate the existence of joint authorship, and gives certain rights to the survivor." Upon those authorities and principles I come to the conclusion on the law in this case, that the plaintiffs are not the authors.

There was a case referred to during the argument of *Hatton* v. *Kean* (6), which was a case no doubt in favour of Mr. Shortt's contention. That was a different case to this; it was the case of an infringement of a dramatic representation. No doubt the original piece there had been arranged by Mr. Charles Kean, though he had no doubt invited the plaintiff Hatton to compose music for that piece. If the question there had been, who was the author of that particular music, it might have been answered in a very different way to what it was in *Hatton* v. *Kean* (6). But the question was, in whom was the right of the dramatic representation; and it was held that Kean's mind had arranged the whole thing, and, as accessory, he had set a particular piece to music. Limited specifically to those particular facts, I think that case, although at first sight it appears to be an authority in favour of Mr. Shortt's and the plaintiffs' contention, does not bear out what is contended for. Therefore, upon the authority of those cases, I give my judgment for the defendant, with costs.

From this judgment the plaintiffs appealed.

(5) 40 Law J. Rep. C.P. 244; Law Rep. 6 C.P. 523.

(6) 7 Com. B. Rep. N.S. 268; 8 W. R. 7; 29 Law J. Rep. C.P. 20.

Nottage v. *Jackson*, *App.*

Petheram, *Q.C.*, and *Shortt*, for the appellants.

Crump, for the respondent.

The arguments proceeded entirely on the construction of the sections 1 and 4 of the Act.

BRETT, M.R.—In this case Messrs. Nottage & Kennard are a firm who carry on business as photographers under the name of the London Stereoscopic and Photographic Company. They, or one of them, directed a person who is a servant in their employment, but a skilled person, to proceed to the Oval, and there take a photograph of the Australian team of cricketers, which he did, and the photograph was completed. Then Messrs. Nottage & Kennard, under the name of the London Stereoscopic and Photographic Company, registered that photograph, or the negative of it, under the statute of the 25 & 26 Vict. c. 68.

Now they entered themselves as the proprietors of the copyright of the photograph—which was right enough; but they entered themselves as the authors of it—and the question is, whether that registration, stating, rightly enough, that they are the proprietors, but stating that they were the authors, is a good registration under the statute of 25 & 26 Vict. c. 68.

I take it to be clear that it can only be a good registration, if they were right, within the meaning of this Act of Parliament, in saying that they were the "authors" of this photograph. If they were not the authors, the registration is wrong, and is void, because the description is void; and therefore this case is to be determined upon our decision as to what is the meaning in this Act of Parliament of the "author" of a photograph. The words of the Act are: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing and photograph which shall be or shall have been made either in the British dominions or elsewhere, or which shall not have been sold or disposed of before the commencement of this Act, and his assigns," shall be entitled to a copyright. I need not read the whole of the section, but it is clear that they are bound to state in the registration who are the "authors." The question is more than the mere name of the person in the register or the certificate, because the copyright, whoever be the proprietor of it, is to continue for the life of the author; and therefore, if you put in the wrong person as the author, you put in the wrong life, and you may make the duration longer than it should be. I confess I have the greatest difficulty in construing this Act of Parliament. Persons who draw Acts of Parliament will sometimes use phrases that nobody else uses. I am speaking for myself only as to the strangeness of the phraseology. It says, "The author," and so on, "of every original painting"—whoever in ordinary life talks of the author of a painting? We talk of an artist or a painter. Then it says, "the author" of a drawing. One can, no doubt, make out who is the author of a painting; the author of a painting is the man who paints it, and the author of a drawing is the man who draws it.

Here we have the "author" of a photograph. I should like to know whether the person who drew this Act of Parliament was clear in his mind as to who can be the author of a photograph. We understand that all the photographers have come to the conclusion that they are the authors of a photograph—that is, the people who own the machinery, the people who keep the shop, the people who pay the servant—that they are the only persons who are interested in the photograph at the time it is done; they think they are the authors of the photograph, because the photograph is made and formed by the work of their mere servants.

I cannot tell whether the person who drew this Act of Parliament had that idea or not, but I am not satisfied in my mind that he had, because it is full of difficulties. Here you have merely two gentlemen stated to be the authors. Can two people be the authors of a photograph? It is difficult to say; but if they are, for whose life is it to last? For the life of one of them, or for the life of the longest liver, or what? They are the owners of everything about the place, the machinery and everything else; but they may live in Scotland, and their photographic shop may be carried on in London. They may live

two hundred miles off. Can they be called the authors of a photograph of which they know nothing? It is done by their servants. They may go to the shop once a week, and when they are there they may superintend the operations—though they seldom do, I suppose. At all events they cannot superintend the taking of all the photographs in their shop. They may have half a dozen studios. They may superintend the taking of a photograph in one place, and they may have a skilled person who superintends the taking of photographs in another place. It would be obvious that they are the authors of a photograph where they are; but are they the authors of a photograph where they are not? Take this very case. It is not pretended that these gentlemen were at the Oval; they were either in London, or fifty miles perhaps the other side of London. They send a man to the Oval. The idea of photographing the Australian cricketers may have been the idea of one of these gentlemen, and he if he saw the other may have put it into the head of that other. Even if he did, neither of them was at the Oval. The man who went to the Oval was the man who took the photograph. They said, "Go to the Oval and photograph the Australian cricketers," and he had to do it. Well, he goes to the Oval. What had he to do? He had to arrange the group—to put them in the right position and the right focus. But he does not do it all, because there is another man who gets the plate ready, I suppose; and there is another man who, when the thing is ready, takes the cap off. It is difficult to say who is the author of a photograph. Neither of them forms the picture, because, after all, that is done by the sun. As I say, I wonder whether the gentleman who drew this Act of Parliament was clear in his own mind. I do not think he was, and I confess I cannot myself be very clear about it. All I can do is to see who is the person who most nearly answers the description of the author of the other things—the author of a painting or the author of a drawing. All I can say is, it is not the man who simply had the idea of a picture, because the proprietor may say, "You go and draw Mrs. So-and-so, with a dog at her feet, and in one hand holding a flower." He may have the idea, but still he is not there. He may be a hundred miles away from the place, and he may have given the instruction by letter. The nearest I can come to is that it is the person who effectively is as near as he can be the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be. Although he may only have done it by standing in the room and giving orders about it, still it is his mind and action, as far as anybody's mind and action are concerned, which is the effective cause of the picture, such as it is when it is produced. Therefore it will be a question in every case who that man is. That would be a matter of evidence. That would be what my learned brother would call a question of fact. We have not to say in this case who was that man. I suppose it was the principal man who was sent down to the Oval. At all events, it was neither of these two gentlemen who are described as the authors, and it certainly was not both of them. Therefore the author here is wrongly described, and the registration is bad, and the copyright does not exist. Consequently the defendant is entitled to judgment, because he is sued for having committed a breach of these gentlemen's rights as to their copyright.

After some difficulty I have come to the conclusion that the judgment of the learned Judge in the Court below was right, and must be affirmed, the result being that if this had been properly registered it would not have been for the life of the people to whom alone the thing belonged, but, by reason of the strange phraseology of this Act of Parliament, for the life of the person whose life probably it was never intended to make the measure of this right. All that the great photographers of London can do seems to me either to superintend the work themselves, or when they choose their artist to do it, to consider not only his skill but his state of health.

COTTON, L.J.—In this case the plaintiffs brought out a photograph of the Australian cricketers, and they brought an

action against the defendant on the ground that he had been publishing the same photograph, and they claim the copyright under the Act 25 & 26 Vict. c. 68.

Now the Act provides that no action shall be brought until there has been a registration in compliance with the terms of the 4th section; and it requires, amongst other things, that the author shall be stated in the memorandum which is registered. That is essential, because the duration of the copyright depends upon the life of the author, and it is therefore most important that the real author should be stated in the memorandum which is registered.

The objection taken by the defendant in this case, which was held good in the Court below, was this—that the plaintiffs had registered themselves in their names of George Swan Nottage and Howard John Kennard as the authors of this photograph. They carry on business under the name of the London Stereoscopic and Photographic Company; and it is undoubted that if they are the authors, and if there is copyright in somebody, they are the proprietors of that copyright.

Now the Act gives no definition of "author," and undoubtedly the Act, as regards photographs, is not very accurately drawn. It sometimes talks of a photograph, and sometimes of a negative. It says the author "shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing, and the designs thereof, or such photograph and the negative thereof." Both of them are photographs, but I think it is pretty clear that where there is a copyright the owner of the copyright shall have the sole right of multiplying in any other way the prints from that negative.

As the Act does not give any definition of what an author is, we must consider what an author is, dealing with the "author" as regards the subject-matter of this case—photographs. As regards other matters which are here referred to—paintings and drawings—it appears to me that there is no difficulty at all; because, although "author," I agree, is not a word very aptly applied to a painting or a drawing, yet we can understand what is meant. It is not the person who suggests the idea, but the person who makes that which is the painting or drawing, whoever may have communicated the idea. Of course, a good deal may be done by the hand of those who work under his direction, but it must be the originator who is the maker of the painting or drawing. In the case of photographs it is said that there is a difference between these and paintings or drawings. Undoubtedly there is a very great difference in the way in which a photograph is produced—that is to say, the actual painting, if I may say so, is done by the sun, but it is done by the sun with the various appliances employed to produce the picture. Is there, in the nature of a photograph, any essential difference?

The mere preparing the materials, or the preparing or supplying the machinery—the lens and the camera—by means of which the sun is made to act on the plate, cannot, in my opinion, make a man the author, any more than preparing the canvas, the paper or the pigments can make the man who prepares those in any sense the author of a painting or drawing; and if there were an essential difference as regards a photograph as distinguished from a drawing—that is to say, if it were of necessity that there could be no person as the author of a photograph in the same sense that a person is the author of a drawing—we might possibly be compelled to give a different meaning to the word "author" as regards photographs from that which we do in the case of pictures; but that is not so. It is very true that an artist who paints a landscape or takes a portrait does not prepare the paints as a rule (some do), and the photographer does not prepare the lens and does not prepare the camera; but there are many who do all those processes, and when they have got the machinery—the camera, the lens and the plate—they produce, with the aid of the sun, the picture which is the photograph. It is not necessary that photography should be carried on by persons who act as the servants of others, who pay them, and provide the materials and give directions as to what is to be done. Many photographers, both professionals and amateurs, do everything them-

selves from first to last; and, when they have got the materials, produce, by the aid of the sun, the picture. From the nature of the thing there is no essential difference to make us give a different interpretation to the word "author" in the case of a photograph to that which we should give to it in the case of an author of a painting or drawing. In my opinion, "author" involves originating, making, producing, as the inventive or master-mind, the thing which is to be protected, whether it be a drawing or a painting or a photograph.

Now, have the plaintiffs done anything of the kind? In each case it must be a question of fact. All they do, as I understand, is this—they are the proprietors of a large photographic shop; they provide, undoubtedly, materials; and they pay the people who are actually employed to take the photographs, whether of men or of landscapes, or of anything else. I think the Master of the Rolls rather over-stated their case; because, as I understand the evidence here, it was not even one of the proprietors of the London Stereoscopic and Photographic Company who gave directions to the persons to go to take the photograph. It was simply one of their foremen who had the idea that a photograph of the Australian cricketers would be one which would take with the public, and who directed the actual operator, as I will call him, to go and take the photograph at the Kennington Oval. So that they did not even give the direction or make the suggestion; but even if they had, that, in my opinion, would not be sufficient. They did nothing whatever as regards the production of this work, except that they paid for the materials, they paid for the machinery, and they paid the salary of the actual operator who took this photograph. It is unnecessary to decide it here, and therefore I think we had better not mention the cases in which one would find the author of a photograph, but it is sufficient to say in this case that the plaintiffs, though undoubtedly carrying on their business in a way to satisfy the public, cannot say that they are the authors of this photograph for which they seek to have a copyright. Therefore, in my opinion, the decision in the Court below was right, and this appeal fails.

BOWEN, L.J.—I am of the same opinion.

In this case Messrs. Nottage & Kennard have entered themselves on the register as the authors of a photograph of the Australian team of cricketers, which was taken by an artist whom they sent down for the purpose to the Oval.

The question is, whether they are authors within the meaning of section 1 of the Copyright Act of 1862.

Now there is no definition of "author" given in the Act, nor is the term "author" a legal term. It is purely a popular and conventional one. Who is the author of a painting, a picture, or a photograph? Although it may be true that in each case there is sufficient difference between the questions to render it impossible to say that one is to be determined exactly as the other, still in all three cases the question must be one of fact. Who is the author here of this picture of the Australian team of cricketers? Who would be the author supposing Messrs. Nottage & Kennard had never been born, and that the artists who were employed by them went down upon their own business, and upon their own pecuniary resources, to take this picture. Of course the authors would be the artists who took this picture. Do they become less the authors because they were employed by Nottage & Kennard?

It is to be remarked that this Act of Parliament treats photography as a fine art. It puts it on a level, for the purpose of registration, with paintings and drawings. In order to see who is the author of a photograph one must consider the question on the assumption that photography is to be treated for the purpose of the Act as such fine art. I think it is evidently not the man who pays, not the man who contributes the machinery, not the man who does nothing except form the idea, not the man who does nothing towards embodying the idea—none of those persons, in the ordinary sense of the term, can be considered the artist—nor, lastly, the man who finances the expedition or who sends it out. Let us suppose for a moment that instead of being an ex-

pedition to the Oval to take the cricket team it had been an expedition to photograph some phenomena which might occur on the transit of Venus, could the British Government who sent out the people on board ship to take the photographs of the transit of Venus in any sense be considered the authors of the photograph? It seems to me the only difference between that kind of question and the question we have to decide in the present case is one of degree. There is not very much more interval or distinction as regards genius between the author of a picture and the author of a sign-board, than there is between a photographer who takes a picture of the transit of Venus and the photographer who takes a photograph of a man or a horse. I should say they were both authors in a sense. I should say the true definition of "author" for the purpose of the Act—keeping in mind that photography is to be treated for the purpose of the Act as if it were an art—is that the author is the man who really represents, or creates, or gives to the ideas, or fancy, or imagination, the local habitation—the man in fact who, in the words of the Master of the Rolls, is most nearly the effective cause of the representation when completed. That cannot be Messrs. Nottage & Kennard, who, sitting in the distance, simply contribute the machinery and the funds, Nature finding the sun—but the persons who use the machinery and the funds for the purpose of embodying the idea. I think that must be the meaning of the 1st section of the Act, for this additional reason—the copyright given in the photograph is only to enure during the natural life of the author. In the first place the section does not say "during the natural life of the author or authors." I do not mean to say you must not construe the section as if it did, and that if there had been two authors, and one of them survived the other, the copyright might not last during the life of the survivor; but I do say that the person who drew this section evidently thought that in ninety-nine cases out of a hundred there would only be one author. The idea of there being two authors seems never to have presented itself to him, which shews he took rather the notion I have formed in common with the rest of the Court as to the definition of the term. And, secondly, there is this cogent argument—the copyright is to enure during the natural life of the author. If the author is the person who finances, a joint stock company limited may be the author for anything I know, yet any copyright taken out is a copyright which is to enure "during the natural life of the author." What is the natural life of a joint stock company limited? There is no such thing. That appears to me to shew that whoever drew this section did not contemplate an author being a corporate body, nor did he imagine apparently the case of an author being more than one person. I think that is a very strong additional argument in favour of the decision to which the Court below arrived.

Solicitors—Neish & Howell, for appellants; R. Smith & Wilmer, agents for Eddison & Eddison, Leeds, for defendant.

[IN THE QUEEN'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

1883. June 14. July 4. } *In re* BILLERICAY HIGHWAY BOARD; THE QUEEN *v.* THE JUSTICES OF ESSEX.

Highway Board—Corporation—Dissolution of District—Continuance of Board for Winding-up Purposes—25 & 26 *Vict.* c. 61 (*the Highway Act*, 1862), *s.* 39—*Appeal.*

[For the report of the above case, see 52 Law J. Rep. M.C. 124.]

1883. June 5.

VIVIAN v. LITTLE.

Practice—Discovery of Documents—Deeds in Custody of the Court.

There is no power to make an order, in an action of trespass to land brought against the committee of a lunatic, for the production of title-deeds in the custody of the Court having jurisdiction in lunacy, and therefore out of his possession or control.

This was an appeal from an order of Day, J., at chambers, setting aside, with costs, an order of Master Francis directing inspection of certain documents in an action of trespass to land, originally brought in the County Court and transferred to the High Court, against the committee of a lunatic. The documents were admitted to be in the custody of the Court having jurisdiction in lunacy. The defendant, in his affidavit of documents, described those in question as "a bundle of deeds." Master Francis ordered the defendant to make a further and better affidavit and give immediate inspection, or be debarred from using the documents in evidence. The defendant appealed, and Day, J., rescinded the Master's order. The plaintiff appealed to the Divisional Court.

W. Pitt Lewis, for the plaintiff, supported the order of the Master.

Clement Higgins, for the defendant.—These documents not being in the defendant's power or possession or that of his agents, there is no power to make an order for their inspection—*Kearsley* v. *Phillips* (1). That was a case where the documents could have been inspected with the leave of the Court granted on petition.

Pitt Lewis, in reply.—In *Kearsley* v. *Phillips* (1) the order was sought against a third person, not, as in this case, a party to the action. The defendant is bound to do the best he can to get the deeds—*Hutchinson* v. *Glover* (2)—and to obtain the information required, if it be not within his own knowledge but that of his servants—*Bolckow & Co.* v. *Fisher* (3).

POLLOCK, B.—In this case an order has been made by my brother Day setting aside an order of Master Francis directing the defendant to give the plaintiff inspection of certain deeds. In support of the application to the Master the plaintiff filed the usual affidavit; and, in his affidavit in answer, the defendant says that he is a mere committee in lunacy of the estate to which the documents relate, and has handed them over to the proper custody of the Court of Chancery. The question is whether the defendant is bound to produce these deeds. I think, both on principle and authority, he is not. It seems almost sufficient to say that the deeds are not in his possession or control but in that of the Court of Chancery. But the case of *Hutchinson* v. *Glover* (2) has been cited by counsel for the plaintiff, where an order was made for inspection of a document not in the possession of the person against whom the application was made, but in that of one who was jointly entitled to the custody of the document sought to be inspected, on the ground that he could not be released from liability except by shewing that he had done all in his power and had asked the person in whose custody the document actually and rightfully was to allow inspection. But in that case, there being only one copy of the document in question, each held it for the other. It is clear that before you can purge yourself of the liability to give inspection you must shew you have done all that is possible to obtain the documents. The true distinction between such cases as those and this is pointed out by Lord Cottenham in *Murray* v. *Walter* (4). The person against whom inspection is asked must go to all who can give him the information required, but not when the documents are in the custody of the Court or otherwise out of his possession and control, or when the possession is limited. This is a clear

(1) *Ante*, pp. 8, 269; Law Rep. 10 Q.B. D. 465.

(2) 45 Law J. Rep. Q.B. 120; Law Rep. 1 Q.B. D. 138.

(3) *Ante*, p. 12; Law Rep. 10 Q.B. D. 161.

(4 Cr. & P. 114.

distinction, and this appeal must be dismissed with costs (5).

LOPES, J., concurred.

Appeal dismissed with costs.

Solicitors—Gregory, Rowcliffes & Co., agents for Smith, Paul & Archer, Truro, for plaintiff; Henley Grose Smith, for defendant.

1883. Feb. 11. } THE QUEEN *v.* THE JUSTICES OF THE CENTRAL CRIMINAL COURT.

Mandamus—Central Criminal Court—Restitution of Stolen Goods—24 & 25 Vict. c. 96. s. 100.

[For the report of the above case, see 52 Law J. Rep. M.C. 121.]

[IN THE COURT OF APPEAL.]

1883. April 20, 21, 28. } CLEMENTS *v.* MATTHEWS.*

Landlord and Tenant—Bill of Sale—Surrender—Validity of, as affecting Assignee under a Bill of Sale—Growing Crops.

B., the tenant from year to year of a farm of the defendant, assigned by bill of sale to the plaintiff all his property upon the farm, together with all growing and all other crops which at any time thereafter should be in or about the same or any other premises of his. On the 25th of April, after the execution of this bill of sale, the defendant distrained for rent, and while in possession under that distress, he, having no knowledge of the bill of sale, agreed with B. that he would forego all claim for rent, that B. should surrender the farm to him, and that the tenancy should be determined as from the 24th of June next ensuing. In May, B. having made default in payment of the instalments under the bill of sale, the plaintiff took an inventory of the goods on the farm, and put locks on the gates of the fields in which the crops were growing. The defendant then informed the plaintiff of the agreement between himself and B.; whereon the plaintiff removed the locks, and shortly after gave the defendant notice of the assignment to him by the bill of sale of the crops. The defendant attended to the cultivation of the crops, took possession of the farm on the 24th of June, and reaped and sold the crops as they came to maturity.

In an action of trover and for the conversion of the crops,—

Held, *that although the plaintiff was in equity entitled to relief, yet an action of trover could not be maintained; that the surrender by the tenant to the landlord was a valid surrender at law, but that it could not affect prejudicially the equitable rights of the plaintiff as assignee of the crops; that if there could be no valid surrender as against the plaintiff, and if the tenant must still be considered with regard to the plaintiff to be in possession, so that the plaintiff could claim to be by the assignment in the same position as the tenant, then the plaintiff, although entitled to the value of the crops when sold, was also liable to pay the rent of the farm and the expenses of cultivating and harvesting the crops; and that as the balance on a settlement of account was in favour of the defendant, judgment must, in the circumstances of the case, be entered for the defendant.*

Appeal by the defendant from the judgment of Lopes, J., on further consideration.

The statement of claim alleged that on the 22nd of September, 1880, James Baggs, of High House Farm, assigned to the plaintiff, *inter alia*, all "the stock-in-trade, trade fixtures, live and dead stock, growing and other crops, and all other goods, personal chattels and effects of and belonging to the said James Baggs, then being in and about the dwelling-house, yards, fields, buildings and premises aforesaid, together with all other stock-in-trade, trade fixtures, live and dead stock, growing and other crops, and other goods,

(5) In *Hutchinson* v. *Glover* the document was in the actual *possession* of the defendant, but a third party was jointly *interested* in it—see *per* North, J., *ante*, p. 9, and *per* Field, J., p. 11.

* *Coram*, Brett, M.R.; Cotton, L.J., and Bowen, L.J.

personal chattels and effects whatsoever, which at any time thereafter should be in or about the same or any other premises of the said James Baggs during the time that any money might be owing upon the security of the said indenture." It alleged also that the bill of sale was duly registered; that in February, 1881, Baggs made default in payment of rent due to the defendant as landlord; that the defendant distrained, seized and sold part of the aforesaid goods; that Baggs made default in payment of sums secured by the bill of sale; that in May, 1881, the plaintiff, by virtue of the bill of sale, entered and took possession; that on the 1st of June, 1881, the plaintiff gave notice to the defendant that the crops then growing on High House Farm were assigned to the plaintiff; that he had on the 20th of May, 1881, seized the crops, and that if the defendant should do anything prejudicial to the plaintiff's ownership he should hold the defendant personally responsible; that on the 27th of June, and on other days thereafter, the defendant wrongfully seized and converted to his own use and deprived the plaintiff of the possession of the crops aforesaid; the plaintiff claimed 101*l.* damages.

The defence admitted that soon after the 1st of June, 1881, the plaintiff gave a notice to the defendant claiming the crops growing on the farm in question, and alleged that before the 25th of April, 1881, the defendant distrained upon the farm for rent due from Baggs to him; that on the 25th of April it was agreed between Baggs and the defendant that the defendant should forego all claim for rent, and that Baggs should surrender the farm with the crops to the defendant, and that the tenancy should be determined on the 24th of June; that the agreement was carried out, and that the defendant, after the determination of the tenancy, reaped and gathered the crops, as he was entitled to do.

It appeared that Baggs was tenant from year to year of High House Farm, belonging to the defendant; that on the 22nd of September, 1880, he gave the plaintiff the bill of sale of which the material part is above set out. On the 25th of April, 1881, the defendant distrained upon the furniture and stock of Baggs on the farm for rent in arrear; and while in possession under that distress an agreement was made between him and his tenant that the distress should be withdrawn, that certain goods should be sold and the proceeds of the sale applied in part payment of the rent due, that the defendant should forego all claim for the residue of the rent, that the tenant should surrender the farm with the growing crops thereon to the defendant, and that the tenancy should be determined and possession given to the defendant on the 24th of June, 1881. This agreement was carried out.

On the 21st of May the plaintiff sent a man to take an inventory of the goods on the farm, and also put locks upon the gates of the fields in which crops were growing. On the 23rd of May the defendant gave notice to the plaintiff of the agreement between himself and his tenant, and the plaintiff then, under protest, removed the locks from the gates. Early in June the plaintiff gave the defendant notice of the assignment under the bill of sale. On the 24th of June the defendant took possession of the farm and crops, he then attended to the cultivation thereof, and as the crops became ripe he reaped and harvested them.

The jury found a verdict for the plaintiff for 15*l.*

LOPES, J., on further consideration, gave judgment for the plaintiff.

The defendant appealed.

Bosanquet, Q.C., for the defendant.—The general assignment of crops which might come into existence after the date of the bill of sale did not give the plaintiff any right either in law or in equity to those crops.

[BRETT, M.R.—Must the case not be considered as one of equitable rights?]

Equity would not enforce this general grant of future property against the tenant, and so it would not enforce it against the landlord.

[COTTON, L.J.—Is not *Holroyd* v. *Marshall* (1) in conflict with that view?]

The decision in *Holroyd* v. *Marshall* (1 is confined to specific property earmarked

(1) 10 H.L. Cas. 191; 33 Law J. Rep. Chanc. 193.

so as to be capable of identification, such as a piece of machinery to be placed in a particular manufactory; but the contract in the present case is so general that specific performance of it could not be granted. *Belding* v. *Read* (2) points out the distinction, and establishes that such property as crops not yet in existence cannot be prophetically conveyed, and that decision has been recognised by Fry, J., in *In re D'Epineuil* (3). All the cases on this branch of the law have arisen between the mortgagee and a judgment creditor or an assignee in bankruptcy; but no equity similar to that which arises in such cases can arise in this case against the landlord, so that it is not necessary for the defendant to dispute the authority of *Lazarus* v. *Andrade* (4). No claim for specific performance was raised by the pleadings or at the trial; and as against the landlord, who must be considered to be a *bona fide* purchaser for value, no equity can be raised by the plaintiff.

[BRETT, M.R.—Assume that the remedy sought by the plaintiff is wrong in form, but yet that he is to be considered to have sought an injunction or something in the nature of specific performance—would that remedy be given to him in equity when he had allowed the defendant to spend money in cultivating and reaping the crops?]

There is no remedy to which the plaintiff can in the circumstances of this case be entitled.

Jelf, Q.C., and *Rose*, for the plaintiff.

[BRETT, M.R.—Must we not dissent from *Belding* v. *Read* (2) if we hold that this description suffices?]

The question as to the words being read distributively was not there argued, but here there is no difficulty in construing the words of the bill of sale distributively, and if the plaintiff is right in substance it matters not what form his action takes. A grantor cannot derogate from his own grant. The defendant, the landlord, carved out of his estate an estate which he granted to his tenant, and he thereby enabled the tenant to create rights in other parties.

[BRETT, M.R.—Then one right was to make a fresh bargain with his landlord.]

He could not do so at the time when he attempted to do so, for the assignment of the crops to the plaintiff was complete when the crops came into existence, so that the tenant could not assign them to the landlord—*Collyer* v. *Isaacs* (5); for the bill of sale had passed the property in the growing crops without any need of possession being taken.

[BRETT, M.R.—As between the tenant and the defendant, the defendant bought the right to the crops; but the question is, whether the tenant could create a right against the plaintiff.]

The plaintiff had a right under the bill of sale; the defendant was not in possession until after he had notice of the plaintiff's right, which was prior to that of the defendant.

[BRETT, M.R.—But the plaintiff has allowed the defendant to incur expense about his crops when he could have gone to the Court and obtained, as he says, an injunction.]

That depends on the time at which the rights of the parties accrued; the defendant here is only an assignee of the tenant.

[BRETT, M.R.—Suppose the defendant to be a purchaser for value without notice, he then paid money without notice, but before he gets in the crops he has notice—does that assist the plaintiff?]

Certainly, for before the contract was completed he had full notice of the claim and title of the plaintiff.

Cur. adv. vult.

BRETT, M.R. (on April 28).—A person named Baggs was yearly tenant of a farm to the defendant; he executed a bill of sale in favour of the plaintiff, by which he assigned to him all the stock-in-trade, fixtures, live and dead stock, growing and other crops, and all goods in and about High House Farm, together with all other growing and other crops, &c., "which at any time thereafter should be in or about the same or any other premises of

(2) 3 Hurl. & C. 955; 34 Law J. Rep. Exch. 212.

(3) 51 Law J. Rep. Chanc. 491; Law Rep. 20 Ch. D. 758.

(4) 49 Law J. Rep. C.P. 847; Law Rep. 5 C.P. D. 318.

(5) 51 Law J. Rep. Chanc. 14; Law Rep. 19 Ch. D. 342.

the said James Baggs." After the execution of that bill of sale he was in debt to his landlord for rent; and on the 25th of April, 1881, the landlord, the defendant in this action, distrained; and while he was in possession, and unaware of the existence of the bill of sale, he made an agreement with his tenant to withdraw the distress and to release the residue of the rent due, on condition that the tenant Baggs would give up the farm to him from the 24th of June next ensuing, and give up also to him the growing crops. The landlord accordingly withdrew the distress, and certain goods belonging to Baggs were sold. On the 21st of May the plaintiff, the bill of sale holder, took an inventory of the crops and locked the gates of the fields—that was, as it seems to me, taking symbolical possession of the growing crops. On the 23rd of May the defendant informed the plaintiff of the agreement between himself and the tenant, and the plaintiff then took the locks off the gates—and that is evidence, as it seems to me, that he retired from his claim. On the 24th of June the defendant took possession of the farm, and therewith of the growing crops, attended to the cultivation of those crops, reaped them in due course, and sold them. The plaintiff now sues the defendant in respect of those crops. If this were an action of trover at common law, there would be, as it seems to me, many fatal objections to it—for, amongst other things, the plaintiff was not in possession of the crops, and, further, trover would not lie unless and until the crops were chattels.

It is, however, argued that the plaintiff is entitled to treat the action as an equitable action, as an action in the nature of an action for specific performance. Against this it is urged by the defendant that the description of the property in the bill of sale is so indistinct and vague that specific performance would not be granted in equity, and it is said that the crops purported to be assigned by the bill of sale were not sufficiently ascertained. Now the bill of sale relates to two different sets of crops, and although the description of the crops referred to in the second part may be too indefinite, yet the description of the crops growing on the particular farm mentioned is certainly sufficiently definite, and therefore the objection must so far fail.

Then it is said that the plaintiff has an equity as against the defendant, and that although the defendant acted without knowledge of the claim of the plaintiff, yet that before his title was completed he had notice of that claim, and therefore that the equity of the plaintiff must prevail, for that if there are two equities, that which is prior in time must have the preference. It seems to me that in this case the title of the defendant was, as between him and his tenant, a legal and not an equitable title; the defendant was, as between himself and his tenant, the owner of the land; he distrained, and then for valuable consideration the tenant agreed to surrender the farm to the defendant; that surrender was carried out, and the result is that there was a surrender by operation of law which vested the legal property in the defendant without any intervening existing tenancy. That surrender would not take effect at law if there had been any legal interest brought into existence by the tenant so as to come before the surrender; but there was none in this case, so that there was nothing to affect the legal result of the agreement made between the defendant and his tenant. The defendant was therefore in law the legal owner of the High House Farm in fee, and he was such owner in possession on the 24th of June.

Is there, then, any equity in favour of the plaintiff as against the defendant? It seems to me that if equity would interfere at all it would only affect the matter to this extent—that the tenancy being at an end in law, and there being a valid surrender, the defendant must be, as against every person except the plaintiff, the owner in fee in possession of the farm; but although this is so, yet the plaintiff can say that in equity, as between him and the defendant, there was and could be no valid surrender. If that be so, then what possible equity could there be in allowing the plaintiff to maintain that, and at the same time allowing him to say to the landlord, who was in possession under the distress, and who gave it up on the faith of a surrender being made in law, that there could be no valid surrender, and therefore that,

as the landlord gave up the distress, he, the plaintiff, was therefore let in? To allow such a contention to prevail would not have the semblance of justice, and it cannot be equity. It seems to me that if there is any equity it is that there being held to be no surrender the defendant must be considered to be in possession under the distress. He then can realise that distress, as is his right; so that it seems to me that the utmost the plaintiff can get is that, after paying the expenses of the cultivation and reaping of the crops, he must have the surplus as between himself and the defendant. I think therefore that the appeal must succeed.

COTTON, L.J.—The question in this case is as to the crops which came into existence after the bill of sale was made. The action was in form one of trover, but I am of opinion that such an action cannot be maintained. It was then said that since the Judicature Act there had been a fusion of law and equity, that the plaintiff was so entitled to recover if he had any title legal or equitable. It is true that now every Court deals with the rights of all parties, whether legal or equitable, but still there are distinct rights at law and in equity. It was argued that this bill of sale was ineffectual as against Baggs, because, on the principles laid down in *Holroyd* v. *Marshall* (1), the description of the property assigned was insufficient. I am unable to agree, and I also am of opinion that this case can be distinguished from *Belding* v. *Read* (2), for future crops are different from chattels. The decision in that case turned upon the fact that the assignment purported to be an assignment of all personal estate and effects then being or thereafter to be upon the premises of the grantor named in the deed or elsewhere in the kingdom of Great Britain. In this case it appears to me that as against Baggs the plaintiff could claim the crops.

Is, then, the defendant in a better position than Baggs? It is said that the defendant is a purchaser for value without notice; but he had notice of the claim of the plaintiff before he acquired by surrender the land whereon the crops were grown. There was nothing in the conduct of the plaintiff which can be said to have deceived the defendant or induced him to withdraw the distress. The defendant comes in as between himself and the plaintiff under the surrender made by the tenant Baggs. The plaintiff then is entitled to succeed, on the principle laid down in *Coke upon Littleton*, 338 B, that an "estate surrendered hath in consideration of law a continuance," lest strangers who were not parties thereto "may receive prejudice touching any right or interest they had before the surrender."

That principle must prevail here: the plaintiff insists on an equity, and the defendant relies on the surrender and the fact that the term was ended. The plaintiff must contend that the term continues, and that the defendant cannot be heard to say that it is effectually ended. As against Baggs the plaintiff must insist on the continuance of the term; but then, if he insists on that for his benefit, he must also take the burden, he must be bound to put himself in the position of the termor, and he is liable for the rent. The right of the plaintiff against the growing crops is to take them; but then he must pay all the expenses incurred in making them marketable. I think the case is analogous to the case of two mine owners working adjoining mines or seams—if one fraudulently appropriates the coal from the mine of the other, he could not claim to be allowed the expenses of working it; but if, under a *bona fide* belief of right and title, or by accident, he were to work the coal of his neighbour, he would then on a settlement be entitled to the expenses of winning and working the coal. Here the defendant claims to have the rent, and the expenses of reaping and harvesting these crops. Theoretically the plaintiff is entitled to relief; but yet his claim is really to the value of the crops, subject to the rent due to the landlord and to the expenses of harvesting those crops. That, as I understand, will destroy the balance claimed by him on the finding of the jury.

BOWEN, L.J.—The first material fact, as it seems to me, is that Baggs by bill of sale assigned to the plaintiff all the crops on High House Farm, and all the crops which should at any time thereafter be about the same or any other premises

belonging to him. Then in February, 1881, the landlord distrained; whereupon an agreement was made between the landlord and the tenant that the landlord should retire from the distress, and that the tenant should surrender the farm; the landlord accordingly retired. At the time this agreement was made, the landlord had no notice of the rights acquired by the plaintiff under his bill of sale, but he acquired knowledge of those rights before the 24th of June. On that day the landlord entered, took possession of the farm, and he has since reaped the crops; and this action is brought for his having so done. It cannot be an action for trover; but it is said that the plaintiff has a right which he can enforce by action, and whether it is for an infringement of his right or for specific performance it matters not. It is said on behalf of the defendant, the landlord, that the words of description in this bill of sale are too vague, and that at law this bill of sale could pass no property in the crops not in existence. At law such a bill of sale would merely justify an entry, but in equity it is admitted that it confers a right to have the property when it comes into existence. Is a description, then, too vague because it says that the grantee is to have all the property of the grantor on Black Acre and on all other property of the grantor which may come into existence? I cannot think that such a description is too vague with regard to Black Acre, at all events; nor do I think that the facts of this case bring it within the authority of *Holroyd* v. *Marshall* (1). It was there said (p. 209), "A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in Gloucester is a contract relating to specific property, and which would be specifically performed." Nor is it necessary to consider whether the facts of the case bring it within the principle laid down in the same case a little farther on, where Lord Westbury says (at p. 211), "But if a vendor or mortgagor agrees to sell or mortgage property real or personal of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree specific performance," because I think that in the present case the words "other premises" do not destroy the description of property on High House Farm; so that I think the objection to the bill of sale must fail.

The landlord here comes in by virtue of the surrender; the surrender cannot be effected without a grant from the tenant; and it is said that such a grant, if made, is in derogation of the grant already made by him to the holder of the bill of sale. There is, however, either at law or equity a clear answer to this contention. The landlord had an absolute right to distrain, and the bill of sale conferred no rights against the landlord if he did distrain. Assume that the landlord knew of the bill of sale at the time of the bargain, what effect would that have? It could not affect his right to go into possession and to distrain. The effect of a surrender at law is well known since the time of Coke, who says (6), "But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath, in consideration of law, a continuance." That passage was cited and relied on in *The London and Westminster Loan and Discount Company* v. *Drake* (7).

Treating, then, the estate thus surrendered as having in the eyes of the law a continuance, the bill of sale holder has, as against the landlord, only a defeasible right to get the crops. The landlord is not to be turned out, because he has taken something more than possession, if what

(6) Co. Lit. 338 B.

(7) 6 Com. B. Rep. N.S. 798; 28 Law J. Rep. C.P. 297.

he has done does not injure the bill of sale holder; and here the landlord's previous right to distrain covered the whole ground. It is said that when the landlord went out he was a *bona fide* purchaser for value without notice, and that he has a right to hold the term. But the answer is that the landlord acquired notice before the completion of the surrender, and the doctrines of equity establish that if notice is acquired before the completion of the purchase relief cannot be asked for. Assuming that to be the doctrine of equity, it does not apply in this case, as the plaintiff, the grantee of the bill of sale, could not defeat the right of the landlord to possession; so that there is no right of the plaintiff which can have been injured. It is admitted that the rent and the expenses would swallow up all the rights of the bill of sale holder, so that the landlord would be entitled to the balance. The judgment must be reversed, and the result will be that there is nothing which in the facts of this case the plaintiff is entitled to recover.

Appeal allowed. Judgment for the defendant.

Solicitors—Smiles & Co., for plaintiff; T. Fortune, agent for W. J. Humfrys, Hereford, for defendant.

[IN THE COURT OF APPEAL.]

1883. July 16. THE QUEEN *v.* THE JUSTICES OF THE CITY OF LIVERPOOL.

Licensing Acts—Neglect of Occupier to apply for Renewal Licence—Application by New Tenant for Licence after Efflux of Current Licence—Jurisdiction of Justices—9 *Geo.* 4. *c.* 61. *s.* 14.

[For the report of the above case, see 52 Law J. Rep. M.C. 114.]

1883. May 9, 10. July 3. THE QUEEN *v.* YATES.

Criminal Law—Libel—Criminal Information—44 *&* 45 *Vict. c.* 60. *s.* 3 (*Newspaper Libel and Registration Act*, 1881)—*Construction of Statute*—*Condition Precedent to Filing Information*—*Fiat of Director of Public Prosecutions.*

The Newspaper Libel and Registration Act, 1881 (44 *&* 45 *Vict. c.* 60), *enacts in section* 3: "*No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained*":—Held, *by* DENMAN, J., FIELD, J., *and* MATHEW, J. (*dissentiente* LORD COLERIDGE, C.J., *and* HAWKINS, J.), *that the section does not apply to criminal informations for libel at all.* Held, per totam Curiam, *that the section does not apply to criminal informations for libel filed ex officio by the Attorney-General.*

In this case a rule for a criminal information had been made absolute on the motion of the Attorney-General on behalf of the Earl of Lonsdale against the proprietor of the *World* newspaper, in respect of a libellous article that had been published in that paper. When the rule *nisi* was applied for, the Attorney-General mentioned to the Court that the fiat of the Director of Public Prosecutions had not been obtained, because, though he had been asked for it under section 3 of the Newspaper Libel and Registration Act 1881 (44 & 45 Vict. c. 60), he had declined, on the ground that he did not think that he ought to interfere with the discretion of the Court to which application for the rule was about to be made (1). Upon

(1) 44 & 45 Vict. c. 60. s. 3: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

the argument when the rule was made absolute, the point was not raised; but subsequently a rule *nisi* to quash the information, on the ground of its having been improperly granted in the absence of such fiat, was obtained by *Charles Russell, Q.C.*; and against this rule

The Attorney-General (*Sir H. James, Q.C.*), *Charles Hall, Q.C.*, and *Danckwerts*, now shewed cause.—The enactment does not apply to criminal informations. That is a proceeding by and on behalf of the Queen, and the granting of leave to file an information is an act done by the Court in the exercise of its jurisdiction. The Queen's coroner, as officer of the Crown in the Queen's Bench, could, and it was his duty to, file informations in that Court upon what came to his knowledge; the Attorney-General could do so in his discretion upon facts laid before him. The practical distinction which grew up was that the Attorney-General acted in matters concerning the Crown and the public interest, and the coroner acted on behalf of private individuals. The abuse of filing informations as of course led to the statute 4 & 5 Will. and Mary, c. 18, which required the leave of the Court before the coroner could file an information. This did not, however, apply to the Attorney-General. The statute, it will be seen, did not prohibit informations, it only put a restraint on the action of the Queen's coroner. And the recent Act does not interfere with *ex officio* informations by the Attorney-General.

[LORD COLERIDGE, C.J.—You must not assume, so far as I am concerned, that the Act does not apply to *ex officio* informations by the Attorney-General against newspapers for libel.]

It cannot, without affecting the prerogative of the Crown, which is never affected by statute without express words. Here, however, we are dealing with the order of the Court on which the Queen's coroner has filed the information; the statute says "express order" of the Court; and, so far as can be found, the practice has been to order, not *ex mero motu*, but on the application of some individual.

[FIELD, J.—Then the coroner is only a ministerial officer in filing the information?]

Such is the effect of the practice; the Court makes the order, and its right to do so cannot be taken away without express words.

[LORD COLERIDGE, C.J.—Why may there not be a condition precedent to the exercise of the jurisdiction?]

If there is, the objection should be taken on shewing cause against the rule *nisi*; the Court has now acted.

[LORD COLERIDGE, C.J.—When is a criminal prosecution commenced?]

When the information is filed; it is so implied in the Act of Will. and Mary. The previous proceedings are only for leave to prosecute. No action for malicious prosecution would lie in respect of an improper application to the Court for a criminal information. The defendant is not affected until the information is filed. [He cited—*Bac. Abr.*, "Information"; *Hawkins' P.C.* (Bk. 2, Chanc. 26); *Wilkes* v. *The King* (2); *Com. Dig.* "Information"; *Black. Com.* (orig. ed. 1785, pp. 308–10); *The King* v. *Berchet and Others* (3); *Fountain's Case* (4); *Tancred on Informations*, p. 30; and *The Queen* v. *Phillips* (5), to shew that informations were at the suit of the Crown, and that filing them was the act of the Attorney-General as representing the Crown as of right, or of the King's coroner and attorney as representing the Crown in the King's Bench, or, since the Act of Will. and Mary, of the Court, by giving leave to the coroner to file them.]

The argument is that if the information is issued by the officer of the Crown, the application of the recent statute would affect the Crown; if issued by the Court, then it would affect the jurisdiction of the Court; and there are no express words to do either. Then an application for an information cannot be within the enactment, for the prosecution is not then begun.

[LORD COLERIDGE, C.J., referred to *Ditcher* v. *Denison* (6), as to what is the beginning of suit under the Church Discipline Act?]

(2) Wilmot, p. 326.
(3) 1 Shower, 106.
(4) 1 Sid. 152.
(5) 4 Burr. 2089.
(6) 11 Moore P.C. 324.

The Queen v. *Yates.*

The Court will look at the object and intention of the statute when the language is ambiguous—*Haydon's Case* (7) and *Harding* v. *Preece* (8). The object here was to check unauthorised proceedings against newspapers; but in criminal informations there was ample protection, because the Court heard cause shewn before granting the rule.

The statute has plenty of scope without including criminal informations. There is no reference in it to the Superior Courts, and not even the granting of concurrent jurisdiction could oust the sovereign jurisdiction of the Queen's Bench—*Bac. Abr.* "King's Bench," 140; *Thatcher* v. *Waller* (9); *Dr. Foster's Case* (10) and *Smith* v. *The Commissioners of Sewers* (11). So in respect of *certiorari*, that cannot be taken away without express words—*Smith's Case* (12) and *The Queen* v. *Morley* (13).

To recapitulate: first, this Act applies only to summary proceedings or prosecution by indictment; secondly, it is repugnant that the Crown and the Queen's Bench should be controlled by the Director of Public Prosecutions; thirdly, the granting leave to file an information is the action of the Court, and if when the Court had granted an order it were necessary for the Director of Public Prosecutions to intervene, the jurisdiction of the Court would be ousted. This application should, therefore, be dismissed.

Charles Russell, Q.C., Poland, and *Gwynne James, contra.*—There is no ousting of the jurisdiction of the Court, nor interference with the prerogative of the Crown, involved; it is only a matter of procedure as to the fulfilment of a statutory condition of the exercise of jurisdiction. It is a very small point. Is a proceeding by information a criminal prosecution? If so, the section is express which says, "No criminal prosecution shall be commenced."

[DENMAN, J.—It is said to be only a prosecution when the information is filed.]

The information itself is a prosecution—it is like an indictment, when filed it is the same as an indictment found. The first steps have been taken without the fiat. The natural construction of the words of the Act shews that it has not been complied with. What is there which requires the Court to refuse to give effect to the plain words?

It is possible, of course, that criminal proceedings may be said to have commenced when the information was filed, but it may have been when the rule was made absolute, or again when the rule *nisi* was granted. I suggest that they began when application was made for the rule *nisi*—the analogy is then perfect between this and the proceedings by summons before a magistrate. The words are as wide as possible, "no criminal prosecution."

[FIELD, J.—The Vexatious Indictments Act says, "no indictment shall be preferred."]

Yes; that Act did not include libel where there might be proceeding by criminal information; now, however, by section 6 of the Act, libel is to be one of the offences within the Vexatious Indictments Act, and so general words are now used.

Then it is reasonable enough that before any proceedings are taken against a newspaper proprietor, some kind of sanction should be obtained by the leave of the Director of Public Prosecutions being given; otherwise the protection would be imperfect, as the application for the rule *nisi*, if refused, would still make public the alleged ground of it.

[LORD COLERIDGE, C.J.—There must be some limitation read in here, because it cannot be intended that the Attorney-General in Ireland should give himself his own fiat before filing an *ex officio* information.]

I am not concerned to argue that the section applies to *ex officio* informations where the Attorney-General acts directly for the Crown. The Crown cannot be bound except by express words. There has always been a distinction between the Attorney-General acting *ex officio* and private persons setting the Queen's coroner in motion. This is, however, it is submitted, the only limitation to the section.

We must look at the words of the Act

(7) 3 Co. Rep. 7.
(8) 51 Law J. Rep. Q.B. 515; Law Rep. 9 Q.B. D. at p. 297.
(9) T. Jones, 53.
(10) 6 Co. Rep. at p. 64.
(11) 1 Mod. 44.
(12) 1 Vent. 66.
(13) 2 Burr. 1040.

itself. What is there to shew that criminal informations are excluded? Surely the defence under section 2 would be open in the case of an information by a private prosecutor. Then section 3 says "criminal prosecution." *Prima facie*, information comes within these words—*The Queen* v. *Steel* (14). All the earlier stages in obtaining a criminal information are criminal, and have been so treated as not appealable. Section 15 would apply to all cases, even *ex officio* informations. It is said that the Queen's coroner acts for the Crown; but it is not a patent office now. Appointment is made under 6 & 7 Vict. c. 20, and since the Act 4 & 5 Will. and Mary, c. 18, the office has ceased to be other than ministerial. He does not initiate proceedings, and cannot refuse to carry out the orders of the Court when made—*Chit. Crim. Law*, ii. p. 841.

These informations are simply for the redress of private wrongs; it so appears also plainly from section 8 of Lord Campbell's Act, 6 & 7 Vict. c. 96. There is thus nothing affecting the jurisdiction of the Courts, but the rights of a prosecutor are regulated. An illustration may be given by reference to 24 & 25 Vict. c. 96. s. 80, which requires the sanction of the Attorney-General before prosecuting fraudulent trustees. No one suggested or could suggest there that the prerogative of the Crown was interfered with, or the jurisdiction of the Courts ousted.

[LORD COLERIDGE, C.J.—We are all agreed that this has become a mode of redressing private wrongs, and you need argue no further as to the supposed interference with the Crown.]

As to the objection not having been taken on the argument of the rule, being one that goes to jurisdiction, it may be taken at any time, even after trial and verdict. A defendant is not bound to take it when there might be a possibility of curing it.

Cur. adv. vult.

The following judgments were delivered on July 3:—

MATHEW, J.—This was a rule to quash an information for libel filed by order of the Court against the defendant, who is the proprietor of the newspaper the *World*, on the ground that the written fiat or allowance of the Director of Public Prosecutions had not been obtained.

The application raised the question, which turned out to be one not easily answered, whether a criminal information is a prosecution within the meaning of the 3rd section of the Newspaper Libel Act, 1881.

The difficulty of ascertaining the meaning of the Legislature upon the point is one of a class with which the Courts are but too familiar, and is due to the fact that the language of the enactment is neither wholly popular nor altogether technical, and is, therefore, not to be interpreted readily either by a layman or a lawyer. The attempt to construe the Act will, it seems to me, be best made by a consideration of the state of the law before the statute passed, and of the provisions by which the existing law was intended to be amended.

Prior to the Act of 1881, a newspaper proprietor, publisher, editor or other person responsible for the publication of a newspaper, might be proceeded against criminally for a libel published in the paper—first, by information filed *ex officio* by the Attorney-General, or by the Queen's coroner by order of the Court of Queen's Bench under 4 & 5 Will. and Mary, c. 18; secondly, by a summons or warrant issued by a magistrate; and, thirdly, by bill of indictment presented to a grand jury.

With respect to proceedings by way of criminal information at the suit of private prosecutors, it was only when the libel was of a nature, to use the language of Blackstone, "so gross, notorious and atrocious" as to justify, in the judgment of the Court, a departure, in the interest of the public, from the ordinary course of the criminal law, that an information could be had recourse to. A defendant was protected from the vexatious use of this mode of proceeding by the requirement that judicial sanction should be obtained before the information was filed, and also by the provisions of the 4 & 5 Will. and Mary, c. 18, and 6 & 7 Vict.

(14) 46 Law J. Rep. M.C. 1; Law Rep. 2 Q.B. D. 37.

c. 96, which entitled a successful defendant to the costs of his defence.

But with respect to proceedings before a magistrate or the grand jury, the position of a defendant was very different. In any case where an action would lie for a libel without proof of special damage, criminal proceedings might be taken by a private prosecutor, and an application might be made to a magistrate to send a defendant for trial, or, without any notice to a defendant, a bill might be presented to the grand jury. This was a state of the law likely to lead to great abuses, and to expose the class of persons responsible for the publication of newspapers to criminal proceedings of the most vexatious and harassing description, and there was the further grievance that the costs of a successful defence could not be recovered from the prosecutor.

It was with this state of things that the Newspaper Libel Act, 1881, was intended to deal, and the Act contains several provisions for the protection of newspaper proprietors, the meaning of which is sufficiently clear.

Sections 2, 4, 5 and 6 are meant to protect newspaper proprietors from criminal proceedings in respect of libels not of a serious nature, and these sections clearly relate to ordinary criminal proceedings only—that is, to proceedings before a magistrate or grand jury. Then comes the question upon which our judgment in this case depends—has the 3rd section any wider operation? By section 3 it is enacted that "No criminal prosecution shall be commenced against a newspaper proprietor for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland."

Does this apply to offences of the character referred to in the other sections of the Act, or is it applicable to libels of every description, whether grave or trivial, and to proceedings by way of criminal information, as well as to proceedings in the ordinary course of the criminal law?

In the first place, it is manifest (and this was conceded in the course of the argument by the defendant's counsel) that the section does not apply to criminal informations filed by the Attorney-General, for if it did the Attorney-General could not proceed in England without the permission of an official who is his subordinate and acts under his superintendence (see 42 & 43 Vict. c. 22. s. 2), and in Ireland without a fiat issued by himself. Some proceedings other than those to be instituted by the Attorney-General *ex officio* must, therefore, have been contemplated.

Then, does the section apply to the analogous proceedings of a criminal information filed by order of the Court?

The object of the Act, as disclosed in sections 2, 4, 5 and 6, was to prevent vexatious prosecutions. But as regards proceedings by criminal information filed by the Queen's coroner, was not this result secured by 4 & 5 Will. and Mary, c. 18? Was the Court likely to fail to discover that an application for a criminal information had been made vexatiously; and if the Court failed to make the discovery, was the Public Prosecutor likely to be more successful? Is it probable that Parliament intended to alter the law in respect of the classes of libels usually dealt with by criminal informations? It would be difficult to suggest on what ground newspaper proprietors could reasonably ask for the interference of Parliament on their behalf, when, for instance, a libel was deliberately published of an individual so malicious and indefensible that the Court would order a criminal information.

Again, was it meant that such libellers should have a greater protection than ordinary offenders—for this would be the result of holding that the Act of 1881, as well as the Act of William and Mary, applied to offenders of the former class?

But considerations of the probable intention of Parliament cannot avail against the clear language of an enactment, and it was argued for the defendant that section 3 was perfectly clear. But is this so? The section says, "No criminal prosecution shall be commenced," &c. The learned counsel for the defendant was pressed during the argument to say at what stage of the proceedings by way of criminal information a prosecution could be said to have commenced. He admitted, as I understood him, that the fiat of the Public

Prosecutor might not be necessary before the application to the Court for an order to file the information. But he argued that the proceedings assumed the character of a prosecution within the meaning of the section when a rule *nisi* had been obtained from the Court to file the information and the rule had been served on the defendant.

But it seems clear to me that the commencement of the prosecution is the filing of the criminal information. The order of the Court under 4 & 5 Will. and Mary, is analogous to the fiat under section 3 of the Act of 1881.

If this be so, and the order of the Court must be followed by the fiat of the Public Prosecutor, it must have been intended by the Legislature either that the Public Prosecutor should agree as of course with the Court, and allow the proceedings to be continued, or that he should differ and prohibit them. In the one case the protection of his fiat would be illusory. In the other he would necessarily be called on (upon what materials does not appear) to exercise the functions of a Court of final appeal from the order of the Queen's Bench.

I cannot suppose, in the absence of apt and decisive language for the purpose, that any such result was intended by Parliament. It seems to me so unreasonable that I am bound, if it be possible without violence to the language of the section, to find some other meaning for its provisions.

I think the proceedings contemplated by section 3 did not include a criminal information. What was meant seems to me to have been a prosecution in the ordinary sense of the term—namely, a criminal charge made before a magistrate or grand jury, and not the extraordinary proceeding by way of criminal information. The language of section 6 is strongly confirmatory of this view. By that section every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within the meaning of the Act to prevent vexatious indictments. It may not be easy to bring the precise terms of this section into harmony with the rest of the statute, and it is unnecessary to determine whether section 3 and section 6 are each applicable to the same proceedings, so that the fiat of the Public Prosecutor and the order of a Judge would in some cases be necessary before a private prosecution could proceed.

But offences punishable by criminal information are clearly not within the Vexatious Indictments Act, which contemplates only ordinary criminal proceedings, and it would seem to follow that such offences were not within the meaning or operation of section 3.

For these reasons I am of opinion that the 3rd section does not apply to criminal informations filed by order of the Court, and that this rule must be discharged.

HAWKINS, J.—I am of opinion that the 3rd section of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), applies to criminal information for libel at the instance of private prosecutors, and that the written fiat or allowance of the Director of Public Prosecutions is a necessary preliminary to the commencement of such criminal prosecutions, which commencement, I think, is when the rule *nisi* for the criminal information is applied for—see *Clarke* v. *Postan* (15), where the mere making of a criminal charge before a magistrate, who instantly discharged it, was held sufficient foundation for an action for malicious prosecution. If it were otherwise, the most scandalous and false affidavits might be used on the application for a rule *nisi* with impunity against any civil action. It seems to me impossible to say that a criminal information under which (if found guilty) a person may be imprisoned and fined as a criminal is not a "criminal prosecution" within the ordinary and popular sense of those words. It is contended, however, by the prosecutor in the present case that we ought, in the section referred to, to construe them as excluding all criminal informations, and as applicable only to other criminal proceedings, namely, by indictment or before a Court of summary jurisdiction; and it was argued before us that, having regard to the existing state of the law at the time of the passing of the Act, the intention of the Legislature that they should be so construed is apparent and obvious. As regards informations *ex officio* filed by the Attorney-General by

(15) 6 Car. & P. 423 (Bosanquet, J.).

virtue of his office on his own responsibility in exercise of the prerogative of the Crown, it cannot be doubted that they are excluded from the operation of the section; for the general rule is well established that the rights of the Crown shall not be barred or restrained by any statute unless it be specially named, which is not the case in the section now under consideration.

Informations at the instance of private persons stand, however, upon a totally different footing. With regard to them, although exhibited in the name of the Queen, they are not in any sense State prosecutions, any more than are ordinary indictments which are also preferred in the name of the Queen. Formerly, criminal informations for misdemeanours were exhibited by the clerk of the Crown without check or restraint, at the mere will of any individual. This privilege came to be so abused by malicious and contentious persons that the Legislature thought fit to put a limit upon it, and accordingly, by statute 4 & 5 Will. and Mary, c. 18. s. 1, it was enacted that the clerk of the Crown should not, without express order, to be given by the Court of King's Bench in open Court, exhibit, receive or file any such information. From thenceforward a restriction was placed upon the exhibition of criminal informations for trivial matters, or for purposes of malice or extortion; but there was still nothing to prevent the presentment to a grand jury of a bill of indictment for any offence at the mere will of any person who thought fit to present it. In course of time, however, it was found that this power too was grievously abused for unworthy purposes. Bills of indictment were often presented, and easily procured to be returned as true bills, upon the most unsatisfactory evidence, subject to no test of cross-examination, and were used as instruments of oppression and extortion.

To remedy, to some extent, this evil, the Vexatious Indictments Act, 22 & 23 Vict. c. 17, was passed, which, by section 1, provides that no bill of indictment for certain misdemeanours therein mentioned (not including libels) shall be presented to or found by any grand jury, unless—(1) The prosecutor has been bound to prosecute or give evidence against the person accused; or (2) Unless the accused has been committed for trial or bound by recognisance to appear to answer to an indictment to be preferred against him for such offence; or, (3) Unless such indictment for such offence be preferred by the direction or with the consent in writing of a Judge of one of the Superior Courts or of the Attorney- or Solicitor-General. The 2nd section of the Act entitles the person who prefers a charge to insist upon being bound over to prosecute in the event of a magistrate refusing to commit or hold the accused to bail; so that any malicious person could in one way or other insist upon his right to present a bill of indictment. The state of the law then, when the Newspaper Libel Act, 1881, was passed, stood thus: A criminal prosecution for the offence of libel could only be instituted by criminal information or by indictment, no other form of criminal proceedings for libel being known to the law. No criminal information could be filed without the express order of the Court of Queen's Bench, but a bill of indictment might be preferred at the mere will of any one who thought fit to present it. It is unnecessary to enter minutely into the history of the Newspaper Libel Act, 1881, or to endeavour to point out all the reasons which brought about its enactment, but it is beyond all question that one great object of the Legislature was to afford to newspaper proprietors more protection than they then enjoyed against hostile proceedings for trivial libels. Its preamble recites that it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel. By section 3 it is enacted that no criminal prosecution shall be commenced against any proprietor, &c., of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions.

The 5th section for the first time gives a Court of summary jurisdiction, in the course of an investigation with a view to an indictment, power (with the assent of the accused) to deal summarily with trivial libels; and the 6th section extends the Vexatious Indictments Act to the offence of libel.

Now the first question I have asked

myself is this—If it was intended by the Legislature to include within the 3rd section all the forms of criminal procedure known to the law for the offence of libel, what more apt, simple and unequivocal language could it have used to express that intention than the words, "No criminal prosecution shall be commenced without the fiat of the Public Prosecutor"? And if, on the other hand, the Legislature had intended to exclude criminal informations from the operations of the section, what more inapt or misleading language could it have selected to express that intention? To neither of these questions have I been able to suggest to myself an answer.

Why, then, am I, sitting here judicially, to come to the conclusion that the Legislature has deliberately said what it did not mean, and left unsaid, or rather said the contrary to, that which it intended to express?

It has been suggested that the Legislature must be taken to have passed the Act under discussion with full cognisance of the statute of Will. and Mary, which gave effectual protection against vexatious and frivolous criminal informations, and must be taken to have intended the 3rd section to apply to indictments only. If it were so, how strange it is that, with the knowledge that there were only two forms of criminal procedure applicable to libel—namely, information and indictment—the words "no indictment" were not substituted for the comprehensive and unambiguous words "no criminal prosecution."

It was urged, moreover, that by including criminal informations within the 3rd section, we should be construing the Act in such a manner as to give the Public Prosecutor a controlling power over Her Majesty's Court of Queen's Bench, and to interfere with the prerogative and jurisdiction of that Court. I think no such consequences would result from such a construction of the section.

The result of our so interpreting the Act would indeed be to vest in the Public Prosecutor (who, in addition to his legal attainments, ought to be a man of experience, knowledge of the world, common sense and discretion) the power and the duty to say, having regard to all the surrounding circumstances of each particular case (into all which circumstances he ought to make enquiry), whether it is expedient that a newspaper proprietor should, under all those circumstances, be criminally prosecuted at all, and to grant or refuse his fiat, accordingly, even though he may be satisfied that, in strictness of law, a libel has been published. I can imagine many cases in which that power might be most usefully exercised—cases in which inestimable mischief and injustice might be done by the first step in a prosecution, whether by application to the Queen's Bench for leave to file a criminal information, or by proceedings before a magistrate with a view to an indictment.

But though the Public Prosecutor has the power to grant or refuse his fiat, he has no power, if he grants it, to direct in what form the prosecution shall be conducted.

The Court of Queen's Bench, on the other hand, has not, and never had, the power to put a veto upon a prosecution; but it had, and has, the power, under the statute of Will. and Mary, to refuse to allow it to be instituted in the form of a criminal information, and it does constantly so refuse in cases which, though justifying the application of the criminal law, can be equally well dealt with by a grand jury upon a bill of indictment.

The distinction between the power of the Public Prosecutor and that of the Queen's Bench is obvious; and I see no reason why these two powers should not exist harmoniously together—the Public Prosecutor determining in the first instance whether a criminal prosecution is expedient and should be allowed; the Queen's Bench determining whether to permit the use of a criminal information or to leave the prosecutor to his other remedy by indictment. These jurisdictions could never clash, for the jurisdiction of the Public Prosecutor must necessarily have ceased before that of the Queen's Bench came into existence.

But the reason urged for excluding informations from the operation of the section would also apply to an indictment preferred by order of a Judge or the Attorney- or Solicitor-General under the Vexatious Indictments Act. It might just as well be argued that the Legislature never intended to give the Public Prosecutor power, prac-

tically, to supersede the order of a Judge or the fiat of the law officers of the Crown; and yet that some indictments are within the operation of the section is clear, or it would have no operation at all. It is impossible to suppose the Legislature to have intended that no restraint should be put upon a vindictive unreasonable prosecutor who insisted upon being bound over to prosecute notwithstanding the refusal of the magistrate to commit, or of a Judge to allow an indictment to be preferred before the grand jury.

To extend the exception to indictments by order of a Judge, or the Attorney- or Solicitor-General, as well as to criminal informations, would practically limit the 3rd section to proceedings before a magistrate preliminary to an indictment. If such was the intention of the Legislature, how easy it would have been to express it in so many words. I cannot think the Legislature intended the language used in the 3rd section to be construed in any other than its popular sense, and so as to comprehend every criminal prosecution—that is, it intended what it said. Probably when the Act of 1881 was passed, the jurisdiction of the Queen's Bench to refuse a criminal information, and of a Judge or the Attorney- or Solicitor-General to order an indictment, was altogether lost sight of; and possibly, had it not been so, the 3rd section might have been differently framed; but this is mere speculation. We are not here to say what the Legislature would have done if the suggested inconveniences had been present to its mind, but what it has done. Even if we were satisfied that the section is defective by reason of an oversight, we have no right to remedy the defect by engrafting an exception upon clear and explicit language; that would be to legislate, which we have not the power to do, and not to construe the language as we find it (16). It is not our duty to amend defective legislation, but simply to administer the law as it stands.

(16) See *Warburton* v. *Loveland* (2 Dow & Cl. 489), *Miller* v. *Salomons* (7 Exch. Rep. 475; 21 Law J. Rep. Exch. 161), *per* Pollock, C.B., *Lee* v. *The Bude, &c., Railway Company* (40 Law J. Rep. C.P. 285; Law Rep. 6 C.P. 580), *per* Willes, J., and *The Queen* v. *Clerworth* (4 B. & S. 934), *per* Blackburn, J.

For the reasons I have stated, I am of opinion that this information ought to be quashed; but as the majority of the Court take a different view, the rule must of course be discharged.

In the course of the discussion I have entertained some doubt whether the omission to obtain the fiat of the Public Prosecutor was a mere irregularity in procedure capable of being waived by omitting to take the objection at the proper time—namely, in shewing cause against the rule *nisi*—or whether the objection goes to the original jurisdiction of the Court.

Our refusal to quash the information or motion will not prevent the defendant from raising the whole question in such a shape as he may be advised, either by plea to the jurisdiction, or by assigning error in fact, if the judgment on the information should be given against him (17).

FIELD, J.—This is an application by the defendant, the proprietor of a newspaper, to quash, for defect of jurisdiction, a criminal information for libel exhibited against him by the Queen's coroner by order of this Court.

The defect alleged is the absence of the fiat of the Director of Public Prosecutions, the necessity for which, as a condition precedent, is said to arise under the 3rd section of the 44 & 45 Vict. c. 68, which enacts that no "criminal prosecution" for such a libel shall be commenced against any proprietor of a newspaper without the written fiat or allowance of the Director of Public Prosecutions in England, or of Her Majesty's Attorney-General in Ireland, being first obtained.

The short question, therefore, is whether an information so filed at the instance of a private individual is a "criminal prosecution" within the meaning of the section.

That those words are sufficiently large in their widest sense to include such a proceeding, no one, I think, doubts; but it does not of necessity follow that the words are so used in that sense. Indeed, it is clear that it does not, for in their largest and widest sense would be included an information filed *ex officio* by Her Majesty's Attorney-General, whether of England or Ireland, and it is certain that such a pro-

(17) See *The Queen* v. *Marsh* (6 Ad. & E. 236) and *The Queen* v. *Heane* (4 B. & S. 947).

ceeding is not a "criminal prosecution" within the meaning of the 3rd section.

What, then, is the limitation to be put upon these general words? Is everything but *ex officio* information included, or is there to be imposed any further limitation?

The question is not altogether easy to answer, in consequence of the use by the Legislature of general, and what may be almost called popular, language, instead of precise words the well-known import and effect of which when used leave no room for doubt as to their meaning.

To enable this question to be answered, the first step is to see what, at the time of the passing of the Act, were the several modes by which an individual could commence and prosecute any criminal proceedings in such a case, and what were the mischiefs attending such proceedings which the Legislature wished to prevent.

The ordinary remedy of a private prosecutor for this, as for any other offence punishable by the criminal law, was of course by bill of indictment presented to and found by a grand jury, and such a bill it was competent to any individual to prefer, without any preliminary enquiry, order, fiat or allowance.

The finding of such bill might therefore be, and often was, the first step in or commencement of a prosecution, for although it was a usual, and generally a fair and proper, course for a prosecutor, before preferring his bill, to summon the proposed defendant before a magistrate, and so institute an enquiry into the alleged offence, the result of which might be the committal, or binding over, or discharge of the defendant, such a step was not a necessary preliminary to the sending up of the bill, and it was constantly found that although the magistrate dismissed the application, a vindictive or vexatious prosecutor still preferred his bill, and that many vexatiously did so without going before a magistrate at all.

Moreover, the very institution of the preliminary investigation was made use of by irresponsible prosecutors as an instrument of vexation and revenge, and however trivial the libel, or whatever the circumstances under which it had appeared in the newspaper, whether its publication amounted to an offence within the meaning of Lord Campbell's Act, or not, the newspaper proprietor was often subjected to expensive and harassing proceedings, the expense of which, even when he was successful, fell upon himself.

By the side of this ordinary remedy with these attendant evils, and others which are remedied by the 4th and 5th sections of the Act we have to construe, there stood the remedy by criminal information.

This exceptional remedy had originally probably been part of the general privilege of the Attorney-General to file informations in the Court of Queen's Bench at his will by virtue of his office, but in course of time so much of the privilege as consisted in filing such an information at the suit of a private individual had become by usage vested in another officer of the Crown, the Queen's coroner, who was also an officer of this Court.

This remedy had, however, also come to be accompanied, in course of time, by some at least of the same evils as attended an ordinary prosecution for libel, but the latter were in the case of this proceeding removed by express legislation as far back as 4 & 5 Will. and Mary, c. 18.

By the 1st section of that Act the Queen's coroner was prohibited from filing any such information without the express order of this Court, and from issuing any process under it without the prosecutor coming under recognisance effectually to prosecute the information and abide by the order of the Court, to whom power was given to award costs against him in certain events. Since that statute, therefore, no prosecutor can proceed by way of criminal information without obtaining the express order of this Court, and which he can only obtain upon rule *nisi* made absolute after no cause shewn, in which proceeding he is obliged by the practice of the Court to bring before it the terms of the libel of which he complains, so that its nature and character may be seen; he is further obliged to deny upon oath that there is any truth in or foundation for the libel, and if he fail his recognisances are estreated unless he pay such costs as the Court may award. This mode of proceeding was therefore placed by the Legislature absolutely under the control of this Court, which in its discretion granted or

refused this order, and only granted it with just care or deliberation, and never in aid of any unworthy or vindictive prosecutor, or trivial or vexatious prosecution.

A more complete protection to the subject against groundless, harassing and vexatious proceedings it is hardly possible to conceive.

Now whatever uncertainty may exist as to the precise limit to be put upon the language of the 3rd section of the Newspaper Libel Act, it is quite clear that the necessity for the fiat does extend to summary proceedings for newspaper libel before magistrates; and as to them there is no uncertainty as to the period at which the prosecution in such a case commences; the result is that no information or complaint for such a libel can be made without the fiat of the Director in England, or the Attorney-General in Ireland, who will of course take care not to authorise any other than legitimate proceedings.

The words "criminal prosecution" have therefore at least one important application. But, besides dealing with this proceeding by section 3, it is also clear that the preferring of a bill of indictment is dealt with by the Act, but not, as it seems to me, because it is directly included in the words "criminal prosecution" in section 3, but by the extension in section 6 to the offence of newspaper libel of the provisions of the Vexatious Indictments Act, 22 & 23 Vict. c. 17.

By that Act, as it is well known, certain specified offences (prosecution by private persons for which had become in practice vexatious and harassing) were placed under certain restrictions, for (although dealing very guardedly with the common law right of the subject to prefer a bill before a grand jury) it imposes alternative conditions, one of which is a necessary preliminary to its exercise.

These conditions are—first, an information before a magistrate, who may either commit, or bind over, or discharge the defendant; or, secondly, the direction of or the consent in writing of a Judge or the Attorney- or Solicitor-General.

In the first alternative, if the magistrate commit or hold to bail, the case of course goes to trial in the ordinary way, and the prosecutor enters into the ordinary recognisances to prosecute and abide by the order of the Court; but the committal or holding to bail is not an essential preliminary to an indictment, for a bill may also be preferred even if the magistrate discharge the defendant, the only condition in that event being, by section 2, the recognisance of the prosecutor.

If, therefore, the prosecutor do not obtain the direction or consent of a Judge or law officer, no indictment can be preferred without the prosecutor rendering himself liable for costs, nor without the fiat of the director being obtained for the preliminary proceedings; so that by this construction a complete protection seems to me to be effected against vexatious or trifling prosecutions.

But the Vexatious Indictments Act provides another mode in which a bill may still be preferred without any preliminary magisterial proceedings, and that is the direction or consent in writing of a Judge or law officer; and it seems to me that, in reference to this latter mode of proceeding, it could not have been intended that the fiat of the director was also necessary. I am unable to see any reason why that additional safeguard should be required, or that expense and trouble should be imposed upon a prosecutor.

Is it to be supposed that if a Judge or law officer, with all the circumstances before him, in the exercise of his discretion, "directed" a prosecution, the order was to be of no avail without the allowance of the Director of Public Prosecutions? or if the prosecutor, disclosing all necessary facts to the Judge, obtained his consent in writing, that must be subject to a previous preliminary investigation or subsequent allowance or fiat?

I cannot think so; of course, if the words of the Act plainly said it, such would be the result; but, to my mind, the words actually used in section 3 are satisfied by the application of them to summary proceedings, and do not extend to an indictment commenced merely by itself.

The question now remains (not free from doubt, as evidenced by the views expressed by some of my learned brethren on the argument, but which, after careful consideration, I am compelled to answer in the negative), Whether a criminal in-

formation at the suit of a prosecutor is included in the provisions of section 3.

Now, as I have before said, it is admitted that an information *ex officio* by the Attorney-General is not a criminal prosecution within it.

That it is not so is evidenced by the fact that the Attorney-General for Ireland is constituted the alternative jurisdiction for that country.

But that is not the reason for the exclusion, the real ground being (as tacitly admitted by Mr. Russell) that it could not have been intended by the Legislature that the discretion of a high public officer like the Attorney-General should be submitted to the discretion of the Director of Public Prosecutions, although also a high public officer for the exercise of the very same functions. But that ground of exclusion seems to me to apply with at least equal if not greater force to the supposition that the discretion of this Court, the highest criminal Court in the realm, is subordinated to that of another tribunal; and before I could arrive at that result I should require much clearer indication of the will of the Legislature than I find in section 3.

In the first place, if the words are to be applied to a criminal information, the period when a prosecution is "commenced" is somewhat uncertain. Is such a prosecution commenced when the order *nisi* is obtained or when the information is filed? If the filing of the information is the commencement, then the order of this Court that it shall be filed is in effect rescinded by the refusal of the Director to give his sanction, and Mr. Russell fairly admitted that this consequence would be so unreasonable that he could not contend for it.

But he said that such was not the case, and that the prosecution commenced at some earlier period, and (so far as I was able to collect) he fixed that earlier period at the application for and making of the order *nisi*. But, if that be so, the consequences appear to me to be as unreasonable as in the other view. Is the subject to be prevented, in a case in which in the discretion of this Court, if brought before it, he would be entitled to have what he asks for, from making any application for it? Is the Director of Public Prosecutions to be asked to give leave to apply for the leave of this Court? Is he to exercise a discretion preliminary to the exercise of a second discretion by another and higher tribunal acting with all parties before it and with the same identical functions? and, if so, with what object?

The action of this Court in granting or refusing an order to file a criminal information guards against all the mischiefs attending either upon summary proceedings or indictment, and the only one which Mr. Russell was able, when pressed, to point out as the object of the Legislature if the fiat is necessary in criminal information was the *ex parte* application for the rule.

But that application is either successful or not: if successful, it is one which ought not to have been prevented; if unsuccessful, the defendant is in no way vexed or harassed by any order. Again, I say that all these consequences seem to me to be so unreasonable that unless the Legislature has plainly said they are to come into existence I cannot think that it contemplated them. And, in my judgment, the words used in the 3rd section are not sufficiently indicative of any such intention. The terms used in that section are general; admittedly they must receive some limitation, and I think that the necessary limitation to be imposed excludes criminal information and indictment when preferred by the direction or with the consent in writing of a Judge or law officer. I think, therefore, that the rule must be discharged.

DENMAN, J.—The question in this case turns upon the true meaning of section 3 of 44 & 45 Vict. c. 60. The words of that section are as follows:—"No criminal prosecution shall be commenced against the proprietor of any newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained."

The facts of the present case are that a rule has been made absolute by which it is ordered that a criminal information be filed against the defendant Yates, who is the proprietor of a newspaper, for an

alleged libel appearing in his paper; that a criminal information has been accordingly filed by the Master of the Crown Office; and that no written fiat or allowance of the Director of Public Prosecutions has been obtained.

At first sight this state of facts would seem to bring the case within the section referred to, and to shew that the information, having been issued in violation of the enactment, ought to be quashed: for there can be no doubt that, according to ordinary understanding among lawyers and to the words of the most approved text-books, a criminal information filed by the Master of the Crown Office is a well-known kind of criminal prosecution, so that the words of the statute, construed according to a well-known use of them among lawyers, will include the case. There might be some doubt as to the particular stage of the proceedings at which the prosecution was "commenced"; but this would be immaterial to the decision of the present case, for there could be no doubt, if the section includes a criminal information under the words "criminal prosecution," that the prosecution would have been commenced at the latest when the information was actually filed.

But, notwithstanding the apparent ease and simplicity of the above solution of the case, I have, upon consideration of the whole statute 44 & 45 Vict. c. 60, and the Acts therein referred to, and having regard to the state of the law relating to criminal informations existing at the time when that statute was passed, come to the conclusion that section 3 does not apply to criminal informations at all; and that the words "criminal prosecutions for any libel" must be construed as confined to proceedings by indictment, or before a magistrate with a view to obtaining either the power of indicting or a summary conviction as provided by the Act.

My reasons for thinking that this is the true meaning of section 3 are as follows: In 1881, when the 44 & 45 Vict. c. 60, was passed, there was in existence, and still is, unrepealed, the statute 4 & 5 Will. and Mary, c. 18. That is an Act with which all lawyers are familiar, and which it is impossible to suppose to have escaped the attention of the Legislature. Its object was to prevent the abuses which had arisen, owing to the too great ease with which the Master of the Crown Office had exhibited criminal informations on the relation of private prosecutors. The main provision of that Act, the whole of which is still in force, and which has been constantly acted upon ever since, is that the Master of the Crown Office "shall not without *express order*, to be given by the Court of King's Bench in open Court, exhibit or file any information for misdemeanour." Upon this provision a not inconsiderable and a very well-known portion of the jurisdiction, practice and business of the King's Bench has for nearly two centuries been founded, and in no class of misdemeanour has it been more often called upon to act than in cases of libel, and in no cases of libel more frequently than in applications against proprietors, &c., of newspapers. Nothing can be more improbable than that the Legislature, with such a jurisdiction, and the statutable requirements in connection with it still in constant operation, should have intended to enact that, either before or after applying to the Court for the "express order" mentioned in that well-known statute, a party complaining of a libel in a newspaper should be required to obtain the fiat or allowance of any individual.

But it is not sufficient merely to shew that it is improbable. The true question is, has the Legislature so enacted? I am of opinion that it has not. I think that the words of section 3 do not, when read with the rest of the Act, shew an intention to include, or necessarily or in fact include, criminal informations. They are, no doubt, large enough to include them; but in the construction of statutes, though where clear and unambiguous words are used—where the language is precise and capable of but one construction—it is not the province of the Court to scan the wisdom or policy of the enactment, but to give effect to the plain meaning of words; yet, where general words are used capable of including or excluding a particular case, it is, I apprehend, clearly the duty of the Court to call to its aid the other provisions of the statute itself, and of other statutes referred to in it, and, assisted by

these, and having regard to the state of the law existing at the time of the enactment, to form its judgment as to the real intention of the Legislature, and the true meaning of the language used, in the passages in which it is used.

Sometimes what Lord Cottenham called "flexible expressions" are used (18); and in such cases, when the question arises whether a particular case falls within the enactment or not, such assistance is of the utmost importance. Akin to this observation is the maxim (19), that all words, if they be general, and not express and precise, are to be restricted to the fitness of the matter. It is also a true canon of construction of statutes, that the Legislature does not intend any alteration in the law beyond what it declares either in express terms or by necessary implication. There is, moreover, a presumption against any intention, not only to oust, but to restrict, the jurisdiction of the Superior Courts, except where such intention is clearly shewn.

Now, admitting fully that a criminal information, in ordinary parlance, and even in ordinary legal parlance, is a kind of criminal prosecution, I am of opinion that, applying the principles above referred to, it is not a "criminal prosecution" within the meaning of those words as used in section 3 of 44 & 45 Vict. c. 60.

The Act begins by reciting that it is expedient to amend the law affecting civil actions and criminal prosecutions for "newspaper libels." It is said a criminal information is a kind of criminal prosecution, therefore it is included in the preamble of the Act; if the Act had not intended to include it, it would have used the word "indictments" only. This would be a strong argument if the Act referred to no other proceedings except indictments and (possibly) criminal informations; but it does refer expressly in the following clauses 4 and 5 to proceedings before magistrates, which are in their nature the commencement of criminal prosecutions, and which in one case may end in an actual conviction for libel (section 5). It seems to me that there is more reason for saying that these are what the preamble refers to, than that the general words "criminal prosecutions" include that peculiar kind of criminal prosecution (fenced about as it already is by 4 & 5 Will. and Mary, c. 18) known to everybody as a proceeding by way of criminal information.

There is, indeed, one provision in the Act which I think would apply to criminal information—namely that in section 15, which provides that copies of registers shall be conclusive or *prima facie* evidence, as the case may be, "in all proceedings civil or criminal." This alone would satisfy the words of the preamble. But it is never safe to rely too much upon the words of the preamble either as extending or limiting the enacting parts of the statute.

Now turning to the words of section 3, "no criminal prosecution shall be *commenced*," can it be supposed that these prohibitory words are intended to prohibit a person from doing (or, to speak more correctly, from having done for him by the Master of the Crown Office) that which he has no power to do, or have done, until he has obtained a rule absolute for an "express order" of the Court of King's Bench, that the Master of the Crown Office shall file the information, subject to well known and elaborate provisions by statute as to recognisances and other matters? Or, if the mere motion for the rule or any intermediate stage of the proceedings *before* the filing be looked upon as the "commencement" of the prosecution, can it be supposed that the Legislature intended that the Director of Public Prosecutions should have the power of vetoing an application to a Court invested with full power and discretion by a well known statute to decide whether an information shall or shall not be filed by its own officer? Either supposition seems to be wholly inadmissible.

But, pursuing further the words of section 3, no criminal prosecution is to be commenced in the cases mentioned "without the written *fiat* or *allowance* of the Director," &c. This seems to me to be very inaccurate language as applied to the case of a criminal information, and equally so whether the commencement of the

(18) *Salkeld* v. *Johnson* (1 Mac. & G. 264).
(19) Bac. Max. 10.

prosecution be the filing of the information or any anterior proceeding. In the former case the statute gives the director no power to "fiat" or "allow." He cannot say let it be done, or effectively allow it, independently of the Court. For whatever he may write, the Queen's Bench is not bound to order an information to be filed. On the other hand, if the motion, or any subsequent steps short of the filing, is the commencement of the prosecution, the words "fiat" or "allowance" are equally out of place.

Passing on to the succeeding sections of the Act, sections 4 and 5 contain provisions relating to proceedings in Courts of summary jurisdiction where criminal charges are made against proprietors of newspapers for libel; and they both contemplate a proceeding which may end in an indictment or summary conviction, as the case may be, and are wholly inapplicable to a proceeding by criminal information.

Section 5 contains a provision enabling the Court of summary jurisdiction, in certain cases, with consent of the party charged with libel, to deal summarily with the case, and applies the provisions of section 27 of 42 & 43 Vict. c. 49, relative to indictable offences dealt with summarily. This provision is not applicable to the case of a criminal information. Then by section 6 it is enacted "That every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of 22 & 23 Vict. c. 17, intituled an Act to prevent vexatious indictments for certain misdemeanours," which provisions are again wholly inapplicable to criminal informations.

The words of section 6 are difficult to construe, but I can put no construction on them which is at all consistent with any view, except that the libels dealt with by the Act are only libels to which the Vexatious Indictments Acts are applicable —that is, libels for which proceedings are taken in such a manner that the Vexatious Indictments Acts can apply; that is, libels which are prosecuted by indictment, or with a view to an indictment or summary conviction—not libels for which proceedings are taken by application to the Queen's Bench for or by the actual filing of a criminal information.

I have now dealt with all the provisions of 44 & 45 Vict. c. 60, which have any bearing upon the question raised before us, and I cannot resist the conclusion that section 3 of the Act was never intended to apply to criminal informations; that the words "criminal prosecution" do not mean to include, and do not, according to true interpretation, include, "criminal informations," or proceedings to obtain criminal informations, but that they are confined to the kinds of prosecution contemplated by sections 4, 5 and 6 of the Act, and the Acts therein referred to, namely, indictments and proceedings before magistrates, with the view of indicting or obtaining a summary conviction in the case provided for by section 5 of the Act.

For these reasons I am of opinion that the rule ought to be discharged.

Lord Coleridge, C.J.—In this case a criminal information has been filed against Mr. Yates for libel, and the question for our consideration is, whether, previously to that application being made, the leave or sanction of the Director of Public Prosecutions should have been first obtained. I observe that the Act under which the question arises is one passed in favour of newspaper proprietors; it enlarges the well established rule which protects *bona fide* reports of matters of public interest, and is intended to make prosecutions more difficult. The earlier Act, Lord Campbell's Act, very much enlarged the ordinary protection which a person accused of libel has, and this Act was carried to enlarge that protection still further in the case of newspapers. At the time of the passing of the Act, one of the most ordinary modes of proceeding against newspapers for libel was by means of a criminal information. In the books the commonest cases of criminal informations will be found to be against newspapers; and to suppose that the Act enlarging the protection afforded previously to newspapers was not intended to include one of the commonest modes of prosecution, imposes, in my opinion, the onus on those who say it does not of shewing that they are right. If the words are clear, and if

the matter with which they deal is such as may reasonably be seen to have been under the notice of the Legislature at the time, we have no business to look about for a way of evading their plain effect. It is otherwise only when the ordinary sense of the words used would lead to a grave absurdity. Take the case of the Attorney-General in England or Ireland under section 3 of this Act. He, as representing the Crown, files *ex officio* an information. It is clear that that cannot be intended to be included in the words "criminal prosecution"; it is clear, because in Ireland the Attorney-General is the same person as he whose fiat is required, and in England the Director of Public Prosecutions is the subordinate of the Attorney-General. I agree, therefore, that the conclusion applying section 3 to *ex officio* informations would be absurd, and so I have no difficulty in deciding that such a prosecution is not within section 3, because it cannot have been intended to be within it.

If reasons of the same cogency could be adduced as to other criminal informations, I should agree with the majority of the Court, but I confess that I have a great objection to construe plain words to exclude what they do, or to include what they do not, say. It is the duty of the Court to construe the words as they are, without adding to or taking from them. When I was young an Act was passed expressly to take away the equitable jurisdiction of the Court of Exchequer, and yet there were found plenty of arguments to shew that it had nevertheless not done so in revenue cases, and the Court itself so decided. Afterwards an Act was passed to enlarge the jurisdiction of the Mayor's Court, yet the greatest jurist of my time persuaded himself and the Court of Common Pleas that the Act had had no such effect. Later, the Court of Appeal overruled this decision, and allowed that the Act meant what it said. Another Act of Parliament said that costs should follow the event; nevertheless, it was ingeniously argued and decided that it was meant that they should not, and that was so held till finally corrected in the House of Lords. These are instances of the tendency there is to disregard plain language in Acts of Parliament and substitute some wholly inconsistent opinion for it, and against this tendency Courts ought to be on their guard. For my part, I always give way with the greatest possible reluctance when I am obliged to say that the Legislature has not enacted what it seems to have done, and I do not think that this is a case where I am at all so obliged.

The Act here says, "No criminal prosecution shall be commenced . . . . without the written fiat." I have shewn that at the time of the Act passing criminal information was a very common way of beginning prosecutions against newspapers. Those who passed the Act must have been aware of it, and it is incredible that a House full of lawyers should have intended to exclude that common mode of prosecuting newspapers, and yet have used the words I have read. I think, therefore, that "criminal prosecution" must include criminal information.

Now, what is the chief argument against so construing the plain words? It is that proceeding by criminal information requires the express order of the Queen's Bench, in open Court, to be given to filing the information, and that to say that the Director of Public Prosecutions must give his leave restrains the exercise of the jurisdiction of the Queen's Bench. If I could see that this was so, I might think the conclusion to be drawn from the fact of such restraint very difficult to escape from in construing the section. If the Act limited the discretion of the Court by interposing the fiat of the Director of Public Prosecutions, it would be a serious matter. But I venture to think that no such conclusion is necessary at all: to say that the necessity of going through certain conditions precedent to the coming to the Court, a Judge or a grand jury, amounts to a fettering of the discretion of the tribunal, is, in my opinion, a misuse of language. The condition has to be fulfilled by a person desiring to proceed before the exercise of the discretion in question is asked for. One of my learned brothers has fairly enough held that, in his view, an application to a Judge is also outside the section.

The proceedings of the Queen's Bench

are regulated by the statute of 4 & 5 Will. and Mary, c. 18. That Act shews, by the preamble, that this proceeding by criminal information through the Queen's coroner had previously been treated as a purely private matter. The Master of the Crown Office granted leave to file informations as of course on the private application of individuals. The statute restrained the Queen's coroner from acting, possibly improperly, on private information, and necessitated application to the Court, whose discretion was thenceforward to be exercised as to granting or refusing leave to file. So, now, I see no more reason why this well-known private mode of redressing wrongs should not be subjected to the preliminary condition imposed by this statute. There is no more interference with prerogative or jurisdiction of the Court than there was by the Act of Will. and Mary. On the other hand, there is abundant reason and good sense in imposing the condition. The Director of Public Prosecutions has means of investigating and enquiring into matters which the Court has not; for it must be remembered that at first the application to the Court is *ex parte*—one side only is heard.

It has been too much insisted on that when the Court makes the rule absolute, the condition requiring the fiat is a fettering of its discretion; whereas, when it discharges the rule—thereby saying that its discretion ought not to have been appealed to—its discretion must obviously be wholly free. I do not, therefore, think that it is at all derogatory to the honour of the Court that this preliminary should be required.

I think, further, that the difficulty as to the "commencement of the prosecution" is not great. A criminal prosecution is commenced within the meaning of this Act of Parliament when the first step is taken in a long series of legal proceedings which end in the conviction of the accused. It is, therefore, the coming to the Court to ask leave to proceed that is the commencement, and the Director of Public Prosecutions must be asked for his fiat before any application is made to the Court at all. I come, without hesitation, to the conclusion that this rule should be made absolute.

Rule discharged.

Solicitors — R. & A. Horn, for prosecution; Lewis & Lewis, for defendant.

1883. June 14, 21. THE QUEEN (*on the prosecution of Sibley*) *v.* WHITE (*Auditor of West Gloucestershire*) AND OTHERS.

Poor — Overseers — Opposing Bill in Parliament—Costs.

[For the report of the above case, see 52 Law J. Rep. M.C. 128.]

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TO THE SUBJECTS OF THE CASES

IN

THE QUEEN'S BENCH DIVISION

OF

The High Court of Justice,

AND ON APPEAL THEREFROM

IN THE

COURT OF APPEAL AND HOUSE OF LORDS.

LAW JOURNAL REPORTS, VOL. LII.

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Bank of England Note—*alteration of date and number: principal and agent: forged note received as solicitor: paid away as solicitor: personal liability: notice of infirmity in note: 45 & 46 Vict. c.* 61. *s.* 64]—The plaintiffs held certain acceptances of A's, and the defendant was acting as solicitor to A and to B. B agreed to take up A's acceptances; and the defendant cashed a cheque for B at B's bank, and received two 100*l.* Bank of England notes. On the 29th of May, defendant sent a clerk to the plaintiffs with these two 100*l.* Bank of England notes, which were paid to them, the clerk receiving three acceptances of A's, and 63*l.* 15*s.* in cash. The defendant retained 13*l.* 15*s.*, in payment of a bill of costs due from A to himself, and paid 50*l.* to B. On the 7th of June, one of the notes which the plaintiffs had paid away was brought back to them as having been refused by the Bank of England, and with the words "The No. and date of this note have been altered" written across it. On the 22nd of July, they demanded 100*l.* of the defendant, who then had notice that the note was bad. All parties had believed the two notes to be good:—*Held*, first, that the plaintiffs, in receiving the note from the defendant and handing him the acceptances, were not dealing with him merely as agent for A or B; secondly, that the rule as to the necessity of giving notice of the infirmity of a note or bill in order to enable a plaintiff to take advantage of such infirmity is not applicable to the case of a forged Bank of England note; and, thirdly, that the proviso in section 64 of the Bills of Exchange Act, 1882, does not apply to Bank of England notes; that the alteration in question was "apparent" within that proviso, since, although the holder had not the means of detecting it, it would at once be obvious upon presentation at the Bank of England; that that Act has not a retrospective operation; and that, consequently (following *Suffell* v. *The Bank of England*, 51 Law J. Rep. Q.B. 401; Law Rep. 9 Q.B. D. 555), the Bank of England were entitled to refuse payment of the note, and the plaintiffs, having received a worthless document from the defendant, were entitled to recover the amount for which they had taken it as payment. *The Leeds and County Bank* v. *Walker*, 590

Bankruptcy—*liquidation: landlord and tenant: non-disclaimer by trustee of debtor's tenancy: set-off: liability of trustee for rent due before appointment*]—W. was tenant from year to year to the defendant of a certain farm and

land, in respect of which an offgoing tenant was, upon the expiration of the tenancy, entitled to receive from the landlord all reasonable allowances in respect of any tillages, sowing or cultivation, the benefit whereof should be given up to the defendant. On the 24th of September, 1879, W. filed his petition for liquidation, and the plaintiff, who was appointed trustee, elected not to disclaim the tenancy, but to till and cultivate the farm. The plaintiff's tenancy expired in September, 1880, after notice to quit had been duly given by him, and he was then entitled to receive as offgoing tenant allowances amounting to 785*l.* odd:—*Held*, that the defendant was not entitled to set off against the above amount any sum which had accrued due for rent from the debtor prior to the appointment of the plaintiff as trustee. *Alloway* v. *Le Steere*, 38

—— *sale by sheriff: notice of petition in bankruptcy: sale occupying more than one day: "proceeds of such sale": bankruptcy act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87]—When there is a sale by a sheriff under a *fi. fa.* which occupies more than one day, the fourteen days contemplated by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87, begin to run from the time when the sale authorised by the writ is completed, that is, the end of the last day of the sale. *Jones* v. *Parsell* (*J. A. Jenkins, claimant*), 672

—— *scheme of settlement: annulling adjudication: discharge of debtor*: 32 & 33 *Vict. c.* 71. *s.* 28]—Where, under section 28 of the Bankruptcy Act, 1869, the creditors of a bankrupt assent to a general scheme of settlement of the affairs of the bankrupt which is approved by the Court of Bankruptcy, the bankrupt is thereby discharged and released from his debts whether or not such scheme includes a condition that the order of adjudication is to be annulled; and such scheme is an answer to an action subsequently brought by one of the creditors for his debt. *Gilbey* v. *Jeffries* (App.), 601

J. was adjudicated a bankrupt. The creditors assented to a general scheme of settlement of the affairs of J., upon the terms that if he assigned to the trustee under the bankruptcy all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. J. executed a deed of assignment, the scheme was approved by the Court, and the bankruptcy was annulled. One of the creditors subsequently brought an action against J. for his debt:—*Held* (affirming the judgment of the Queen's Bench Division, *ante*, p. 116), that the scheme released J., and was an answer to the action. Ibid.

—— *trustee: notice to disclaim tenancy: assignment by trustee to pauper: sham transaction: liability for rent*]—A trustee in bankruptcy, who is in possession of premises of which the bankrupt was tenant, and who, after notice to disclaim from the landlord, assigns the bankrupt's tenancy to a pauper, is not liable to pay rent in respect of such premises after the date of the assignment, although the jury find that the assignment was a sham transaction, not intended by the pauper to have the effect which it would appear on the face of it to have, and that the trustee knew that. *Hopkinson* v. *Lovering*, 391

—— See PARTNERSHIP.

Barratry. See SHIP AND SHIPPING.

Bastardy—second order to pay on expiration of first: jurisdiction of Justices: Bastardy Act, 1872 (35 & 36 Vict. c. 65). *Williams* v. *Davies* (M.C. 87), 647

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Bill of Lading—*execution in triplicate: indorsement of one set: delivery on production of unindorsed bills: liability of warehousemen: merchant shipping act*, 1862 (25 & 26 *Vict. c.* 63), *ss.* 66–78]—The consignees of a cargo of sugar obtained an advance from a bank, secured by the indorsement and delivery of one set of the bills of lading, which were made out in triplicate. The bills of lading stated on their face that they were executed in triplicate, and ended with the words "the one of which bills being accomplished, the others to stand void." The sugar was deposited by the master with a dock company under the provisions of the Merchant Shipping Act, 1862. The consignees produced to the dock company one of the other sets of bills unindorsed, and the dock company, having no notice of the indorsement to the bank, delivered the sugar upon delivery orders signed by the consignees:—*Held*, that the dock company were not bound to enquire whether any of the sets had been indorsed, but were justified in delivering to the holder of one set in the absence of notice of the previous indorsement of another. *Glyn, Mills, Currie & Co.* v. *The East and West India Dock Co.* (H.L.), 146

—— *execution in triplicate: validity of tender of two of three sets: contract: sale*]—The plaintiffs contracted in London with the

defendants for the sale of goods to be delivered at Philadelphia, payment to be made in net cash in London in exchange for bills of lading of each cargo or shipment. The goods having been shipped in Russia, the plaintiffs tendered in London to the defendants two duly indorsed copies of a tripartite bill of lading, the other copy not having been dealt with. The defendants refused to accept these two copies. The plaintiffs then procured the third copy from Russia, and six days after the first tender they tendered all three copies to the defendants, who refused to accept them, on the ground that it was too late then to forward them in time to deliver them in America before the arrival of the ship with the goods. In an action for non-acceptance of the goods,—*Held*, that the tender of the two copies of the bill of lading was a valid tender, that the defendants were bound to accept the goods, and to make payment in accordance with the contract. *Sanders Bros.* v. *Maclean and Co.* (App.), 481

—— See SHIP AND SHIPPING.

Bill of Sale—*bills of sale amendment act*, 1882 (45 & 46 *Vict. c.* 43), *ss. 7 and* 9 *: accordance with form in schedule*]—The Bills of Sale Act (1878) Amendment Act, 1882, s. 9, enacts that a bill of sale made or given by way of security for the payment of money by the grantor thereof, shall be void, unless made in accordance with the form in the schedule to the Act annexed. The form permits the insertion of terms as to insurance, payment of rent or otherwise, which the parties may agree to, for the maintenance or defeasance of the security. *Davis* v. *Burton* (*Blaiberg claimant*) (App.), 636

By section 7: "Personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes: first, if the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security; secondly, if the grantor shall become bankrupt or suffer the goods or any of them to be distrained for rent, rates or taxes; . . . fourthly, if the grantor shall not without reasonable excuse upon demand in writing by the grantee produce to him his last receipts for rent, rates and taxes." Ibid.

A bill of sale of goods was made by way of security for the payment of 300*l.* money advanced and of 180*l.* agreed capitalised interest thereon; the whole sum of 480*l.* to be paid by instalments at certain specified dates. There were covenants that the grantor would deliver to the grantee the receipts for rent, &c., when demanded in writing or otherwise; that the grantor would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition. It was further agreed that if the grantor should break any of the covenants, all the moneys secured by the bill of sale should immediately become due and should be forthwith paid to the grantee, and that all the foregoing covenants were necessary for maintaining the security within the meaning of sub-section 1 of section 7 of the Act; and there was a proviso that the chattels assigned should not be liable to seizure for any cause other than those specified in section 7 of the Act:—*Held*, that the bill of sale was void, inasmuch as it was not substantially in accordance with the form in the schedule, and was in violation of section 7. Ibid.

Judgment of the Queen's Bench Division (*ante*, p. 334) affirmed. Ibid.

—— *registration : affidavit of execution and attestation : residence, &c., of attesting witness : description by introduction to affidavit by attesting witness : description by reference : bills of sale act*, 1878, *s.* 10. *sub-s.* 2]—The affidavit of execution and attestation filed upon the registering of a bill of sale was made by the attesting witness, and a description of the residence of the deponent was contained in the introduction to the affidavit, and was the same as the description of the residence of the attesting witness in the attestation clause:—*Held*, that there was a description of the residence of the attesting witness satisfying 41 & 42 Vict. c. 31. s. 10. sub-s. 2, by MANISTY, J., on the ground that the affidavit incorporated the description in the attestation clause, relying on *Routh* v. *Roublot* (28 Law J. Rep. Q.B. 240); by NORTH, J., on the ground that the description in the introduction to the affidavit (whether perjury could be assigned upon it or not) sufficed, relying especially on *Allen* v. *Thompson* (2 Jur. N.S. 451), followed in *Ex parte Lowenthal* (43 Law J. Rep. Bankr. 132); by DENMAN, J., on the ground that *Routh* v. *Roublot* (28 Law J. Rep. Q.B. 240) was in point on one or the other of those two grounds. *Blaiberg* v. *Parke*, 110

—— See LANDLORD AND TENANT.

Board. See BURIAL.

Building Contract—*construction of: powers of surveyor named in building contract: certificate as to extras and omissions*]—A contract for the building of some houses by the plaintiff for the defendant contained the clause "all extras payment for which the contractor shall become entitled to under the conditions shall be paid at the prices as shall be fixed by L., the surveyor appointed by the proprietor."

One of the conditions attached to the contract said, "The contractor to be paid on the certificate of surveyor, at the surveyor's discretion, during the progress of the works, in payments on account of the rate of eighty-five per cent. value of works executed, and the balance of such contract to be paid on completion of works to surveyor's satisfaction." On completion of the works the surveyor gave a certificate, in which the plaintiff was allowed a certain sum for "extra work measured and valued":—*Held*, that such certificate was conclusive against the parties, not only as to the prices, but also as to whether the items for which such prices were allowed were extras or not. *Richards* v. *May*, 272

Burial—*power to appoint burial board: district having separate burial ground: part of area already under a burial board:* 18 & 19 *Vict. c.* 128. *ss.* 11 *and* 12]—A meeting, in the nature of a vestry, of an ecclesiastical district, not separately maintaining its own poor, but having at the time of the passing of 18 & 19 Vict. c. 128, a separate burial ground, passed, under section 12 of that Act, resolutions for appointing a burial board. The district formed part of an area for which a burial board already existed:—*Held*, that the appointment was bad. *The Queen* v. *The Overseers of the Parish of Tonbridge*, 595

Campbell's Act. See CARRIERS.

Carrier—*consignor and consignee: contract of carriage: special condition: lien: refusal of consignee to accept goods*]—The plaintiff consigned certain goods for carriage by the defendant company to the consignee's address. The consignment note, which was signed by the plaintiff, contained a condition that "all goods delivered to the company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges," &c.:—*Held*, that the lien continued so long as the company held the goods, and was in no way affected by the refusal of the consignee to accept the goods after they had arrived at their destination. *Westfield* v. *The Great Western Rail. Co.*, 276

—— *liability of: ship: tort: injury and death caused by collision at sea: meaning of words "loss or damage": passenger's ticket: action by personal representatives:* 9 & 10 *Vict. c.* 93]—The personal representatives of a deceased man cannot maintain an action under Lord Campbell's Act (9 & 10 Vict. c. 93) where the deceased if he had survived would not have been entitled to recover. The defendants, a steamship company, issued a passenger's ticket, which contained, amongst others, the following condition: "The company will not be responsible for any loss, damage or detention of luggage under any circumstances. . . . . The company will not be responsible for the maintenance of passengers, or for their loss of time or any consequence arising therefrom . . . . nor for any delay arising out of accidents; nor for any loss or damage arising from the perils of the sea, or from machinery, boilers or steam, or from any act, neglect or default whatsoever of the pilot, master or mariner":—*Held* (affirming the judgment of the Queen's Bench Division, *ante*, p. 395), that the words "loss or damage arising from the perils of the sea," &c., as contained in the above conditions, exempted the defendants from liability for injury or loss of life to a passenger occasioned on the voyage by the negligence of the defendants' servants. *Haigh* v. *The Royal Mail Steam Packet Co.* (*Lim.*) (App.), 640

—— *negligence: temporary loss of goods: carriers act* (11 *Geo.* 4. *and* 1 *Will.* 4. *c.* 68), *s.* 1: *consequential damages*]—A carrier is protected by the provisions of the Carriers Act, s. 1, not only from liability for the loss, whether temporary or permanent, of undeclared goods, but also from liability for the consequences resulting from such a loss, and consequently is not liable in damages for the detention of undeclared goods, where such detention is the result of a loss in respect of which he is protected by the Carriers Act. *Millen* v. *Brasch & Co.* (App.), 127

The plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel, consisting of silk dresses and other articles within the Carriers Act, exceeding 10*l.*, but no declaration of their value was made. Owing to the negligence of the defendants, the trunk was sent to the Victoria Docks in London and thence shipped to New York. It was eventually recovered, and after considerable delay delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for the repurchase of other articles in Rome at enhanced prices,—*Held*, by the Court of Appeal—first, that the trunk was lost within the meaning of the Carriers Act, and that the defendants were protected by the provisions of that Act for the loss and injury to its contents, notwithstanding that the loss was temporary; secondly (reversing the judgment of LOPES, J., on this point), that the plaintiff was not entitled to recover, as consequential damages for non-delivery of the undeclared articles within due time, the cost of the repurchase

of other articles at Rome at enhanced prices, inasmuch as such non-delivery was the result of a loss in respect of which the defendants were protected by the Carriers Act. Ibid.

—— See RAILWAY COMPANY.

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Certificate. See BUILDING CONTRACT; CONTRACT.

Certiorari. See EMPLOYERS' LIABILITY ACT.

Champerty. See MAINTENANCE.

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Charter-party—*construction: "at all times of tide": "always afloat": demurrage*]—A charter-party provided for delivery of cargo *ex H.* at S. "or so near thereto as she may safely get at all times of tide and always afloat":—*Held*, that the lay days began to run on notice to the receivers that the vessel had arrived at the nearest place to S. to which she could get in the then state of tide. *Horsley* v. *Price*, 603

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Church and Clergy—*district churches: ecclesiastical law: 6 & 7 Vict. c. 37. s. 15, and 19 & 20 Vict. c. 104. s. 14 (new parishes acts, 1843 and 1856): marriages of residents in newly constituted parish: rights of vicar of new parish as to marriages and fees: "ecclesiastical purposes": 4 Geo. 4. c. 76. s. 2*]—Where under the new Parishes Acts a district in which a church is built is separated from an existing parish and constituted "a new parish for ecclesiastical purposes," the law as to the publication of banns and the solemnization of marriages applies to persons who dwell in such new parish. Such persons are not entitled to resort to the old parish church for the publication of banns or solemnization of marriage, those being ecclesiastical purposes in respect of which the new district with its church has become a separate and distinct parish. *Fuller* v. *Alford*, 265

Church Rate—*31 & 32 Vict. c. 109. ss. 1 and 5: rate levied on a contract for good consideration: parish of St. Paul, Covent Garden: 51 Geo. 3. c. cl.*]—By an Act of 12 Car. 2, reciting that the Earl of Bedford had erected the church and rectory house of St. Paul's, Covent Garden, and charged his property with the perpetual payment of 100*l.* a year to the rector, it was enacted that St. Paul's be a parish, and that the yearly sum of 250*l.* be charged upon the houses of the inhabitants of the parish (except Bedford House) for the support and benefit of the rector, curate, clerk and sextons of the parish, and that the said sum be collected by a rate made by the churchwardens. By the Act 51 Geo. 3. c. cl., reciting that it was expedient, from the very great advance in the price of articles of necessary consumption, that the said sum of 250*l.* should be increased, it was enacted that the yearly sum of 520*l.*, in lieu of 250*l.*, be charged upon all the houses in the parish (not excepting Bedford House), and the rent-charge upon the Duke of Bedford's property be increased to 180*l.* a year. On action brought to recover the amount of a rate made under the above statutes against an inhabitant of the parish,—*Held*, by DAY, J., that the rate was recoverable. Although being made partly for ecclesiastical purposes, it was a church rate within section 1 of 31 & 32 Vict. c. 109 (the Compulsory Church Rate Abolition Act, 1868), yet it was enforceable by virtue of section 5 of the same Act as being on a contract made for good consideration between the Duke of Bedford and the parishioners of St. Paul. *Bell* v. *Bassett*, 22

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Common Informer. See MAINTENANCE.

Commons, Enclosure of. See MINES.

Company—*companies act, 1862 (25 & 26 Vict. c. 89), s. 4: unregistered association of more than twenty members: acquisition of gain by individual members: object of association to carry on business of money-lending: action on promissory note by trustee*]—A mutual benefit society of more than twenty members, the object of whose business is, from a fund created by the contributions of its members, to lend money, not generally, but only to members of the association, upon approved security, carries on the business of money-lending which has for its object the acquisition of gain by the individual members thereof, within the meaning of 25 & 26 Vict. c. 89. s. 4, and such an association, unless registered as a company under that Act, is illegal. *Shaw* v. *Benson* (App.), 575

The trustee of a society which is illegal under 25 & 26 Vict. c. 89. s. 4, cannot maintain an action upon a promissory note given by a member of the society to secure a sum of money advanced to him under the rules of the society. Ibid.

—— See ACTION; RAILWAY COMPANY.

Compensation, Right to. See VENDOR AND PURCHASER.

—— See GASWORKS CLAUSES ACT; PUBLIC HEALTH.

Condition. See CONTRACT.

Condition Precedent. See PRACTICE.

Conflict of Laws—*incorporeal hereditament: contract in England by Englishmen as to sporting rights over land in Scotland: de facto enjoyment of right: lex loci rei sitæ: lex fori*]—The provision of the English law that a right to an incorporeal hereditament can only be conveyed by deed is part of the *lex loci* and not of the *lex fori*, and a lease made in England by Englishmen of sporting rights over land in Scotland which, if made in Scotland, would not require a deed, may be enforced in England, although it be not sealed. The lessee, who has had the actual enjoyment of the right conveyed, cannot set up the invalidity of the lease by reason of the want of a seal as a defence to an action for breach of a stipulation contained in it. *Adams* v. *Clutterbuck*, 607

Consideration. See ACCORD.

Contempt of Court. See ATTACHMENT.

Contract—*covenant for extension of time for performance in case of non-removal of a staging: implied contract that the staging would be moved without unnecessary delay: certificate of engineer: reference to or award by engineer*]—The plaintiff contracted with the defendants to remove a certain quantity of the bed of the river Mersey within a certain time, but in case a temporary staging erected in the river was not removed by the defendants in sufficient time to enable the plaintiff to complete his contract within the time agreed upon, he was to be entitled to such extension of that time as the engineer should deem reasonable. The plaintiff was to be paid eighty per cent. of the value of the work certified by the engineer as having been completed each month, and the balance when the work was finished, but if any "difference" arose between the defendants and the plaintiff "concerning the work contracted for or concerning anything in connection with the contract, such difference" was to be "referred to the engineer, and his decision" was to be final and binding on the local board the defendants, and the contractor the plaintiff. The work was not completed till some time after the date stipulated for by the contract, but this the plaintiff alleged to be due to the non-removal of the staging. The engineer admitted that the plaintiff was entitled to compensation for the time (thirty-eight days) during which he incurred expenses by the delay caused by the non-removal of the staging, but the full amount for extra work and expenses could not be agreed on between him and the plaintiff. After some correspondence the engineer certified that the work was finished to his satisfaction, and the plaintiff was entitled to 1,065*l.* 10*s.*, which was paid; but the plaintiff claimed 2,489*l.* 13*s.* 11*d.* beyond that amount:—*Held*, that the engineer had no authority to make an express contract on behalf of the defendants that no unreasonable delay should occur in removing the staging, but that there was an implied contract to that effect, and that if the plaintiff was in fact prevented from completing the contract in time by reason of any such unreasonable delay he was entitled to damages. *Held, also*, that this was not a difference concerning a matter in connection with the contract such as to make the engineer's certificate final and binding, and that in fact there had been no reference to, or award by, the engineer. *Lawson* v. *Wallasey Local Board*, 302

—— *gaming and wagering: agent employed to bet in his own name: repudiation of bet before payment*: 8 & 9 *Vict. c.* 109. *s.* 18]—R., a betting agent, was employed by A. to make bets for A. in R.'s own name, and A. tacitly agreed to indemnify R. R. made bets for A. accordingly. The bets were lost, and were paid by R., who would otherwise have suffered serious inconvenience and loss as a defaulter. R. suing A. for the amount so paid, A. alleged that he had repudiated the bets before payment:—*Held*, by HAWKINS, J., that such repudiation, if any, was inoperative, and that A. was legally bound to indemnify R., in pursuance of his agreement, such an agreement not being "a contract by way of gaming or wagering" within the meaning of 8 & 9 Vict. c. 109. s. 18. *Read* v. *Anderson*, 214

Per HAWKINS, J.—A request to another person to bet in that person's own name implies in law a promise to indemnify him; and the principal cannot escape liability to his agent by repudiating the bet after it is made. Ibid.

—— *parol agreement to devise interest in land: part performance: statute of frauds*]—The plaintiff agreed to purchase a farm belonging to his brother J. H., upon the representation that it was worth 2,000*l.* and that the rental was 70*l.* a year; but having subsequently discovered that the rental was only 45*l.*, and that the farm was not worth 2,000*l.*, he insisted upon repudiating the contract. J. H. thereupon verbally promised that if the plain-

tiff would complete the purchase, he would devise to the plaintiff and his son certain other lands which belonged to him, and would also consent that the purchase-money should be reduced to 1,800*l.* The plaintiff alleged that he completed the purchase relying upon that verbal promise. J. H. made a will in favour of the plaintiff and his son as agreed, but revoked it by a subsequent will. In an action against the estate of J. H., to recover damages for breach of the alleged verbal agreement,—*Held*, that the part performance relied on by the plaintiff—namely, the completion of the purchase—being referable not to any agreement to refrain from repudiating the previous contract of purchase, but to that previous contract itself, did not constitute such a part performance of the alleged verbal agreement as to exclude the operation of the Statute of Frauds. *Humphreys* v. *Green* (App.), 140

Contract (continued)—*verbal agreement to devise realty : part performance : statute of frauds*]—The appellant was induced to serve A. as his housekeeper for many years, and to give up other prospects of advancement in life, by a verbal promise made by A. to leave her a farm for her life. A. signed a will, leaving the farm in accordance with his promise; but the will was not duly witnessed:—*Held*, that, assuming a contract in fact between A. and the appellant, there was no part performance unequivocally referable to a contract, so as to exclude the operation of the Statute of Frauds; and that the appellant could not recover the farm from A.'s heir. *Maddison* v. *Alderson* (H.L.), 737

Loffus v. *Maw* (3 Giff. 592; 32 Law J. Rep. Chanc. 49) disapproved. Ibid.

Parker v. *Smith* (1 Coll. 608) questioned. Ibid.

—— *written document not read by one party : deposit of goods at auction rooms : entering judgment*]—The plaintiff left a waggonette to be sold at the defendant's repository, and received a receipt, which he put into his pocket without reading it. The receipt contained the words "subject to the conditions as exhibited on the premises," and one of the conditions so exhibited was that, on the lapse of a month, property might be sold by auction without notice to the owner unless the charges were paid:—*Held*, that the plaintiff was bound by the condition, and judgment was entered for the defendant, notwithstanding the verdict of the jury for the plaintiff. *Watkins* v. *Rymill*, 121

—— See BILLS OF LADING; CARRIER; RAILWAY COMPANY; REVENUE.

Contractor. See NEGLIGENCE.

Conviction. See NEGOTIABLE INSTRUMENT.

Copyhold—*fine on admittance : mode of assessing : assessment of, on annual value of premises : no assessment of a precise sum*]—A lord of a manor who is by custom of the manor entitled to a fine upon admission of a copyhold tenant on the roll of the manor is entitled to assess and recover such fine as a certain number of years of the improved annual value of the land, and he is not bound to assess it at, and to claim, a precise sum of money. *Fraser* v. *Mason* (App.), 643

Judgment of the Queen's Bench Division (*ante*, p. 423), affirmed. Ibid.

Copyright—*musical composition : right to sole liberty of performing : performance at a place not a place of dramatic entertainment : right to recover penalty or damages : 3 & 4 Will. 4. c. 15. s. 2 : 5 & 6 Vict. c. 45. ss. 20 and 21*]—By 3 & 4 Will. 4. c. 15. s. 1, the author or his assignee has as his own property the sole liberty of representing for a certain period, at a place of dramatic entertainment, an unpublished dramatic piece. *Wall* v. *Taylor*. *Wall* v. *Martin* (App.), 558

By section 2, if any person represents such a piece without permission at any place of dramatic entertainment, he is made liable to the payment of an amount not less than 40*s.*, or to the full amount of the benefit received by him, or of the injury sustained by the owner, whichever shall be the greater damages. Ibid.

5 & 6 Vict. c. 45. s. 20, creates a right in the sole liberty of representing or performing any musical composition; and section 21 enacts that the person who has the sole liberty of representing a dramatic piece or musical composition shall have the remedies given by 3 & 4 Will. 4. c. 15, "as fully as if the same were re-enacted in this Act." Ibid.

In an action by the owner of the sole liberty of performing a musical composition, which was not a dramatic piece, to recover penalties for the unauthorised performance of that composition at a place which was not a place of dramatic entertainment,—*Held* (affirming the judgment of the Queen's Bench Division), by BRETT, M.R., and BOWEN, L.J. (*dissentiente* COTTON, L.J.), that the plaintiff was entitled to recover the penalty given by 3 & 4 Will. 4. c. 15. s. 2, and was not limited to the recovery of damages only, for that the right to recover the penalty is not confined to cases in which there has been an infringement of the sole liberty of performing a musical composition by an unauthorised performance at a place of dramatic entertainment. Ibid.

—— *registration : photograph : "author" : 25 & 26 Vict. c. 68. ss. 1 and 4*]—The plain-

tiffs, a firm of photographers, trading under the name of the L. S. and P. Co., registered themselves as the "authors" of a photograph, the negatives of which had been taken, at the instance of one of their managers, by another of their employés, who made use of their machinery and materials for the purpose, copies being printed off at a different establishment by a totally different set of employés of the plaintiffs. The plaintiffs themselves had nothing to do personally either with the idea or the execution of the photograph:—*Held*, that the registration was insufficient; that the plaintiffs were not the authors of the photograph within the meaning of section 1 of 25 & 26 Vict. c. 68; and, consequently, were precluded by section 4 of that Act from bringing an action to restrain the infringement of their copyright in the photograph. *Nottage* v. *Jackson* (App.), 760

Semble,—The "author" of a photograph within section 1—the person on whose life the duration of the copyright depends—is the person who superintends the arrangement of the picture, the pose or grouping of the object or objects, and who is most nearly the effective cause of the photograph when completed; and who that person is, is a question of fact. Ibid.

Corporation. See PRESCRIPTION.

Corrupt Practices. See MUNICIPAL ELECTION.

Costs. See HUSBAND AND WIFE; LANDS CLAUSES ACT; PRACTICE; SLANDER; SOLICITOR.

Counsel. See PRACTICE; SLANDER.

Counter-claim. See PRACTICE.

County Court. See PRACTICE.

Covenant. See LANDLORD AND TENANT; PRACTICE.

Criminal Act. See SLANDER.

Criminal Charge. See PRACTICE.

Criminal Law—*libel: criminal information:* 44 & 45 *Vict. c.* 60. *s.* 3 (*newspaper libel and registration act*, 1881): *construction of statute: condition precedent to filing information: fiat of director of public prosecutions*]—The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), enacts in section 3: "No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney-General in Ireland, being first had and obtained":—*Held*, by DENMAN, J., FIELD, J., and MATHEW, J. (*dissentiente* LORD COLERIDGE, C.J., and HAWKINS, J.), that the section does not apply to criminal informations for libel at all. *Held, per totam Curiam*, that the section does not apply to criminal informations for libel filed *ex officio* by the Attorney-General. *Reg.* v. *Yates*, 778

Criminal Matter. See PRACTICE.

Crown. See PRACTICE.

Custom. See MINES.

Damage feasant. See DISTRESS; SLANDER.

Damages—measure of. See PRINCIPAL AND AGENT; MAINTENANCE; SHIP AND SHIPPING.

—— See ACTION.

Debentures. See INCOME TAX.

Debtor. See BANKRUPTCY.

Debtor and Creditor—*accord: agreement to accept less sum than debt: payment to creditor's nominee*]—An agreement by a debtor to pay to the creditor or his nominee a less sum than the debt payable to the creditor is not a sufficient consideration for an agreement by the creditor not to take further proceedings. *Beer* v. *Foakes* (App.), 712

Judgment of Queen's Bench Division (*ante*, p. 426) reversed. Ibid.

Deck Cargo. See SHIP AND SHIPPING.

Defamation. See SLANDER.

Defend, Leave to. See PRACTICE.

Demand. See LIMITATIONS, STATUTE OF.

Demurrage. See CHARTER-PARTY; SHIP AND SHIPPING.

Demurrer. See PRACTICE.

Deposit. See VENDOR AND PURCHASER.

Detinue. See LIMITATIONS, STATUTE OF.

Discharge in Bankruptcy. See BANKRUPTCY; PARTNERSHIP.

Disclaimer. See BANKRUPTCY.

Discontinuance. See PRACTICE.

Discovery. See PRACTICE; ELECTION PETITION.

Distress. See LANDLORD AND TENANT; MORTGAGOR AND MORTGAGEE.

Distress damage feasant—*cattle impounded on premises: tender of damages after the impounding: exorbitant demand: payment under protest: money had and received*]—The placing of cattle that have been distrained damage feasant in a private pound does not necessarily cause a subsequent tender of amends made by the owner to be too late. *Green* v. *Duckett*, 435

The defendant placed a bull that was trespassing on his farm in a shed belonging to him. The plaintiff, the owner of the bull, within a reasonable time tendered to the defendant 1*s.* 6*d.*, which was more than the amount of damage the bull had done. The defendant refused to release the bull unless the plaintiff paid him 2*l.* The plaintiff paid him 2*l.*, under protest, and brought an action against him to recover 1*l.* 18*s.* 6*d.*:—*Held*, that the plaintiff was entitled to recover the amount claimed. Ibid.

—— See LANDLORD AND TENANT.

District. See BURIAL.

Divisional Court. See PRACTICE.

Documents. See PRACTICE.

Easement. See RIPARIAN OWNER.

Ecclesiastical Law. See CHURCH AND CLERGY.

Election. See ESTOPPEL; MUNICIPAL ELECTION; VESTRY.

Election Petition — *discovery of documents: vouchers for payments to voters alleged to be colourably employed: parliamentary elections act*, 1868 (31 *&* 32 *Vict. c.* 125), *ss.* 2, 25 *and* 26]—The general power over the proceedings in an election petition given by the Parliamentary Elections Act, 1868, to the Judges is subject to the modification created by sections 25 and 26 of that Act, and in the absence of any rules to that effect the Judges have no power to order the production of documents before the trial of the petition. *Moore* v. *Kennaird. In re Salisbury Election Petition*, 285

Wells v. *Wren: the Wallingford Election Petition* (49 Law J. Rep. C.P. 681; Law Rep. 5 C.P. D. 546), followed. Ibid.

Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 11, sub-s. 1: child "prohibited from being taken into full-time employment": attendance order. *Winyard* v. *Toogood. Hance* v. *Fortnum* (M.C. 25), 190

Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *ss.* 1 *and* 6: *certiorari: removal into high court: consolidation*]—Neither the fact that an action brought in the County Court, under section 1, sub-section 1, of the Employers' Liability Act, involves questions of a technical character necessitating an intricate scientific investigation, nor the fact that an action has been brought in the High Court against the same defendants in respect of the same injury, constitute sufficient reason for the removal of the County Court action into the High Court. *Munday* v. *The Thames Iron Works and Shipbuilding Co.*, 119

—— (43 *&* 44 *Vict. c.* 42), *s.* 1. *sub-s.* 1: "*defect in the condition of ways, works, machinery or plant*": *temporary obstruction of road used by workman*]—By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1. sub-s. 1, a right of compensation against an employer is given in the case of any personal injury caused to a workman "by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer." *McGiffen* v. *Palmer's Ship Building and Iron Co.* (*Lim.*), 25

A workman, who was employed to convey molten iron in a hand-truck along a way constructed for the purpose from one part of his employer's works to another, was injured by the upsetting of the loaded truck over some "tap" negligently placed a few hours previously upon, and so as to obstruct, the way which ought to have been kept clear:—*Held*, that the "tap" forming a temporary obstruction of the way, but not altering the powers of the road nor its fitness for the purpose for which it was generally used, and not being incorporated with the road, did not constitute a "defect in the condition of the way" within the meaning of the above sub-section. Ibid.

—— (43 *&* 44 *Vict. c.* 42), *s.* 1. *sub-s.* 5: "*locomotive engine*": *steam crane fixed on a trolly*]—A steam crane fixed on a trolly, and propelled by steam along a set of rails when it

is desired to move it, is not a "locomotive engine," within the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 5. *Murphy* v. *Wilson & Son*, 524

—— (43 & 44 *Vict. c.* 42), *ss.* 1 *and* 8: *superintendence: personal injury caused by "the negligence of any person in the service of the employers who has any superintendence entrusted to him whilst engaged in the exercise of such superintendence* "]—Action for personal injuries caused by the negligence of a "gangway man," whose duties were to give the word when certain sacks were to be hoisted by means of a steam crane from a barge alongside and lowered into a vessel, and also himself to manage a guy-rope for the purpose of regulating the movements of the beam of the crane and to call out to the men in the hold to "look out" when the sacks were to be lowered. During the lading with the sacks, the ship being also laden with coal listed to port, and the bulwark over which the grain was raised gradually became higher than the other, so that when the sacks had been hoisted from the barge and were being swung round by the crane they struck against the combing of the hatchway, owing to their not being checked by the guy-rope, were knocked off the sling, and fell on the plaintiff:—*Held*, that the "gangway man" was not a person having "superintendence" within the meaning of sections 1 and 8 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42); and, further, that if he had such superintendence the accident did not happen while he was engaged in such superintendence, the cause of the accident being his failure to use the guy-rope, and not any act or omission of his in respect of the hoisting or lowering, or of warning those in the hold. *Shaffers* v. *The General Steam Nav. Co.*, 260

—— (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 5: "*train upon a railway*": *meaning of a* "*railway*."]—By 43 & 44 Vict. c. 42. s. 1. sub-s. 5, employers are made liable to compensate workmen in their service for injuries caused to them "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine or train upon a railway":—*Held*, that the term "railway" in sub-section 5 was used in a popular sense, and included a temporary tramway used by a contractor for the passage of engines and trucks during the construction of certain works. *Doughty* v. *Firbank*, 480

Enclosure of Commons. See MINES.

Estoppel—*choice of debtors: election: refusal to assent to a composition*]—The rule that where there is a choice of debtors an election must be made within a reasonable time ought to be strictly applied when a liability is sought to be created by estoppel and the remedy against the person who ought to pay is likely to be imperilled by delay. *Fell* v. *Parkin*, 99

A creditor having a choice of debtors attended at a meeting of the creditors of one of such debtors, handed in a claim which was allowed, took the chair at the meeting, and voted against the acceptance of a composition:—*Held*, that the creditor had elected to accept the liability of that debtor, and to give up his claim against the other. Ibid.

Scarf v. *Jardine* (51 Law J. Rep. Q.B. 612; Law Rep. 7 H.L. Cas. 345) followed. Ibid.

—— See RAILWAY COMPANY.

Execution. See PRACTICE.

Extradition—habeas corpus: crime: committal by magistrate: jurisdiction: sufficiency of evidence: 33 & 34 Vict. c. 52, ss. 9 and 10. *In re Maurer* (M.C. 104), 756

Fine. See COPYHOLD.

Fines and Recoveries Act. See HUSBAND AND WIFE.

Fire. See LANDLORD AND TENANT.

Fire Insurance—*vendor and purchaser: insurance by vendor of house agreed to be sold: loss by fire before completion of purchase: receipt by vendor of both purchase-money and compensation: right of insurance company to benefit of such payment: subrogation*]—The defendants agreed to sell to R. certain land and buildings which they had insured with an insurance company on behalf of which the plaintiff sued. The agreement for sale contained no reference to the insurance. After the date of the agreement for sale, but before the date named for completion, the buildings were damaged by fire, and the defendants, the vendors, received compensation from the insurance company. The purchaser afterwards duly completed the purchase, and paid to the defendants the full amount of the purchase-money. In an action by the insurance company in respect of the amount which they had paid to the defendants as compensation for the loss caused by the fire,—*Held*, that the plaintiff company was entitled to succeed: that a contract of insurance is a contract of full indemnity, and nothing more; that as the defendants had received the full amount of the purchase-money as well as the insurance-money, the plaintiff company was entitled to have brought into the account that which diminished the loss suffered by

the defendants, and to obtain the benefit of part of the purchase-money received by them subsequently to the payment by the company of the insurance-money. *Castellain* v. *Preston* (App.), 366

Firm—action against. See PRACTICE.

—— See PRACTICE.

Fish—preservation of freshwater fish: 36 & 37 Vict. c. 71. s. 15: placing a device to catch fish descending stream: ancient weir constructed with trap. *Briggs* v. *Swanwick* (M.C. 63), 544

Fishery Acts—fishing: salmon: 36 & 37 Vict. c. 71. s. 22: licence: tributary: reservoir fed by stream. *Harbottle* v. *Terry* (M.C. 31), 191

—— See PRESCRIPTION.

Fixtures. See MINES.

Foreign Agent. See PRINCIPAL AND AGENT.

Foreign Judgment—*fraud of plaintiff: defence to action on judgment*]—It is a good defence to an action upon a foreign judgment to allege that the judgment in question was obtained by the fraud of the plaintiff. To an action on a foreign judgment the defendants pleaded as a defence that the plaintiff had obtained the judgment in an action in which the defendants were sued for the detention of the plaintiff's goods, and that both at the time when the action was brought and when judgment was obtained the goods were in the actual possession of the plaintiff and her husband, and that the plaintiff fraudulently concealed that fact from the foreign Court: —*Held*, a good defence. *Abouloff* v. *Oppenheimer* (App.), 1

Foreign Plaintiff. See PRACTICE.

Forfeiture. See LANDLORD AND TENANT.

Fraud. See FOREIGN JUDGMENT; PARTNERSHIP; VENDOR AND PURCHASER.

Frauds, Statute of. See CONFLICT OF LAWS; CONTRACT.

Freight. See MARINE INSURANCE; SHIP AND SHIPPING.

Gain, Acquisition of. See COMPANY.

Gaming—Vagrant Act Amendment Act, 1873 (36 & 37 Vict. c. 38), s. 3: open place to which the public have access: railway. *Langrish* v. *Archer* (M.C. 47), 309

—— See CONTRACT.

Garnishee. See ATTACHMENT OF DEBTS.

Gasworks Clauses Act—(10 *Vict. c.* 15), *s.* 6: *gas mains laid in highway without statutory powers: subsequent act giving authority: duty on landowner to leave support: right to compensation: gasworks clauses act*, 1871 (34 & 35 *Vict. c.* 41), 41 & 42 *Vict. c.* clxi.]—A limited gas company, acting without any statutory authority, and without the authority of the landowner, but with the permission of the highway authority, laid pipes under the soil of the highway. Subsequently a gas company was constituted by a private Act, which incorporated the Gasworks Clauses Acts, 1847 and 1871. The private Act of this company provided for the dissolution of the limited company, and enacted that all the lands, gasworks, easements, mains, pipes, plant and apparatus placed by, vested in, or which were the property of the limited company immediately before the passing of the Act, should be similarly vested in the incorporated company, and the incorporated company were empowered to maintain the existing gasworks and to lay down and maintain additional mains and pipes. The Gasworks Clauses Act, 1847, gives power to undertakers of gasworks to open the soil within their district, to lay and repair pipes therein, and to do other acts necessary for supplying gas, making compensation for any damage done in the execution of such powers. The Gasworks Clauses Act, 1871, renders it compulsory on undertakers of gasworks to supply gas on certain conditions and within certain limits. The defendants, the lessees of the minerals under and adjacent to the highway under which the plaintiffs had laid their pipes, had by working the coal thereunder let down the soil of the highway and caused injury to the plaintiffs' pipes:—*Held*, that the plaintiffs were entitled to support for their pipes, and that the landowner was entitled to compensation for the burden thus imposed upon him; that the plaintiffs could therefore recover damages by action for any injury caused to their pipes, while the owner of the minerals could recover compensation in an arbitration for the limitation thus put upon the user of his land. *The Normanton Gas Co.* v. *Pope and Pearson* (*Lim.*) (App.), 629

General Average. See SHIP AND SHIPPING.

Goods, Property in. See SHIP AND SHIPPING.

Habeas Corpus. See INFANT.

Harbour Authority—*liability of: removal of sunken wreck: construction of local acts: wrecks removal act*, 1877 (40 & 41 *Vict. c.* 16), *s.* 4: *word "may," whether permissive or obligatory*]—By a local Act, the harbour of B. was vested in the defendants, and jurisdiction was conferred on them over P. harbour and channel, "for the purpose of maintaining, improving, regulating and buoying the said harbour and channel"; but such powers were not to confer on them the right to levy dues or rates beyond the limits of B. harbour. *Dormont* v. *The Furness Rail. Co.*, 331

By a subsequent local Act, one-half of the residue of certain light duties to which ships entering or leaving P. harbour and channel were liable to contribute was to be paid to the defendants, to be applied by them in "maintaining, buoying, lighting, regulating and improving" P. harbour and channel. Ibid.

There was a sunken wreck in P. channel, which the defendants, under the powers of sections 4 of the Wrecks Removal Act, 1877, had partially removed, leaving the part not removed insufficiently buoyed. The plaintiffs' vessel struck on the sunken wreck and sank:—*Held*, that the above enactments imposed upon the defendants the obligation to remove the wreck, and to mark its position by buoys, and that they were therefore liable for the damage done to the plaintiffs' vessel. Ibid.

Semble,—Section 4 of the Wrecks Removal Act, 1877, is permissive and not obligatory, and does not impose an obligation upon a harbour authority to remove sunken wrecks from the approaches to their harbour. Ibid.

High Peak District. See MINES.

Highway—*neglect to repair: dangerous projection: cover of water valve pipe: highway authority: water authority: local board*]—A local board, as water authority, fixed in the highway a pipe with an iron valve cover at the top, which was originally level with and formed part of the roadway, but which, in consequence of the road wearing away, gradually projected considerably above it. The local board were also the highway authority, and as such were under a duty to keep the road level. An injury was caused to two horses by one of them stumbling against the valve cover:—*Held*, that the local board were liable to the owner of the horses, for that a duty was cast upon them, apart from their duty as highway authority, to take care that that which they had placed in the highway did not become dangerous to persons passing along it. *Kent* v. *The Local Board of Health for the District of Worthing*, 77

—— *neglect to repair: highway board: order for expenses: quarter sessions: appeal, grounds of: construction of*: 25 & 26 *Vict. c.* 61. *s.* 18]—A complaint having been made to Justices that certain roads alleged to be highways under the jurisdiction of a highway board were out of repair, a summons was issued against such board. Upon the hearing, a land surveyor was appointed to view and report on the state of the roads in question. The report was duly made, and the Justices, upon the evidence and admissions before them, ordered the highway board to do the repairs. The highway board neglected to obey this order; and the Justices appointed such land surveyor to put the highway in repair, and ordered the board to pay the expenses. At several hearings before the Justices, the highway board never denied that they were liable to repair the roads in question. The board appealed to Quarter Sessions against the order upon them for the expenses of repairing the roads. The following were the grounds of appeal:—"1. That the said Justices had no jurisdiction to make the said order. 2. That the said order is contrary to law. 3. That the said order is contrary to the evidence. 4. That the Justices wrongfully admitted evidence of witnesses other than the person appointed by them under section 18 of 25 & 26 Vict. c. 61. 5. That at the time of the making of the said order the said highways had been put into a state of complete and effectual repair. 6. That the sum mentioned in the said order to be spent in putting the said roads into repair is excessive. 7. That the said highway board was and is not liable to repair the said highways, and that the liability to repair the said highways was at all the hearings before the said Justices recited in the said order, and also at the time of the hearing when the said order was made, and at the time of the making thereof, disputed." Upon the appeal it was contended on behalf of the board that the roads in question were not highways, and the order was quashed on that ground:—*Held*, that the highway board were entitled to appeal to Quarter Sessions against the order, but were not entitled on the appeal to raise the question whether the roads were highways—(1) because they were estopped by their admissions before the Justices; (2) because their grounds of appeal gave no notice that the point would be taken; and (3) because the question was not open to them when the order appealed against was made. *Held* also, that the Quarter Sessions, by deciding the question, did not thereby necessarily decide that it was open to the highway board to raise it. *Illingworth* v. *The Bulmer East Highway Board*, 680

Highway (continued)—board: corporation: dissolution of district: continuance of board for winding-up purposes: 25 & 26 Vict. c. 61 (the Highway Act, 1862), s. 39: appeal. *In re Billericay Highway Board; Reg.* v. *The Justices of Essex* (App.) (M.C. 124), 770

—— Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), s. 13: contribution by county for main roads: "maintenance": removal of snow. *The Amesbury Union* v. *The Wilts Justices* (M.C. 64), 526

—— See GASWORKS CLAUSES ACT; LIMITATIONS, STATUTE OF; TRESPASS.

Husband and Wife—*debt of wife contracted before marriage: action against husband after death of wife: persons married between the 30th of July, 1874, and the 1st of January, 1883: married women's property act* (1870) *amendment act*, 1874 (37 & 38 *Vict. c.* 50), *ss.* 1 *and* 2]—A man married between the passing of the Married Women's Property Act (1870) Amendment Act, 1874 (30th of July, 1874), and the coming into operation of the Married Women's Property Act, 1882 (1st of January, 1883), was sued after the death of his wife, merely as her husband, for a debt contracted by her before marriage:—*Held* (on demurrer), that the Act of 1874 did not make the action maintainable, although the defendant did not plead under section 2 that he had not received any property with his wife. *Bell* v. *Stocker*, 49

—— *married woman: conveyance of wife's property without husband's concurrence: fines and recoveries act*, 3 & 4 *Will. 4. c.* 74. *s.* 91]—A married woman applied for and obtained an order, under the 91st section of 3 & 4 Will. 4. c. 74, to dispense with the concurrence of her husband in the conveyance of certain property by her, in which he declined to join unless he was paid a sum of money for so doing. It appeared that the husband had left and lived apart from the applicant for several years, and had in a very small manner contributed to her support since, but that she had otherwise wholly maintained herself. *In re Caine*, 354

—— *necessaries: costs: proceedings for judicial separation and correspondence with a view to a reconciliation: reasonable belief on the part of the solicitor that wife was entitled to judicial separation*]—Unless the necessity for proceedings by a wife against her husband for a judicial separation be made out in point of fact, the husband cannot be made liable for costs incurred by the wife, although the solicitor for the wife may have had reasonable grounds for supposing upon the statements of the wife that proceedings ought to be taken. *Taylor* v. *Hailstone*, 101

—— See PRACTICE.

Income Tax—*English company carrying on business abroad: debenture bonds: deduction in respect of interest on, paid abroad to foreigners residing abroad:* 5 & 6 *Vict. c.* 35. *s.* 100, *sched. D, rule* 4, *ss.* 102 *and* 159]—An English company carrying on business abroad, and making all its gains and profits abroad, claimed to deduct from the sum assessed to income tax the amount of interest paid by it to foreign holders of its debenture bonds living abroad, receiving the interest abroad, and who were persons not liable to pay income tax:—*Held* (affirming the judgment of the Queen's Bench Division), that the company was not entitled to the deduction claimed, for that the case was within 5 & 6 Vict. c. 35. s. 100, sched. D, rule 4, which provides that, in estimating the amount of profits and gains of such a company, "no deduction shall be made on account of any annual interest, or any annuity or other annual payment payable out of such profits or gains." *The Alexandria Waterworks Co. (Lim.)* v. *Musgrave* (App.), 349

—— See REVENUE.

Indictable Offence. See SLANDER.

Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), s. 14: Industrial Schools Amendment Act, 1880 (43 & 44 Vict. c. 15), s. 1: child under fourteen "living in a house resided in or frequented by prostitutes for the purpose of prostitution": child living in such house with her mother. *Hiscocks* v. *Jermonson* (M.C. 42), 400

Infant—*custody of illegitimate infant: writ of habeas corpus: rights of the mother*]—Now that all the Courts are Courts of equity as well as of law, the Court, on a writ of *habeas corpus* issued to obtain the custody of an illegitimate infant, will have regard to what is for the benefit of the infant, and to the rights and wishes of the natural blood relations of the infant. *In re Carey. Reg.* v. *Nash* (App.), 442

Where an illegitimate child, aged seven years, had been since its birth in the care of foster parents in very poor circumstances, and the mother was the kept mistress of a man not the father of the child, the custody of the child was, upon the application of the mother, given to a sister and brother-in-law of the mother, who were respectable persons, and in a superior station in life to that of the foster parents. Ibid.

Inferior Court. See PRACTICE.

Information. See CRIMINAL LAW.

Informer. See PENALTY.

Injunction—*jurisdiction: arbitration: judicature act*, 1873, *s.* 25. *sub-s.* 8]—The Judicature Act, 1873, s. 25. sub-s. 8, has not enlarged the jurisdiction of the High Court in the matter of issuing injunctions; and consequently the High Court has no jurisdiction to issue an injunction in a case where, before the passing of the Judicature Act, no Court would have had the power to interfere by injunction or otherwise. The Court therefore refused to restrain the defendants by injunction from proceeding with an arbitration in which the plaintiffs alleged that the arbitrator had no jurisdiction, on the ground that the matter in dispute was not within the terms of the submission of reference, and consequently that the arbitration proceedings would be futile and vexatious. *The North London Rail. Co.* v. *The Great Northern Rail. Co.* (App.), 380

—— See PRACTICE.

Inspection. See PRACTICE.

Insurance. See LANDLORD AND TENANT; SHIP AND SHIPPING.

Interest, Insurable. See SHIP AND SHIPPING.

Interrogatories. See PRACTICE.

Jettison. See SHIP AND SHIPPING.

Judges' Chambers. See PRACTICE.

Judgment, Entering. See CONTRACT.

—— **Motion for.** See PRACTICE.

—— **Removal of.** See PRACTICE.

Judicial Separation. See HUSBAND AND WIFE.

Jurisdiction—of Justices: *bona fide* claim of right: offence of putting obstructions in a street. *Reg.* v. *Young* (*Justice*) *and White* (M.C. 55), 339

—— See INJUNCTION; PRACTICE; RAILWAY COMMISSIONERS.

Jury, Questions for. See MALICIOUS PROSECUTION.

Land, Recovery of. See PRACTICE; PUBLIC HEALTH.

—— **Support to.** See GASWORKS CLAUSES ACT.

Landlord and Tenant—*agreement for use of room and power: demise of tenement: destruction of tenement by fire: liability of tenant for rent becoming due subsequently*]—The plaintiffs, by an agreement in writing, let to the defendants "all the room and power" in a certain mill, together with the warehouse room in connection therewith, in consideration of which the defendants agreed to pay 500*l.*, subsequently increased by parol agreement to 700*l.*, per annum, by quarterly instalments after the first year:—*Held*, that the agreement amounted to a demise of a tenement; that the consideration to be paid by the defendants was rent issuing out of the land; and that the defendants were liable in respect of three quarters' rent, which had become due after the mill had been destroyed by fire. *Marshall* v. *Schofield & Co.* (App.), 58
Selby v. *Greaves* (37 Law J. Rep. C.P. 251) followed. Ibid.

—— *bill of sale: surrender: validity of, as affecting assignee under a bill of sale: growing crops*]—B., the tenant from year to year of a farm of the defendant, assigned by bill of sale to the plaintiff all his property upon the farm, together with all growing and all other crops which at any time thereafter should be in or about the same or any other premises of his. On the 25th of April, after the execution of this bill of sale, the defendant distrained for rent, and while in possession under that distress, he, having no knowledge of the bill of sale, agreed with B. that he would forego all claim for rent, that B. should surrender the farm to him, and that the tenancy should be determined as from the 24th of June next ensuing. In May, B. having made default in payment of the instalments under the bill of sale, the plaintiff took an inventory of the goods on the farm, and put locks on the gates of the fields in which the crops were growing. The defendant then informed the plaintiff of the agreement between himself and B.; whereon the plaintiff removed the locks, and shortly after gave the defendant notice of the assignment to him by the bill of sale of the crops. The defendant attended to the cultivation of the crops, took possession of the farm on the 24th of June, and reaped and sold the crops as they came to maturity. In an action of trover and for the conversion of the crops:—*Held*, that although the plaintiff was in equity entitled to relief, yet an action of trover

could not be maintained; that the surrender by the tenant to the landlord was a valid surrender at law, but that it could not affect prejudicially the equitable rights of the plaintiff as assignee of the crops; that if there could be no valid surrender as against the plaintiff, and if the tenant must still be considered with regard to the plaintiff to be in possession, so that the plaintiff could claim to be by the assignment in the same position as the tenant, then the plaintiff, although entitled to the value of the crops when sold, was also liable to pay the rent of the farm and the expenses of cultivating and harvesting the crops; and that as the balance on a settlement of account was in favour of the defendant, judgment must, in the circumstances of the case, be entered for the defendant. *Clements* v. *Matthews* (App.), 772

Landlord and Tenant (continued)—*breach of covenant to insure: relief against forfeiture: the conveyancing and law of property act*, 1881, *ss.* 14 *and* 71: *order LVIII. rules* 2 *and* 5: *jurisdiction of court of appeal*]—The 14th section of the Conveyancing and Law of Property Act, 1881, is retrospective in its operation both as to the rights of parties under existing leases and as to breaches committed before the Act came into operation, and also applies to proceedings pending when the Act came into operation where the landlord has not re-entered. *Quilter* v. *Mapleson* (App.), 44

Under Order LVIII. rules 2 and 5, the Court of Appeal, as a Court of rehearing, has jurisdiction to make such order as ought to be made according to the law as it stands at the hearing of the appeal, even although the judgment of the Court below was correct according to the law as it then stood. Ibid.

—— *covenant to pay rates, taxes and charges: rate for paving new street:* 18 *&* 19 *Vict. c.* 120. *s.* 105: 25 *&* 26 *Vict. c.* 102. *s.* 96]—The defendant became tenant of a house under a lease by which he covenanted to pay "the sewers and main drainage rates . . . . and other district rates and assessments whatsoever, whether Parliamentary, parochial or otherwise, which now are, or which at any time during the said term shall be taxed, rated, charged, assessed or imposed upon the said demised premises, or any part thereof, or upon or payable by the occupier or tenant in respect thereof." The local authority paved a new street and apportioned the total expense of so doing on the owners of the houses forming the new street, of which the demised premises formed part. The plaintiffs, on whom the lessor's interest in the premises had devolved, were compelled to pay the apportioned amount:—*Held*, that the charge in question was for work done for the permanent improvement of the property, and therefore for the interest of the landlord, as distinguished from a rate made for temporary or current expenditure for the interest of the tenant or occupier; and therefore that the plaintiffs could not recover the amount from the defendant. *Allum* v. *Dickinson* (App.), 190

—— *distress: fraudulent removal of goods after rent has become due: seizure of goods after expiration of tenancy:* 8 *Anne, c.* 14. *ss.* 6 *and* 7: 11 *Geo.* 2. *c.* 19. *s.* 1]—A landlord is not justified, under 11 Geo. 2. c. 19. s. 1, in following and seizing, after the expiration of the tenancy and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for the rent, for that statute applies only to a case where the landlord has a right to distrain either at common law or under 8 Anne, c. 14. ss. 6 and 7, and it is a condition of the statute of Anne, in order to make it applicable, that the tenant must be in actual possession. *Gray* v. *Stait* (App.), 412

—— *lease by deed: assignment of reversion of part of lands demised: apportionment of rent*]—The lessor of lands demised by deed (before the commencement of the Conveyancing and Law of Property Act, 1881), at a rent covenanted to be paid, assigned the reversion in a part of the lands. The lessee (who had previously to that assignment assigned the term) was sued by the lessor for subsequent rent in respect of that part of the lands of which the reversion remained in him, the sum claimed being a fair proportion of the rent:—*Held*, by POLLOCK, B., that the action for such sum was maintainable. *The Mayor, &c., of Swansea* v. *Thomas*, 340

—— *lodgers' goods protection act*, 1871 (34 *&* 35 *Vict. c.* 79), *ss.* 1 *and* 2: *declaration by lodger: subsequent distress*]—The declaration by a lodger required by the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), s. 1, must be served on each occasion of a distress being levied or threatened, and a superior landlord cannot be made liable as for an illegal distress under section 2, by reference to a notice given on the occasion of a prior distress. *Thwaites* v. *Wilding*, 734

—— See BANKRUPTCY; MORTGAGOR AND MORTGAGEE.

Lands Clauses Act, 1845 (8 *Vict. c.* 18), *ss.* 23 *and* 34: *land taken under compulsory powers: arbitration to assess price: costs of arbitration: payment of, when due*]—When, in an arbitration held to settle the amount of compensation to be paid to the owner of land

compulsorily taken under the Lands Clauses Acts, the costs of the arbitration have been awarded to the owner, such costs become payable within a reasonable time after the award has been made, and the execution of the conveyance and the investigation of the title are not, in the absence of fraud, conditions precedent to his right to recover such costs. *Capell* v. *The Great Western Rail. Co.* (App.), 345

Larceny—water in pipes. *Ferens* v. *O'Brien* (M.C. 70), 524

—— See NEGOTIABLE INSTRUMENT.

Lateral Support. See RAILWAY COMPANY.

Lease, Assignment of. See BANKRUPTCY.

—— See LANDLORD AND TENANT.

Legacy Duty. See REVENUE.

Lex fori. See CONFLICT OF LAWS.

Lex loci rei sitæ. See CONFLICT OF LAWS.

Libel — *innuendo: evidence for jury*] — H. & Sons, a firm of brewers, having quarrelled with a branch manager of a bank, issued a circular to the tenants of their public-houses to the following effect:—"Messrs. H. & Sons hereby give notice that they will not receive in payment cheques drawn on any branch of the" Bank in question. A run on the bank followed, which there was some evidence to connect with the circular. The bank brought an action of libel, alleging by innuendo that the circular imputed insolvency. On motion by the defendants for judgment,—*Held* (*dissentiente* LORD PENZANCE), that there was no case to go to the jury, that the words were innocent in their primary and natural sense, and would not be read by a reasonable man as imputing insolvency. *The Capital and Counties Bank* v. *Henty* (H.L.), 232

—— *privilege: communication to wrong person by bona fide mistake*]—A communication which if made to the person to whom it was intended to be made would be privileged, is privileged although made to another person by a *bona fide* mistake. *Tompson* v. *Dashwood*, 425

—— See CRIMINAL LAW; PRACTICE.

Licensing—beer off-licence: appeal: the Beer Dealers' Retail Licences (Amendment) Act, 1882 (45 & 46 Vict. c. 34), s. 1: the Beer Dealers' Retail Licences Act, 1880 (43 Vict. c. 6), s. 1. *Downing* v. *Schneider* (M.C. 51), 348

—— discretion of Justices as to renewal of "off" licences: Beerdealers' Retail Licences Act, 1882 (45 & 46 Vict. c. 34), s. 1. *Reg.* v. *Kay* (M.C. 90), 590

—— forfeiture of licence by holder: application of owner of premises: refusal of licence: appeal to Quarter Sessions: 37 & 38 Vict. c. 49. s. 15: 9 Geo. 4. c. 61. ss. 14 and 27. *Newton* v. *The Justices of the West Riding of Yorkshire* (M.C. 99), 737

—— neglect of occupier to apply for renewal licence: application by new tenant for licence after effluxion of current licence: jurisdiction of Justices: 9 Geo. 4. c. 61. s. 14. *Reg.* v. *The Justices of the City of Liverpool* (App.) (M.C. 114), 778

—— See CARRIER.

Limitations, Statute of—*fraudulent deposit of title-deeds: detinue: demand and refusal*]—Title-deeds were fraudulently deposited by a person not having the right to their custody with a solicitor, who, with no knowledge of the fraud, advanced money on the security of such deposit,—*Held*, that until the delivery of the deeds had been demanded from the innocent and *bona fide* holder and refused, there was no conversion; and that the Statute of Limitations began to run only from such demand and refusal. *Spackman* v. *Foster*, 418

—— *surveyor of highways: local act: local authority*: 5 & 6 *Will.* 4. *c.* 50 (*highway act*, 1835), *s.* 109: 5 & 6 *Vict. c.* 97. *s.* 5: 38 & 39 *Vict. c.* 55 (*public health act*, 1875), *ss.* 6, 144, 264, 340 *and* 341]—An urban authority, who, by virtue of a local Act, were already before the passing of the Public Health Act, 1875, s. 144, surveyors of highways, were, in respect of an act done by them as such surveyors, sued more than three months, but less than six months, after the cause of action arose:—*Held*, that the three months limited by the Highway Act, 1835, s. 109, for actions against surveyors of highways for anything done under that Act, having expired, the action was too late, notwithstanding the limitation by 5 & 6 Vict. c. 97. s. 5, of two years for an action for anything done under a local and personal Act, and the limitation by the Public Health Act, 1875, s. 264, of six months for an action against a local authority for anything done under that Act.

Burton v. *The Mayor, Aldermen and Burgesses of the Corporation of Salford*, 668
Taylor v. *The Meltham Local Board* (47 Law J. Rep. C.P. 12) distinguished. Ibid.

—— See PUBLIC HEALTH.

Local Authority. See HIGHWAY; LIMITATIONS, STATUTE OF; PUBLIC HEALTH.

Locus Standi. See PRACTICE.

Lodger. See LANDLORD AND TENANT; PARLIAMENT.

Lottery—sale, with added right to a prize: 42 Geo. 3. c. 119. s. 2. *Taylor* v. *Smetten* (M.C. 101), 752

Lunatic. See PRACTICE.

Maintenance—*champerty: action for penalty: common interest in suit: bond indemnifying a plaintiff against all costs: measure of damages*]—The defendant caused a writ to be issued in the name of C. against the plaintiff, claiming the penalty (500*l.*) imposed, by 29 Vict. c. 19. s. 5, upon any person sitting or voting in the House of Commons without having made and subscribed the oath appointed by that Act. The defendant was a member of Parliament, and the action was in reality his action, C. being without any means of paying any costs. The defendant gave to C. a bond by which he indemnified C. against all costs and expenses which C. should incur or become liable to pay in the action or in any way relating thereto; but the defendant could claim no right to, nor interest in, the penalty, should it be recovered. It was proved that C. had consented to the use of his name, but he would not have authorised the action but for the bond:—*Held* (by LORD COLERIDGE, C.J.), on further consideration, that the defendant's conduct constituted maintenance, for which an action would lie at the suit of the plaintiff; and that the latter was entitled to recover as damages all the costs he had been put to in resisting C.'s action, amounting to a complete indemnity for every loss occasioned by the maintenance of the defendant. *Bradlaugh* v. *Newdegate*, 454

Malicious Prosecution—*reasonable and probable cause: preliminary questions for jury: onus probandi*]—In an action for malicious prosecution, the burden of proof lies on the plaintiff to establish the facts, which the jury have to find with a view to the decision of the Judge on the question of reasonable and probable cause, namely, whether the defendant took reasonable care to inform himself of the true state of the case, and whether he honestly believed the case which he prosecuted. *Abrath* v. *The North Eastern Rail. Co.* (App.), 620
Judgment of the Queen's Bench Division (*ante*, p. 352) reversed. Ibid.

—— See ACTION.

Mandamus. See VESTRY.

Manor. See MINES.

Marine Insurance—*time policy on freight: loss: option to charterer to abate freight if ship unseaworthy*]—A ship was chartered by the Admiralty from the appellants. The appellants covenanted that the ship should be seaworthy during her employment, and the charterers agreed to pay freight as long as she should efficiently perform the services required. The charter also contained a clause authorising the charterers, if the ship became incapable, from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, to retain arrears of pay, put the ship out of pay, or make an abatement. The appellants insured with the respondents for three months on freight outstanding. At the end of one month the ship struck on a rock and became unseaworthy, and the charterers refused to pay freight from that date:—*Held*, that the loss sustained by the appellants was not a loss of freight, but was to be regarded as a mulct inflicted after freight had been actually earned; and that the risk of such loss was not covered by an ordinary policy on freight outstanding, but required to be specially insured against. *The Inman Steamship Co.* (*Lim.*) v. *Bischoff* (H.L.), 169

—— See SHIP AND SHIPPING.

Marriages. See CHURCH AND CLERGY.

Married Woman. See HUSBAND AND WIFE. PRACTICE.

—— See PRACTICE.

Master and Servant—*outdoor apprentice: change of firm: "successors in business": change of locality of business: unreasonable command*]—A. was bound apprentice to a firm of engineers and their successors in business, and his father covenanted to provide him with board, lodging and other necessaries. At the date of the articles the firm carried on their business in London, where A.'s father also resided. The articles contained no stipulation as to

where the business should be carried on. Before the expiration of the apprenticeship term the firm was dissolved and split into two firms, one carrying on business in London and the other at Derby. The partners at Derby, where the manufacturing part of the old business was being carried on, required A. to remove to Derby:—*Held*, that the direction to A. to go to Derby was an unreasonable command, which he was not bound to obey. *Held*, also, that as the business of the old firm was not carried on in its entirety by either of the two new firms, neither of them was the successor of the original firm, or entitled to the services of the apprentice. *Eaton* v. *Western* (App.), 41

Semble,—In the absence of an express stipulation in articles of apprenticeship as to the place where the apprentice is to attend for the purpose of being taught his trade, there is an implied stipulation that the contract is to be performed at the place where the master is carrying on the business at the date of the articles, or within a reasonable distance therefrom. Ibid.

Royce v. *Charlton* (Law Rep. 8 Q.B. D. 1) overruled. Ibid.

—— See EMPLOYERS' LIABILITY ACT.

Mayor's Court. See PRACTICE.

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 54 *and* 60: *penalty: vestryman interested in contract made with vestry prior to election: vestryman acting as such after ceasing to be member of vestry: evidence of acting as member of vestry*]—Section 54 of the Metropolis Local Management Act, 1855, which provides that any member of a vestry, who, being interested in a contract made with the vestry, acts as a member after ceasing to be such member, shall be liable to a penalty, applies to the case of a person who being interested in a contract made with a vestry is afterwards elected and then acts as a member of such vestry. *Hunnings* v. *Williamson* (App.), 416

The defendant advanced money to his brother to enable him to carry out a contract which he had made with a certain vestry. The contract was assigned to the defendant by his brother as security for repayment of the advance. The defendant, after the assignment of the contract, was elected a member of the vestry, and attended several meetings of the vestry. At each meeting a signature book was provided, in which each member who attended the meeting signed his name. A minute book was also provided, and duly signed by two members of the vestry, under section 60, into which the minutes of the proceedings were entered, and into which the names of those who signed the signature book were copied:—*Held*, that the defendant was interested in a contract made with the vestry, within the meaning of section 54. *Held* also, that the minute book, being duly signed, under section 60, was *prima facie* evidence to shew that the defendant had acted as a vestryman after ceasing to be such, within the meaning of section 54. Ibid.

Metropolitan Management Acts—18 & 19 Vict. c. 120. s. 105: 25 & 26 Vict. c. 102. s. 77: railway company: expenses of paving new street on bridge over railway: "land bounding or abutting on a street." *The Great Eastern Rail. Co.* v. *The Board of Works of the Hackney District* (M.C. 105), 753

Mines—*customary right of mining: right to erect and remove buildings on surface:* 14 & 15 *Vict. c.* xciv.]—Miners in the High Peak district have, by customs recognised and embodied in an Act of Parliament, the right as against the landowner to enter upon lands in the district for the purpose of working for ore, and to erect on the surface mining machinery, and buildings to cover such machinery:—*Held*, that the maxim "Quicquid plantatur solo, solo cedit," does not apply as between them and the landowner, and that they are entitled to remove buildings so erected at any time while their interest in the mine continues. *Wake* v. *Hall* (H.L.), 494

—— *right to let down surface: enclosure of commons: reservation of mining rights to lord of manor: compensation for damage:* 11 *Geo.* 3. *c.* xcix.]—By an Enclosure Act passed in 1771, certain commons within a manor were enclosed, and allotments were made to various persons in respect of ownership of tenements within the manor. All rights of common were extinguished, and the land so allotted was to be held on the same tenure as the tenements in respect of which it was allotted The Act provided that nothing therein contained was to prejudice, lessen or defeat the right and interest of the lords of the manor and their successors of, in or to the royalties incident or belonging to the manor; but that they and all persons claiming under them should for ever thereafter hold and enjoy all rents, courts, perquisites, profits, mines, power of using or granting wayleave, waifs, estrays, and all other royalties and jurisdictions whatsoever, to the owners of the manor belonging (other than the right of common), in as full, ample and beneficial manner to all intents and purposes as they could have held and enjoyed them in case the Act had not been made. The Act further provided that if the lords of the manor or any one claiming under them should work any mines lying under any of the allotments so to be made, or lay, make or use any ways in, through, over or along any part of the allotments, then the person

so working should make satisfaction for the damage and spoil of the ground so occasioned, to the person in possession of the ground at the time of the damage, such satisfaction not to exceed the sum of 5*l.* yearly during the time of such working for every acre of ground so damaged or spoiled. There were under the manor coal mines, portions of which had for two centuries been worked by the lords or their lessees without leaving any support for the surface. There were in the manor no special customs as to working mines under the commons of the manor. In 1875 the defendants became entitled, as lessees of the lords of the manor, to work coal mines and to get minerals under part of the enclosed common which had been allotted under the Act in respect of a freehold tenement to a predecessor in title of the plaintiff S.; and in 1877 they, by working a mine which was in part under a house which had been built more than twenty years before action on part of the land so allotted, let down the surface, and damaged the house, but their workings would have caused the surface to subside even if there had been no house upon it. In an action by the owner and the tenant of the house for damages for the injury thus caused,—*Held* (affirming the judgment of the Queen's Bench Division), that the lords of the manor and their lessees were not entitled so to work the mines under this house and land as to let down the surface; that the compensation clause was limited to temporary damage caused by works on the surface, and that the Act reserved to or conferred on the lords of the manor no right to let down the surface of the enclosed common land. *Bell & Salvin* v. *Love* (App.), 290

—— See RAILWAY COMPANY.

Misstatement. See VENDOR AND PURCHASER.

Money had and received. See DISTRESS.

Mortgagor and Mortgagee—*effect of attornment by mortgagor as tenant to mortgagee: distress: power for mortgagee to distrain: seizure of goods of third party without notice*]—An attornment in a mortgage-deed by the mortgagor as tenant to the mortgagee at a rent reserved creates a tenancy and rent with all its incident remedies, so that the mortgagee can in such a case distrain upon the goods of a third person, who has no notice of the mortgage, which may be on the mortgaged premises at the time of default in payment of rent by the mortgagor. *Kearsley* v. *Phillips* (App.), 581

Motion for Judgment. See PRACTICE.

Municipal Corporation. See PUBLIC HEALTH.

Municipal Elections Act (38 & 39 *Vict. c.* 40), *s.* 1, *sub-s.* 2: *nomination paper: misnomer: omission of date: "situation of the property in respect of which the burgess subscribing is enrolled on the burgess roll"*]—The provision in section 1, sub-section 2, of the Municipal Elections Act, 1875, that "the nomination paper shall . . . . be in the form No. 2 set forth in the first schedule" to that Act, is mandatory and not directory, and requires the strictest particularity; and a burgess subscribing a nomination paper, if qualified as a burgess in respect of a successive occupation, is bound to put after his name the description of all properties constituting his qualification as successive occupier, and not only a description of the property occupied by him at the time of subscribing such nomination paper. *Henry* v. *Armitage*, 165

—— *petition: corrupt practices: particulars: time: municipal elections act*, 1872 (35 & 36 *Vict. c.* 60]—In election petitions, in the absence of exceptional circumstances, seven clear days before the trial is sufficient time for the delivery of particulars by the petitioners of alleged corrupt practices. *Lenham* v. *Barber*. *In re The Hereford Municipal Election Petition*, 312

—— *petition: time for delivery of particulars: amendment of petition: fresh charge: limit of time*: 45 & 46 *Vict. c.* 50. *s.* 88. *sub-s.* 4; *s.* 100, *sub-s.* 4]—In a municipal election petition, in the absence of exceptional circumstances, particulars of the acts of bribery should not be ordered to be delivered more than seven days before the trial. *Clark* v. *Wallond*, 321

By the Municipal Corporations Act, 1882, s. 88, sub-s. 4, a municipal election petition "shall be presented within twenty-one days after the day on which the election was held." By s. 100, sub-s. 4, "The High Court shall, subject to this Act, have the same powers, jurisdiction and authority, with respect to a municipal election petition and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction":—*Held*, that there was no power to amend a municipal election petition after the expiration of twenty-one days from the election by adding a charge of treating. Ibid.

Maude v. *Lowley* (43 Law J. Rep. C.P. 103; Law Rep. 9 C.P. 165) followed. Ibid.

Musical Composition. See COPYRIGHT.

Necessaries. See HUSBAND AND WIFE.

Negligence—*principal and agent: adjoining owners: party wall: liability of employer for negligence of contractor's workmen*]—The defendant employed a competent contractor to rebuild a house adjoining a house of the plaintiff's, from which it was separated by a party wall. Before the rebuilding was completed a workman of the contractor employed to place a wooden staircase negligently cut into a wall which he had not been authorised to interfere with, and by so doing brought down the defendant's house. Some girders which in the rebuilding had been fixed in the party wall between the plaintiff's and defendant's houses falling with the defendant's house inflicted damage on the plaintiff's house:—*Held*, affirming the judgment of the Court below in favour of the plaintiff, that the defendant, having used the party wall in a way which involved risk to the plaintiff's house, was bound to see that all such precautions were taken as were necessary to prevent any injury happening to the plaintiff's house in the course of the operations, and could not escape that liability by employing a contractor to do the work for him. *Hughes* v. *Percival* (H.L.), 719

—— *railway company: accident: level crossing*]—The defendants' line of railway crossed a public footway and carriage-way on the level. There were carriage gates at the crossing which were locked, a gatekeeper being stationed there by the defendants whose duty it was to open and shut them when required; the wicket gates used by foot passengers were not fastened. There were trees and houses on one side of the crossing so situated as to make it impossible for any one crossing from the down side to see a train coming until he got within a foot or two of the down metals, but when once the down rails were reached there was an uninterrupted view up and down the line for the distance of about 300 yards. The plaintiff passed through the wicket gate for the purpose of crossing from the down line side to the up line side of the crossing, and walked over the down line to the centre of the crossing, and thence to the up line, when he was knocked down and injured by a train travelling on the up line. The plaintiff admitted that if he had looked along the up line before actually crossing the up metals he must have seen the approaching train. The engine-driver of the train did not whistle, nor did the gatekeeper take any steps to warn the plaintiff of the danger of crossing, or to prevent him from doing so:—*Held* (by LORD COLERIDGE, C.J., and DENMAN, J.; *dubitante* MANISTY, J.), upon the above facts, that the accident was solely due to the plaintiff's own recklessness, and that there was no reasonable evidence of negligence on the part of the defendants to be submitted to a jury. *Davey* v. *The London and South Western Rail. Co.*, 665

—— *supply of defective article: injury caused to person using it with whom there was no contract: liability for injury so caused*]—The plaintiff was employed by G., who had contracted with a shipowner to paint a ship which was lying in the dry dock belonging to the defendant. The defendant had contracted with the shipowner to erect staging round the ship, for the purpose of having the ship painted. One of the ropes of the staging was defective, and while the plaintiff was standing on the staging and engaged in painting the ship, that rope broke, and the plaintiff fell into the dock and was injured. In an action against the dockowner for damages for the injury thus caused,—*Held*, reversing the judgment of the Queen's Bench Division, that the defendant was liable for the injury thus caused to the plaintiff. *Heaven* v. *Pender* (App.), 702

—— See ACTION; CARRIER; EMPLOYERS' LIABILITY ACT; HIGHWAY; SHIP AND SHIPPING; TOWAGE.

Negotiable Instrument—*stolen bond: conviction of thief on prosecution of owner: owner's right to recover: bona fide holder for value: 24 & 25 Vict. c. 96. s. 100*]—The owner of a negotiable instrument which has been stolen has no title to it as against a *bona fide* holder for value, although he has prosecuted the thief to conviction. *Chichester* v. *Hill*, 160

By 24 & 25 Vict. c. 96. s. 100, "If any person guilty of . . . . knowingly receiving any chattel, money, valuable security or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property . . . . and convicted thereof, in such case the property shall be restored to the owner or his representative. And in every case in this section aforesaid, the Court . . . . shall have power to . . . . order the restitution of the said property in a summary manner. Provided, that if it shall appear before any award or order made that any . . . . negotiable instrument shall have been *bona fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanour, been stolen, . . . in such case the Court shall not award or order the restitution of such security." Ibid.

A New Zealand Government Bond (which is a negotiable instrument), the property of C., was stolen from his house. A person was subsequently convicted, on the prosecution of C., for receiving the said bond well knowing it to have been stolen. The bond having

passed into the hands of H., a *bona fide* holder for value, C. brought an action against H. to recover it:—*Held*, that the proviso in the above section not only prevented a summary order being made for the restitution of a negotiable instrument, but was an answer to an action brought to recover such instrument. Ibid.

Newspaper. See CRIMINAL LAW.

Next Friend. See PRACTICE.

Nomination. See MUNICIPAL ELECTION.

Notice. See CONTRACT; TOWAGE.

Notice of Action. See PUBLIC HEALTH.

Official Referee. See PRACTICE.

Onus Probandi. See MALICIOUS PROSECUTION.

Parliament—*borough vote: tenant or lodger: vacation of a portion of house let in tenements:* 30 & 31 *Vict. c.* 102. *ss.* 3 *and* 4; 41 & 42 *Vict. c.* 26. *s.* 5]—A tenant of part of a house wholly let out in tenements does not lose his qualification for a vote at Parliamentary elections by reason only that during the qualifying year the tenant of another part of the house gave up his tenancy to the common landlord, and that part remained unlet. *Ancketill* v. *Baylis* (App.), 104

Dictum of BRETT, L.J., in *Bradley* v. *Baylis* (51 Law J. Rep. Q.B. 183) overruled. Ibid.

—— *registration: amendment by barrister:* 10*l. franchise: household franchise: "house": "dwelling-house":* 41 & 42 *Vict. c.* 26. *s.* 28. *sub-s.* 12]—The Revising Barrister may amend the description of the nature of the qualification for a Parliamentary vote in a borough by changing "house" in the occupiers' list into "dwelling-house," when it is proved that the property is below 10*l.* a year annual value, but has been occupied by the claimant as a dwelling-house during the qualifying year. *Friend* v. *Towers*, 109

—— See PENALTY; ELECTION PETITION ACT.

Parol Agreement to vary Note. See PROMISSORY NOTE.

Particulars. See MUNICIPAL ELECTIONS.

Parties, Joinder of. See PRACTICE.

Parties to Action. See PRACTICE.

Partnership—*fraud by one partner: liquidation of partnership: order of discharge obtained by innocent partner: effect of, on his liability for debt incurred by fraud of his partner: bankruptcy act,* 1869 (32 & 33 *Vict. c.* 71), *s.* 49]—One of two partners in a firm of solicitors misappropriated money entrusted to the firm for investment, and then absconded. The firm subsequently went into liquidation, and the other partner, who was not a party to the misappropriation, received his order of discharge. In an action against the innocent partner to recover the amount of the money misappropriated,—*Held*, that the defendant was not protected by the order of discharge, for that the partnership was liable for the fraud committed, and that section 49 of 32 & 33 Vict. c. 71, does not limit the liability of a partner for partnership debts to those incurred by means of his own personal fraud or breach of trust. *Cooper* v. *Pritchard* (App.), 526

—— See PRACTICE; REVENUE.

Part Performance. See CONTRACT.

Party Wall. See NEGLIGENCE.

Passenger's Ticket. See CARRIERS.

Penalty—*by whom to be recovered: common informer: parliament: parliamentary oaths act,* 1866 (29 & 30 *Vict. c.* 19), *s.* 5]—Where a statute imposes a penalty, it goes to the Crown, unless an intention appears to give it to any one else. But it is not necessary that such intention should be expressly declared; it may be shewn by implication. *Bradlaugh* v. *Clarke* (H.L.), 505

By the Parliamentary Oaths Act, 1866 (29 & 30 Vict. c. 19), s. 5, a penalty of 500*l.* is inflicted on a member of either House of Parliament sitting or voting without having previously taken the oath prescribed by that statute. The penalty is "to be recovered by action in one of Her Majesty's Courts at Westminster," by whom, is not said. The Act repealed all earlier enactments in force as to Parliamentary Oaths, and in the provisions which it substituted made some material alterations in the law. Under the repealed statutes like penalties had been inflicted which had been expressly made recoverable by a common informer. On an action by a common informer under the Act of 1866 the defendant demurred upon the ground that the Crown alone could sue:—*Held*, first, that "action" is a general term which would properly include informations and other proceedings by the Crown. *Held*, secondly

(*dissentiente* LORD BLACKBURN), that no sufficient intention appeared by the Act to give the penalty to a common informer, and that it could be recovered only by the Crown. Ibid.

Per LORD BLACKBURN—that, the Act being merely silent as to the persons to sue, the presumption was that no alteration was intended in the previous law by which a common informer was entitled to sue. Ibid.

—— See MAINTENANCE; METROPOLIS LOCAL MANAGEMENT; PRACTICE; SOLICITOR AND PROCTOR.

Perils of the Seas. See SHIP AND SHIPPING.

Photograph. See COPYRIGHT.

Pleading. See PRACTICE.

Policy, Time. See MARINE INSURANCE.

Poll. See VESTRY.

Poor—*rate: rating of owner or immediate lessor instead of occupier: house let at rent or rate not exceeding 20l. a year: weekly tenancies:* 59 *Geo.* 3. *c.* 12. *s.* 19]—By Sturges Bourne's Act (59 Geo. 3. c. 12), s. 19, the owners of houses "which shall respectively be let to the occupiers thereof at any rent or rate not exceeding twenty pounds nor less than six pounds by the year for any term less than one year, or on any agreement by which the rent shall be reserved or made payable at any shorter period than three months," are to be assessed to poor's rates instead of the occupiers:—*Held*, that the limitation of value governs the whole clause, and that the owner cannot be assessed in the case of an agreement under which rent is payable at a shorter period than three months, if the rent is at a higher rate than twenty pounds per annum. *The Churchwardens and Overseers of the Parish of West Ham, Essex*, v. *Ilea* (H.L.), 650

—— lunatic wife: separation from husband: place of residence: place of settlement. *Reg.* v. *The Guardians of the Garstang Poor Law Union* (M.C. 97), 726

—— overseers: opposing bill in Parliament: costs. *Reg.* v. *White* (M.C. 128), 794

—— rate: rateability of house occupied by superintendent of police: house quarter of a mile distant from police station: 43 Eliz. c. 2. s. 1. *Martin* v. *The Assessment Committee of the West Derby Union* (App.) (M.C. 66), 538

—— rating: exclusive occupation: bookstalls at a railway station: demise or licence: 43 Eliz. c. 2; 32 & 33 Vict. c. 67. *Smith & Son* v. *The Assessment Committee for Lambeth and Others* (App.) (M.C. 1), 762

—— settlement: illegitimate idiot: residence with mother; the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34: 9 & 10 Vict. c. 66. s. 1. *Salford Union* v. *The Overseers of the Poor of the Township of Manchester* (M.C. 34), 262

—— settlement: abolition of derivative settlement: 39 & 40 Vict. c. 61. s. 35. *The Madeley Union* v. *The Bridgnorth Union* (App.) (M.C. 71), 544

Possession. See VENDOR AND VENDEE.

Practice—*action against a firm: appearance by one member of firm only: judgment against that member: application to amend judgment and issue execution against another member: rules of court, order XVI. rules* 10 *and* 10*a, order XLII. rule* 8]—The plaintiff issued a writ against R. J. R. & Co.; the appearance was entered for R. J. R., trading as R. J. R. & Co.; the statement of claim was entitled R., sued as R. J. R. & Co., and described him as the sole defendant. At the trial a verdict was taken for the plaintiff by consent, and judgment was entered by consent for the plaintiff against R. J. R., sued as R. J. R. & Co. The plaintiff then discovered that C. had been a member of the firm of R. J. R. & Co., and obtained an order from the Queen's Bench Division amending the proceedings by striking out the words "R. J. R., sued as," and for the trial of an issue between the plaintiff and C., to try whether C. was liable to have execution issued against him upon the judgment so entered up:—*Held*, reversing the judgment of the Queen's Bench Division, that the order ought not to be made; that the plaintiff had elected to proceed against R. J. R. as an individual, and had not proceeded under the provisions of the Rules of Court with respect to suing partners in the name of their firm; and that the trial having been conducted against and the judgment having been entered against a single defendant, the judgment ought not to be altered so as to include C., who was not at any time a party to the action. *Munster* v. *Railton* (App.), 409

—— *action for the recovery of land: pleading: order XIX. rule* 15]—Under the Rules of Court, 1875, Order XIX. rule 15, the

statement by a defendant to an action for recovery of land that he is in possession puts the plaintiff to the proof of the allegations in the statement of claim. *Danford* v. *M'Anulty* (H.L.), 652

Practice (continued)– *action sent to county court for trial: appeal from judgment of divisional court:* 19 *&* 20 *Vict. c.* 108. *s.* 26*: judicature act,* 1873, *s.* 45*: landlord and tenant: agreement to pay for damage done to furnished house: amount payable to be settled in case of dispute by two valuers: right to sue for damage before amount settled: arbitration: condition precedent*]—An action brought in the High Court, but sent for trial before a County Court under section 26 of 19 & 20 Vict. c. 108, does not thereby become a cause in the County Court, but remains in the High Court; so that an appeal will lie from the judgment of a Divisional Court on a motion in the cause, without special leave being obtained under section 45 of the Judicature Act, 1873. *Babbage* v. *Coulbourn* (App.), 50

Balmforth v. *Pledge* (35 Law J. Rep. Q.B. 169; Law Rep. 1 Q.B. 427) approved. Ibid.

A tenant of a furnished house agreed in writing to deliver up possession of the same, together with the furniture, at the expiration of the tenancy, in good order; and in the event of any loss, damage or breakage, to make good or pay for the same; the amount to be paid, in case of dispute, to be settled by two valuers:—*Held* (*per* BRETT, L.J.; COTTON, L.J., *dissentiente*), that the settlement by two valuers of the amount to be paid by the tenant was a condition precedent to the lessor's right to bring an action for damage or loss done. Ibid.

Judgment of Divisional Court affirmed. Ibid.

—— *action: trial: leaving party to move for judgment: divisional court: jurisdiction: appellate jurisdiction act,* 1876 (39 *&* 40 *Vict. c.* 59)*: rules of the supreme court,* 1876 (*order XXXVI. rule* 22*a, order LVIIa.*]—Upon the trial of an action at Nisi Prius, the Judge may, if he think fit, at or after the trial, leave any party to move a Divisional Court for judgment, notwithstanding the provisions of section 17 of the Appellate Jurisdiction Act, 1876, and the Rules of the Supreme Court, 1876, Order XXXVI., rule 22*a*, Order LVII*a*. *Benschor* v. *Coley*, 398

—— *action: writ of summons: business carried on by lunatic in the name of a firm: mode of service of writ: rules of court, order IX. rules* 5, 6 *and* 6*a: judgment in default of appearance: solicitor: locus standi*]—Order IX. rule 6*a*, of the Rules of Court, which permits in certain cases the service of a writ at the principal place of business carried on by one person in the name of a firm apparently consisting of more than one person does not apply where such person is a lunatic or of unsound mind. In such a case the proper mode of service is that laid down in Order IX. rule 5. *The Fore Street Warehouse Co. (Lim.)* v. *Durrant & Co.*, 287

—— *appeal: costs: order on solicitor to pay personally: judicature act,* 1873, *s.* 49]—An order that the costs of an application at chambers should be paid by the applicant's solicitor personally is an order "as to costs only," within the Judicature Act, 1873, s. 49, and no appeal from such order lies without leave. *In re Bradford and Thursby. In re Bradford and Farish*, 759

—— *attachment: charging order: shares standing in name of judgment debtor: application by person having beneficial interest: power to discharge order absolute:* 1 *&* 2 *Vict. c.* 110. *ss.* 14 *and* 15]—An application, under 1 & 2 Vict. c. 110. s. 15, that a charging order, made under sections 14 and 15, should be discharged cannot be entertained after the order has been made absolute. *Jeffryes* v. *Reynolds*, 55

By 1 & 2 Vict. c. 110. s. 14, a charging order can be made, upon the application of a judgment creditor, on shares belonging to and standing in the name of or held in trust for a judgment debtor. By section 15 the order is to be an order *nisi* in the first instance; and "unless the judgment debtor shall, within a time to be mentioned in such order, shew to a Judge of one of the said Superior Courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute. Provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit." Ibid.

A charging order having been made upon shares standing in the name of a judgment debtor, the father of the debtor applied, after the order had been made absolute, that it might be discharged, on the ground that the shares were in fact his:—*Held*, that there was no power to entertain the application, "such order" meaning the order *nisi* and not the order absolute. Ibid.

—— *motion for judgment on admissions in the pleadings: no defence: counter-claim: order XL. rule* 11]—In an action for goods sold and delivered, by writ specially indorsed, leave being given to defend, the defendant did not plead any defence, but set up a counter-claim for damages in respect of goods sold to the defendant which were alleged to be not according to sample:—*Held*, on motion for judgment, under Order XL. rule 11, on the admissions in the pleadings, that the

plaintiffs were entitled to judgment, but upon the terms that if the defendant brought the debt into Court, execution should be stayed until after the trial of the counter-claim. *Showell & Co.* v. *Bouron*, 284

—— *claim and counter-claim: application to sign judgment on admitted claim: rules of court, order XL. rule* 11]—Although the mere fact that a counter-claim is pleaded does not preclude the Court from allowing a plaintiff to sign judgment under Order XL. rule 11, on a statement of claim which the defendant admits, yet the Court will not as a rule make such an order when the counter-claim is not shewn to be frivolous, unsubstantial, or set up for the purpose of delay. *The Mersey Steamship Co.* v. *Shuttleworth & Co.* (App.), 522

—— *claim and counter-claim: discontinuance by plaintiff: effect on counter-claim: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 3 *and* 7: *rules of court, order XIX. rule* 3; *order XXIII.*]—The discontinuance by a plaintiff of an action brought by him against a defendant does not put an end to a counter-claim pleaded by that defendant, for although a counter-claim is not a cross action, yet it is to be treated as though it were in fact a statement of claim in a cross action. *M'Gowan* v. *Middleton* (App.), 355

Vavasseur v. *Krupp* (Law Rep. 15 Ch. D. 474) overruled. Ibid.

—— *costs: appeal as to costs only: inspection of property on terms of bearing costs of inspection: costs incident to proceeding in high court: judicature act*, 1873, *s.* 49: *order LII. rule* 3]—A Judge at chambers, on the application of the plaintiff for an order to inspect the defendant's property, made an order that the plaintiff should have the inspection asked for, but that he should pay the costs of the inspection. *Mitchell* v. *The Darley Main Colliery Co.*, 394

On appeal by the plaintiff to the Divisional Court against the terms so imposed:—*Held*, that the costs so dealt with by the learned Judge at chambers were costs incident to a proceeding in the High Court, which were by law left to his discretion; the matter therefore came within section 49 of the Judicature Act, 1873, and being an appeal as to costs only could not be entertained. Ibid.

—— *costs: taxation between solicitor and client: employment of counsel at chambers: rules of court (costs)*, 1875, *special allowances, rule* 14]—Rule 14 of the Special Allowances as to Costs of the Additional Rules of Court, 1875, which provides that "as to counsel attending at Judges' chambers no costs thereof shall in any case be allowed unless the Judge certifies it to be a proper case for counsel to attend," applies to taxation of costs between solicitor and client, as well as between party and party:—*So held*, by the Court of Appeal, affirming the judgment of the Queen's Bench Division. *In re Chapman* (App.), 75

—— *costs: shorthand notes of evidence at reference: unusual expenses: solicitor and client: duty of solicitor to point out unusual expenses to client: discretion of master on taxation between party and party and solicitor and client*]—It is the duty of a solicitor, who in the course of an action is about to incur unusual expenses—such as the costs of shorthand notes of evidence given at a reference—to point out to his client that the additional expenses so incurred will not be allowed to him, even if successful in the action, on taxation between party and party; and, in default of so doing, the solicitor will not be entitled to charge the costs so incurred on taxation between solicitor and client. *In re Blyth and Fanshawe* (App.), 186

In re Smith (13 Mee. & W. 477; 2 Dowl. & L. 379) followed. Ibid.

Per LINDLEY, L.J.—Although a Master has a discretion on taxation of costs as between party and party, and the same discretion on taxation as between solicitor and client, it by no means follows that what is reasonable in the former case is also reasonable in the latter. Ibid.

—— *costs: security from a foreign plaintiff: joint action: order XVI. rule* 1]—Where plaintiffs join in an action, and one is unsuccessful, the successful plaintiff is chargeable with the costs of joining the unsuccessful plaintiff; and in an action in which an Englishman and a foreigner are plaintiffs the defendant cannot require the foreigner to give security for costs. *D'Hormuzjee & Co., and Isaacs & Co.* v. *Grey*, 191

—— *criminal matter: appeal: jurisdiction of appeal court: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19 *and* 47]—The refusal of an application by a prisoner to be admitted to bail is a judgment in a criminal matter, within the last clause of section 47 of the Judicature Act, 1873, and the Court of Appeal has no jurisdiction to entertain an appeal from such refusal. *Reg.* v. *Foote* (App.), 528

That clause relates to the High Court in its ordinary jurisdiction, and not only to the Court for Crown Cases Reserved, and the word "judgment" used in it has the general meaning of any decision in criminal matters, and not the technical meaning only of a "final judgment" in criminal cases. Ibid.

—— *rules of supreme court*, 1875, *order XXXI. rules* 1, 5 *and* 10: *interrogatories: action for*

penalties]—The Judicature Acts and Rules have only altered the procedure and not the rights of parties, and interrogatories will not be allowed in cases where, as when a penalty is the gist of the action, the Court of Chancery before those Acts would not have allowed interrogatories to be administered. *Hummings* v. *Williams*, 273

Practice (continued)—*discovery: action for penalties: rules of the supreme court, order XXXI.*]—A plaintiff sought discovery of documents from a defendant in an action for penalties:—*Held*, that discovery could not be ordered. *Hunnings* v. *Williamson*, 400

—— *discovery: interrogatories: sufficiency of answer: matters within knowledge of agent or servant*]—In an action by the owners of cargo against shipowners for loss of the cargo by the negligent navigation of the ship, the plaintiffs delivered interrogatories containing questions relating to the navigation of the ship, to the mode in which the watches were kept, to the soundings taken, and to the time at which certain headlands were sighted. The defendants answered that they had no knowledge or information save that contained in the protest, that they had not obtained statements from the officers or crew of what occurred on board the ship, that they were not mariners, and had no knowledge or information of the management of a ship at sea. On an application by the plaintiffs for a further answer,—*Held*, that the answer was insufficient, and that a further answer must be given, for that it did not shew that the defendants had attempted to procure information from their agents or servants, and that it was impossible for them to do so. *Bolckow, Vaughan & Co.* v. *Fisher* (App.), 12

—— *discovery: insufficient affidavit of documents: further affidavit: documents relating to any matter in question in the action: order XXXI. rule 12*]—An affidavit of documents is insufficient and a further affidavit will be ordered where it appears from the affidavit of documents itself or from the documents therein referred to, or from any admission in the pleadings of the party who makes the affidavit, that there are or have been in his possession or power other documents "relating to any matter in question in the action" within the meaning of Order XXXI. rule 12; and a document "relating to any matter in question in the action" is one which it is not unreasonable to suppose contains information which may, directly or indirectly, enable the party who claims the further affidavit either to advance his own case or to damage that of his adversary. *La Compagnie Financière et Commerciale du Pacifique* v. *The Peruvian Guano Co.* (*Lim.*) (App.), 181

—— *discovery of documents: deeds in custody of the court*]—There is no power to make an order, in an action of trespass to land brought against the committee of a lunatic, for the production of title-deeds in the custody of the Court having jurisdiction in lunacy, and therefore out of his possession or control. *Vivian* v. *Little*, 771

—— *entry of judgment on findings of referee: counter-claim and set-off exceeding amount of claim: balance on claim and counter-claim: costs: order LV.*]—The plaintiff claimed the balance of money due under a contract with the defendants for asphalting certain roads. The defendants alleged that the work had been so badly done by the plaintiff that they had been compelled to do it again at an expense to them greater than the amount claimed; and they pleaded by way of set-off and counter-claim the expense they, by his default, had been so compelled to incur. Upon the trial of the issues by an official referee, they were found as follows:—For the plaintiff on his claim for 32*l.* 18*s.* 6*d.*, and for the defendants on their counter-claim for 34*l.* 10*s.* 6*d.* On motion for judgment,—*Held*, that judgment ought to be entered for the defendants for the balance 1*l.* 12*s.*, with costs. *Lowe* v. *Holme*, 270

The defendants had, in proving their counter-claim, which arose out of the subject-matter of the plaintiff's claim, established a defence to such claim. The plaintiff was therefore not entitled to any judgment, having been wholly unsuccessful. Ibid.

Order LV. also applied to such a case, and enabled the Court to give the really successful party his costs. Ibid.

—— *inferior court: mayor's court: procedure in: application of rules of supreme court to: judicature act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 89: *rules of court, order XL. rule* 10]—The provisions of section 89 of the Judicature Act, 1873, which enable inferior Courts to grant in all causes of action within their jurisdiction such relief, redress, or remedy, or combination of remedies, in any proceeding as the High Court could grant, do not enable an inferior Court to apply the provisions of the Rules of the Supreme Court to proceedings in the inferior Court. *Pryor* v. *The City Offices Co.* (*Lim.*) (App.), 362

—— *information: discovery: production of documents: affidavit, sufficiency of*]—The Court will not order the production of documents which the defendant, in his sworn answer to an information (the procedure as to which, under Order LXII., is not affected by the Rules of the Supreme Court), has admitted relate to the matters in dispute and are in his possession and control, but which he objects to

produce, on the ground that the same form or support his own title, and are intended to be or may be used by him in evidence accordingly, and do not contain anything impeaching his defence, or forming or supporting the plaintiff's title or the plaintiff's case. But where the Court can, notwithstanding those averments, see with reasonable certainty, from the information, the admissions in the answer and the description of the documents themselves contained in the answer, that the defendant has erroneously misrepresented or misconceived the nature of the documents, an order for the production of such documents will be made. *The Attorney-General* v. *Emerson* (App.), 67

Per BRETT, L.J.—The rule applicable to proceedings in the Court of Chancery before the Judicature Act as to the sufficiency of an affidavit in which a party claims protection from the production of documents is equally applicable to an affidavit in which the like protection is claimed under the Rules and Orders of the Judicature Act. Ibid.

—— *inspection of documents in joint possession of party and stranger to the action: rules of court, order XXXI. rule* 11]—A defendant stated in his affidavit of documents that certain documents were in the joint possession of himself and another person not a party to the action. The affidavit further stated that he objected to produce the documents, but did not state that he was unable to do so, or that he could not obtain the consent of the other party to their production:—*Held* (affirming the judgment of the Queen's Bench Division, *ante*, p. 8), that the affidavit was sufficient, and that production of the documents ought not to be ordered. *Kearsley* v. *Phillips* (App.), 269

Murray v. *Walter* (Cr. & Ph. 114) followed. Ibid.

—— *interrogatories: libel: objection to answer: "might" tend to criminate*]—In an action for libel the defendant denied publication. To interrogatories asking whether he did not publish the alleged libel, the defendant answered: "I decline to answer all the said interrogatories, upon the ground that my answer to them might tend to criminate me." Upon a summons for a further and better answer,—*Held*, that the answer was sufficient, and that the defendant was not bound to say that he believed that his answer would criminate him. *Lamb* v. *Munster*, 46

—— *leave to defend: bill of exchange: bona fide holder for value: order XIV. rule* 1*a*]—In an action on a bill of exchange the defendants set up a case of fraud, and the plaintiffs, upon a summons under Order XIV., filed an affidavit that they were *bona fide* holders for value of the bill:—*Held*, that the defendants were entitled to unconditional leave to defend. *Fuller & Co.* v. *Alexander Brothers*, 103

—— *mayor's court: removal of judgment from mayor's court into superior court: execution: mayor's court act*, 1857 (20 & 21 *Vict. c.* clvii.) *s.* 48: 35 & 36 *Vict. c.* 86. *s.* 6: *schedule, clause* 9]—The provisions of section 6 of 35 & 36 Vict. c. 86, by which a final judgment obtained in any action in a Court of Record for a sum not exceeding 20*l.*, exclusive of costs, may be removed into any County Court for the purpose of execution, and the provisions of clause 9 of the schedule to that Act, by which any final judgment obtained for not less than 20*l.*, exclusive of costs, may for the same purpose be removed into the Superior Court, are not inconsistent with, and therefore do not repeal, section 48 of the Mayor's Court Act, 1857, whereby a judgment obtained in the Mayor's Court for any sum, whether over or under 20*l.*, may be removed into the Superior Court for the purposes of execution. *Paine* v. *Slater* (App.), 282

—— *parties: married woman: next friend: staying proceedings till husband joined: order XVI. rule* 8]—The plaintiff, a married woman, resident abroad, recovered judgment in her own name against the defendants in the Court of Tiflis, and, on giving security for costs on account of such residence beyond the jurisdiction of the High Court, commenced an action on the said judgment in her own name against the defendants. The husband was not joined, nor was any leave to sue without a next friend applied for. The defendants applied to the Master for a stay of proceedings until such time as the husband should be joined. The Master made no order, and the Judge in chambers refused to reverse the Master's decision:—*Held*, by MANISTY, J. (STEPHEN, J., *dissentiente*), that the practice in Chancery before the Judicature Acts was not to make the husband a party to the exclusion of a "next friend"; that under Order XVI. rule 8, the defendants had only a right to ask that the proceedings should be stayed until a "next friend" is appointed; and that a married woman has a right to bring an action by a next friend, if she chooses, without joining her husband. *Abouloff* v. *Oppenheimer*, 309

—— *partnership: action against firm: who included: dissolution of partners: liability, how determined: order IX. rule* 6: *order XVI. rule* 10: *order XLII. rule* 8]—The operation of Order XVI. rule 10, which enables any two or more persons liable as co-partners to be sued in the name of their firm, is not limited to the case of a partnership actually existing

at the date of the writ. *Daris & Son* v. *Morris*, 401

Where a plaintiff issues a writ against a number of persons in a firm name, and there have been two distinct partnerships carried on by different sets of individuals under the same firm name, and at the date of the action one of such partnerships has been dissolved and the other is subsisting, it is a question of fact which set of persons has been proceeded against under the name common to both. Ibid.

The plaintiffs sought, under Order XLII. rule 8, to issue execution against M., upon a judgment obtained by them against partners in the firm of H. & D., in respect of a sum due upon a bill of exchange. The bill upon which the action was brought was drawn by D., and was by him indorsed in the name of the firm at a time when M. was a partner and when the firm name was H. & D. M. had, however, ceased to be a member of the firm before the issuing of the writ, and was ignorant of the drawing and indorsing of the bill, which was a wholly unauthorised transaction and in no way connected with the partnership business:—*Held*, that the right to include M. was not affected by the fact that he had ceased to be a partner at the date of the writ. But, *held* also, that the facts disclosed an intention on the part of the plaintiffs to proceed against H. & D. only and to exclude M., and that, as there was nothing in the rules to prevent proper effect being given to the plaintiffs' intentions and acts, M. was not a defendant in the action, and therefore not liable to execution upon the judgment. Ibid.

Practice (continued) — *pleading: demurrer: notice in lieu of statement of claim: order XXI. rule 4*]—The indorsement on a writ of claim against the acceptor of a bill of exchange did not state the plaintiff's interest in the bill, nor whether it was a negotiable instrument. Notice in lieu of statement of claim having been delivered under Order XXI. rule 4, the defendant demurred:—*Held*, no ground of demurrer; the defendant's proper course being to apply for a further statement to be delivered as provided by the rule. *Fawcus* v. *Charlton*, 710

Robertson v. *Howard* (47 Law J. Rep. Q.B. 480) not followed. Ibid.

—— *receiver: action for recovery of land: landlord and tenant*]—In an action for recovery of land brought by a landlord against his tenant under a proviso for re-entry for breach of covenant in his lease, a receiver of the rents and profits of the land pending the trial of the action may be appointed on the plaintiff's application. *Gwatkin* v. *Bird*, 263

—— *reference for trial: setting aside findings of referee: to whom application to be made: judicature act, 1873, ss. 57, 58: order XXXVI. rule 34*]—An order referring the issues of fact in an action was made under section 57 of the Judicature Act, 1873. The Judge ordering the reference was moved to set aside the referee's findings:—*Held*, that the motion must be made before a Divisional Court. *Cooke* v. *Newcastle and Gateshead Water Co.*, 337

Quære,—Whether the period from which the time for moving against a referee's report runs is not the delivery of the report to the Judge. Ibid.

—— *remitting to the county court: "claim indorsed on writ": damages for breach of contract: 19 & 20 Vict. c. 108. s. 26*]—The power of remitting to the County Court "any action of contract, where the claim indorsed on the writ does not exceed 50*l.*," under section 26 of the County Court Act, 1856, has reference only to liquidated money claims required to be specially indorsed, and does not extend to actions of contract in which unliquidated damages are claimed, although the claim as indorsed on the writ does not exceed 50*l.* *Knight* v. *Abbott, Page & Co.*, 131

—— *rules of the supreme court (costs): order VI. rule 2: costs on the higher scale: injuries to property: injunction: trespass in assertion of right: "breaches of covenant"*]—The words "injuries to property" in rule 2 of Order VI. (Costs), regulating the allowance of costs on the higher scale in certain actions, mean substantial physical injuries. A trespass on land, therefore, involving no substantial injury to the land, although committed as an assertion of right, does not entitle a plaintiff who has obtained damages and an injunction in an action upon such trespass to costs on the higher scale; nor, in the absence of a deed between the parties, are the words "breaches of covenant" in the same rule satisfied by the breach of the covenant for quiet enjoyment to be implied in a parol tenancy from year to year. *Goodhand* v. *Ayscough*, 97

Prescription—*several fishery owned by corporation: immemorial user by free inhabitants: presumption of charitable trust or condition in grant: profit à prendre in alieno solo*]—An incorporated borough had enjoyed immemorially a several oyster fishery in a navigable tidal river, qualified by an usage, also immemorial, for free inhabitants of ancient tenements in the borough to dredge for oysters without stint from Candlemas to Easter Eve in each year. The corporation claimed a several fishery discharged from the usage in favour of the inhabitants:—*Held* (*dissentients* LORD BLACKBURN)—first, that, inasmuch as the claim of the corporation rested on pre-

scriptive enjoyment, the whole user ought to be taken into account, and that the right to a several fishery could not be maintained, unless it were consistent with the user by the free inhabitants. Secondly, that the claim of the free inhabitants was not to a *profit à prendre in alieno solo*, but was a claim to which the law could and would give effect by presuming a grant to the corporation, subject to a condition or charitable trust in favour of the free inhabitants. *Goodman* v. *The Mayor and Free Burgesses of the Borough of Saltash* (H.L.), 193

Principal and Agent—*foreign agent and consignor: goods supplied not according to order or description: impossibility of procuring goods ordered: measure of damages*]—The defendants, commission agents in China, could not obtain the goods ordered by the plaintiff, a merchant in London, but they by mistake informed the plaintiff that they could do so, and forwarded goods of an inferior quality, supposing them to be the goods ordered:—*Held* (affirming the judgment of the Queen's Bench Division), that the defendants were liable to recoup the plaintiff all the actual loss which he had suffered, but that they were not liable to pay to him the difference between the price which the goods sent fetched in the market when rejected by the plaintiff and sold for the benefit of all concerned, and the market price on that day of the superior goods which he had ordered; for that the relation between the plaintiff and the defendants was one of principal and agent, not one of vendor and purchaser. *Cassaboglon* v. *Gibb, Livingstone & Co.* (App.), 538

—— See BANK OF ENGLAND NOTE; CONTRACT; NEGLIGENCE.

Prisoners—maintenance of: becoming insane: 3 & 4 Vict. c. 54: 27 & 28 Vict. c. 29: Prisons Act, 1877 (40 & 41 Vict. c. 21), ss. 4 and 57. *Mews* v. *The Queen* (H.L.) (M.C. 57), 522

Prisons Act, 1877—(40 & 41 *Vict. c.* 21), *s.* 36: *superannuation allowance or gratuity: officer retired to facilitate improvements in organisation of prison: apportionment of allowance between rates and fund provided by parliament: superannuation act*, 1859 (22 *Vict. c.* 26), *s.* 7]—The Lords of the Treasury have power under the second and last clauses of section 36 of the Prisons Act, 1877, coupled with section 7 of the Superannuation Act, 1859, to apportion between the rates and the funds provided for that purpose by Parliament the amount payable by way of superannuation allowance or gratuity, to an officer who, being under the age of sixty, and not become incapable, by age, sickness or other infirmity received in actual execution of his duty, of executing his office in person, has retired from office to facilitate improvements in the organisation of the department to which he belonged. *Reg.* v. *The Justices of Middlesex* (App.), 552

Privilege. See ATTACHMENT; LIBEL.

Probate Duty. See REVENUE.

Profit à Prendre. See PRESCRIPTION.

Profits. See INCOME TAX; SHIP AND SHIPPING.

Promissory Note—*payable on demand: previous liability to pay in three years: want of consideration: admissibility of evidence: parol agreement to vary note*]—A parol agreement contemporaneous with a promissory note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, is immaterial and inoperative to contradict the terms of the note. *Stott* v. *Fairlamb*, 420

Woodbridge v. *Spooner* (3 B. & Ald. 233) followed. Ibid.

The existence of an agreement by which A has undertaken, for good consideration, to pay B a sum of money at a stipulated time, is not a good consideration for a promissory note for the same sum given by A to B, and payable on demand. Ibid.

Upon a dissolution of partnership, an agreement was entered into, which, after reciting that one of the partners had brought 2,000*l.* into the business, provided that the other partner should pay him that sum within three years, with interest at five per cent., in full satisfaction of all his share in the stock, credits and effects of the partnership, and should indemnify him against the debts of the partnership. Subsequently, a promissory note for the same 2,000*l.*, payable on demand, was given to the retiring partner:—*Held*, that there was no consideration for the note. Ibid.

Proof, burthen of. See MALICIOUS PROSECUTION.

Prosecution. See CRIMINAL LAW.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 179, 180 *and* 308: *compensation for damage sustained by the exercise of the powers of the act: arbitration: dispute as to liability as well as to amount: order in which questions are to be determined*]—A person who claims compensation for damage sustained by reason of the exercise of the powers of the Public Health Act, 1875, is entitled, under

section 308, to have the amount of compensation determined by arbitration in the manner provided by that Act, even though a dispute exists as to the liability of those from whom he seeks to recover compensation; and the prior determination of that question of liability is not a condition precedent to the claimant's right to go to arbitration to settle the question of amount. *Pearsall* v. *The Brierley Hill Local Board* (App.), 529

Public Health Act, 1875 (continued)—(38 & 39 *Vict. c.* 55), *s.* 264—*notice of action: action for recovery of land*]—Where an action was brought against a sanitary authority, to recover possession of some land of the plaintiff, which had been taken by the authority in the course of their operations, but without any consent given or agreement as to purchase having been made,—*Held*, that they were not entitled to notice of action under section 264 of the Public Health Act, 1875. *Holder* v. *The Mayor, &c., of Margate*, 711

—— (38 & 39 *Vict. c.* 55), *s.* 264)—*thing done under the provisions of the act: notice of action: limit of time for bringing action: action to recover money paid under mistake of fact*]—The defendants, an urban sanitary authority, believing that a certain lane was not a highway repairable by the inhabitants at large, required the plaintiffs, as owners of land abutting on it, to execute certain works upon it, pursuant to the provisions of the Public Health Act, 1875; and on the plaintiffs failing to comply with the notice, the defendants did the work themselves, pursuant to section 150 of the Act, and charged the plaintiffs with their proportion of the expense thus incurred. The plaintiffs also believed that the lane was not a highway repairable by the inhabitants at large, and they therefore paid to the defendants the sum so claimed; but on discovering afterwards that the lane was such a highway, and that the defendants were not entitled to require them to execute the works specified, they brought an action to recover the amount so paid by them. They gave notice of action a month before issuing the writ, but this notice was given and the action was begun more than six months after the payment made by them:—*Held*, that the plaintiffs could not recover the money thus paid, inasmuch as they were suing the defendants in respect of something "done or intended to be done or omitted to be done" under the Public Health Act; that the provisions of section 264 of that Act applied, and therefore that the action could not be brought more than six months next after the accruing of the cause of action. *The Midland Railway Company* v. *The Withington Local Board* (App.), 689

—— (38 & 39 *Vict. c.* 55), *s.* 174: *urban authority: municipal corporation: contract not under seal: executed contract*]—The provision in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, requiring every contract made by an urban authority whereof the value exceeds 50*l.* to be in writing and sealed with the common seal of such authority, is mandatory, not directory, and applies, notwithstanding that the urban authority is a corporation independently of the Act, and that the contract was made by their agent appointed under their common seal, and has been performed by the other contracting party. *Young & Co.* v. *The Mayor, &c., of Royal Leamington Spa* (H.L.), 713
Hunt v. *The Wimbledon Local Board* (48 Law J. Rep. C.P. 207; Law Rep. 4 C.P. D. 48) approved, Ibid.

—— apportionment of works in a street: jurisdiction of Justices: bad notice to pave, &c.: appeal to Local Government Board. *Reg.* v. *The Recorder of Sheffield* (M.C. 78), 524

—— (38 & 39 Vict. c. 55), ss. 116 and 117: meat unfit for human food: seizure after sale by permission of purchaser: penalty. *Vinter* v. *Hind* (M.C. 93), 671

—— (38 & 39 Vict. c. 55), ss. 94, 95 and 96: notice to abate nuisance: order of Justices: works necessary for the purpose: power to order specific works. *Ex parte Saunders* (M.C. 89), 701

—— (38 & 39 Vict. c. 55), s. 91. sub-s. 4: "nuisance": "injurious to health": accumulation of cinder refuse. *The Bishop Auckland Sanitary Authority* v. *The Bishop Auckland Iron and Steel Co.* (M.C. 38), 262

—— (38 & 39 Vict. c. 55), ss. 150, 257 and 268: paving streets: apportionment of expenses: notice of demand of payment: decision of local authority: appeal by party aggrieved: time for appeal: memorial to Local Government Board: grounds of appeal: prohibition. *Reg.* v. *The Local Government Board and George Taylor* (App.) (M.C. 4), 190

—— See LIMITATIONS, STATUTE OF.

Quarter Sessions. See HIGHWAY.

Quicquid plantatur solo, solo cedit. See MINES.

Qui Tam. See PENALTY.

Railway Commissioners—*jurisdiction: agreement to refer: "confirmed and made binding"*

by and scheduled to act: reference "required or authorised" by any act: completion of works to satisfaction of engineers: condition precedent: 36 & 37 *Vict. c.* 48. *s.* 8]—Before the H. railway company was formed, B., purporting to act on its behalf, entered into an agreement with two other companies for the working of the H. railway. When the H. company was formed and obtained its private Act, the following section was contained in it: "the heads of agreement, bearing date April 29, 1865, between B. on behalf of the H. company; C. on behalf of the Midland Railway Company; and Y. on behalf of the Great Western Railway Company; which heads of agreement are set forth in schedule 1 to this Act, are hereby confirmed and made binding on the said companies respectively." By clause 18 of the agreement in the schedule, "All differences between the three companies, or any two of them, and all questions as to the carrying into effect of the provisions of this arrangement, shall be determined by arbitration under the Railway Companies Arbitration Act, 1859." By 36 & 37 Vict. c. 48. s. 8, it is provided that "Where any difference between railway companies . . . . is, under the provisions of any general or special Act, . . . required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the Railway Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration." *The Great Western Rail. Co.* v. *The Halesowen Rail. Co.*, 473

The H. Company applied to the Commissioners for an order enjoining the Great Western and Midland Railway Companies to work the H. line, and the Great Western Company objected that the H. Company had not constructed certain platforms:—*Held*, by SMITH, J. (GROVE, J., *dubitante*), that the provision of the agreement requiring all differences to be referred to arbitration was not, although made binding by the Act, a provision of any general or special Act, within 36 & 37 Vict. c. 48. s. 8, and that the Railway Commissioners had, therefore, no jurisdiction. Ibid.

By clause 1 of the agreement, "The H. Company agree at their own expense, to make and complete the railways, stations, buildings and works by this Act authorised, including a terminal station at H., with the necessary conveniences thereto, and proper sidings at the junction with the Midland Railway, for the convenient interchange of traffic in passengers and goods, to the satisfaction of the respective engineers of the three above-named companies; or, in case of their difference, to the satisfaction of an engineer to be appointed by the Board of Trade." By clause 2, "From and after the time when the railways are so completed, the Midland Company and the Great Western Company at all times, at their own joint expense and risk, shall work the H. line": —*Held*, by the Court, that the question as to the necessity for the platforms was within clause 1, and that, as the application of the H. Company did not and could not allege that the works had been completed to the satisfaction of the engineers, clause 18 of the agreement did not apply; that, on that ground, the Railway Commissioners had no jurisdiction; and that the H. Company should be prohibited from proceeding further with the application. Ibid.

Railway Company—*common carriers: advice notes: negligence in issuing two notes referring to one consignment: estoppel*]—The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "charges only"; the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs, having lost the amount of one of the advances so made by them, sued the defendants for the amount:—*Held*, that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat. *Coventry, Sheppard & Co.* v. *The Great Eastern Rail. Co.* (App.), 694

—— *contract: ultra vires: weighing at station goods carried on railway*]—Weighing goods carried on a railway at a railway station for the convenience of the consignees is incidental to the statutory powers of the railway company and not *ultra vires*, and an action

may be maintained by the company to recover charges for weighing them. *The London and North Western Rail. Co. and The Great Western Rail. Co.* v. *Price & Son*, 754

Railway Company (continued)—*mines: land compulsorily taken by railway company sold as superfluous land: right to support of surface: railways clauses consolidation act*, 1845 (8 *Vict. c.* 20), *ss.* 77, 78 *and* 79]—Under sections 77, 78 and 79 of the Railways Clauses Consolidation Act, 1845, a railway company have an option to purchase compulsorily land either with or without the minerals, and the owner of the minerals, in default of such purchase or of payment of compensation, may as against the railway company work the mines to the utmost extent, provided that he works them in a proper manner and "according to the usual manner of working such mines in the district where the same shall be situate." The purchaser of such land as superfluous land acquires no greater right of support to the surface than the railway company possessed. *Pountney* v. *Clayton* (App.), 566

—— *rates for carriage of goods: unreasonable condition: alternative rate: railway and canal traffic act*, 1854, *s.* 7]—The mere fact of a railway company being willing and proposing to carry goods at their ordinary rate with ordinary liability does not of itself make a condition relieving them from all responsibility for goods carried at a lower rate reasonable. *Brown* v. *The Manchester, Sheffield and Lincolnshire Rail. Co.* (App.), 132

The plaintiff, by a contract in writing, undertook and agreed to free and relieve the defendant company and all other companies over whose lines fish consigned to the defendants for carriage might be sent, "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the defendants carrying the same at a rate one-fifth lower than the ordinary rate:—*Held*, that the condition was unreasonable. Ibid.

Judgment of the Queen's Bench Division reversed. Ibid.

—— *regulation of railways act*, 1873 (36 & 37 *Vict. c.* 48), *s.* 11: "*through traffic*": "*through route and rate*": *rights of railway forming intermediate link between other systems: railway commissioners*]—The applicants, a railway company, owning a line which communicated at either end with two other railway systems, applied as against both such railway companies to the Railway Commissioners for an order for a through route and rate to be allowed for goods *via* their line from a station on the one company's line to a station on the other company's line. The applicants had no rolling stock, and their line was wholly worked by another company, under an agreement by which the receipts for through traffic were apportioned according to mileage. They did, however, manage their own line and collect and forward their own traffic, the whole of the staff at the stations on their line being employed and paid by them:—*Held*, affirming the decision of the Railway Commissioners, and in accordance with the judgment of the Court of Session in *The Greenock and Wemyss Bay Railway Company* v. *The Caledonian Railway Company* (3 Nev. & M. 145), that the applicants were entitled to the order, as they were a railway company, within the meaning of the section, entitled to require through traffic to be forwarded, and the traffic in question was "through traffic to or from their railway" as therein defined. *The Central Wales and Carmarthen Junction Rail. Co.* v. *The Great Western and London and North Western Rail. Co.*, 211

—— See CARRIER; NEGLIGENCE.

Rate. See CHURCH RATE; LANDLORD AND TENANT.

Rateable Value. See POOR.

Rates, Alternative. See RAILWAY COMPANY.

Real Property, Sale of. See VENDOR AND PURCHASER.

Realty and Personalty. See REVENUE.

Reasonable and Probable Cause. See MALICIOUS PROSECUTION; VENDOR AND PURCHASER.

Receiver. See PRACTICE.

Referee. See PRACTICE.

Registration. See PARLIAMENT.

Relief. See LANDLORD AND TENANT.

Rent. See LANDLORD AND TENANT.

Repair. See HIGHWAY.

Residuary Account. See REVENUE.

Res Judicata. See ACTION.

Restitution. See NEGOTIABLE INSTRUMENT.

Revenue—beer: Inland Revenue Act, 1880 (43 & 44 Vict. c. 20), ss. 32 and 33: brewer not for sale chargeable with duty: exemption of the occupiers of houses not exceeding 10*l.* annual value. *Tippett* v. *Hart* (M.C. 41), 345

—— *income tax: county buildings used as assize courts and police stations: liability of to assessment: 5 & 6 Vict. c. 35; 16 & 17 Vict. c. 34, schedules A & B*]—The Justices of a county erected, under the provisions of certain statutes, a building consisting partly of courts, with the usual appurtenances, used by the Judges as Assize Courts, by the Justices for holding Quarter and Petty Sessions, and by the County Court Judge; and partly of a central county police station, with accommodation for constables who lived there, and for the temporary detention of prisoners. No rent was received for or profit made out of the building or any part thereof:—*Held*, affirming the judgment of the Queen's Bench Division, that income tax was not payable, under schedules A and B of the Income Tax Acts, in respect of this building. *Coomber* v. *The Justices of Berks* (App.), 81

—— *legacy duty: valuation of property not reduced into money: sale after filing of residuary account: 36 Geo. 3. c. 52. s. 22*]—Chattels which were entered in an account for assessment of legacy duty upon residuary personal estate as property not converted into money, and were there valued, and upon which duty was accepted according to such valuation, were afterwards sold by the executor, in pursuance of an intention existing from the first, but not known to the Crown; and, although there had been no want of good faith towards the Crown, the proceeds greatly exceeded the valuation. Duty was claimed upon the excess:—*Held*, that 36 Geo. 3. c. 52. s. 22, providing for the valuation of property "which shall not be reduced into money," did not apply where property was sold during the administration, though after account filed, and that acceptance of duty upon the basis of the valuation in ignorance of the intention to sell did not disentitle the Crown to duty upon the real value as shewn by the sale. *The Attorney-General* v. *Dardier*, 329

—— *probate duty: partnership property: land: conversion*]—Where land is held by partners jointly as partnership property it is deemed to be personal and not real estate, and probate duty becomes payable on the share of a deceased partner in such land, independently of whether there has or has not been an actual conversion into personalty. *The Attorney-General* v. *Hubbuck*, 464

—— See INCOME TAX.

Riparian Owner—*water: easement: grant of easement to non-riparian owner: right of grantee to send down water diminished in quantity and deteriorated in quality*]—A riparian owner granted by deed to the defendants, who were not riparian owners, the right, liberty, authority and privilege to place fix and lay waterpipes in and through a piece of land extending from their mill to the river. Under this grant the defendants took water from the river, used it for condensing purposes, and returned it diminished in quantity and deteriorated in quality. In an action by a lower riparian proprietor,—*Held*, that the plaintiffs were entitled to recover; that the defendants not being in fact riparian proprietors, the grant to them by the riparian proprietor did not give them the rights of riparian proprietors; and therefore that they were not entitled so to use the water, even though their use might be in the district in question an ordinary and not an extraordinary use. *Ormerod* v. *The Todmorden Joint Stock Mill Co.* (App.), 445

The Stockport Waterworks Company v. *Potter* (31 Law J. Rep. Exch. 9) approved. Ibid.

Rules of Court. See PRACTICE.

Sale. See BANKRUPTCY; BILLS OF LADING.

Sale of Goods. See PRINCIPAL AND AGENT.

Schedule, Form in. See BILL OF SALE.

Seal, Contract under. See PUBLIC HEALTH.

Security. See PRACTICE.

Service. See PRACTICE.

Sheriff, Sale by. See BANKRUPTCY.

Ship and Shipping—*bill of lading: collision between ships belonging to same owners: default of servants: excepted perils: action of tort: measure of damages: admiralty rules: judicature act, 1873, section 25, sub-section 9*]—The plaintiffs shipped goods on board one of the defendants' ships, the *Kroon Prins*, under a bill of lading, which was in the English language, and described the defendants by their corporate name, and which excepted, amongst other things, "collision and accidents, loss or damage from any act, neglect or default whatsoever of the pilots, master or mariners or other servants of the company in navigating the ship." The goods were lost by the *Kroon Prins* coming into collision on the high seas with the *Atjeh*, which also belonged to the defendants; and the jury found

that, though both ships were in fault, the chief blame was to be attached to the *Atjeh*. The defendant company, which was composed entirely of English shareholders, in addition to being registered in England as a limited company, was also registered in Holland as a Dutch company, which was in fact a bare trustee of the ships for the English company. The ships also were registered as Dutch ships, and carried the Dutch flag. Such registration was for the purposes of trading to and from Dutch ports. The ships were not registered under the Merchant Shipping Acts as British ships. In an action to recover the value of the goods, based, first, on the contract to carry safely contained in the bill of lading; and secondly, in *tort*,—*Held*, that, so far as the action was based on contract, the defendants, as owners of the *Kroon Prins*, were relieved from liability for the negligence of their servants on board that ship by reason of the exceptions in the bill of lading, which was an English contract, and must be construed accordingly; also that the defendants were not liable either expressly or impliedly under the bill of lading, which had reference only to the carrying ship the *Kroon Prins*, for the negligence of their servants on board the *Atjeh*. *Held* also, that the defendants, as owners of both the ships, were liable in *tort*, and that the action, viewed as an action of *tort*, came within section 25, sub-section 9, of the Judicature Act, 1873; and the Admiralty rule as to dividing the loss when both ships in collision are to blame was applicable, so that the defendants, as owners of both ships, would have been liable for the whole amount of the loss; but that as they were exonerated by the exception in the bill of lading from the share of the loss occasioned by the negligence of those navigating the *Kroon Prins*, they were only liable for the other half of the loss occasioned by the negligence of those on board the *Atjeh*. *The Chartered Mercantile Bank of India, London and China* v. *The Netherlands India Steam Nav. Co.* (*Lim.*) (App.), 220

Held also (*per* BRETT, L.J.), that both the ships were English and not Dutch ships, notwithstanding that they were registered in Holland as Dutch ships and carried the Dutch flag, inasmuch as the nationality of a ship depends upon the question of ownership. Ibid.

Judgment of the Queen's Bench Division reversed. Ibid.

Ship and Shipping (continued)—*bill of lading: exception: perils of the sea: collision: negligence*] — The plaintiffs shipped a cargo on board the K., a sailing vessel, of which the defendants were the owners, for carriage from Caen to London, under a bill of lading which only excepted perils of the sea. The K., while sailing up the Thames, came into collision with a steamer which was coming down, and was sunk. In an action to recover the value of the cargo which was lost, the jury found that the collision was caused by the K. starboarding her helm, but that there was no negligence on her part. There was no finding as to the steamer:—*Held*, that the loss was not occasioned by a peril of the sea, inasmuch as it had not been shewn that the collision was not caused by the negligence of the steamer; and a collision caused by the negligence of one of two vessels is not a peril of the sea. *Woodley & Co.* v. *Michell & Co.* (App.), 325

—— *bill of lading: indorsement by shipper to secure advances: property in goods: title of indorsee: liability for freight: bill of lading act* (18 & 19 *Vict. c.* 111. *s.* 1)]—The defendants were indorsees of a bill of lading for the mere purpose of securing certain sums of money advanced by them to N. The goods represented by the bill of lading had been shipped by N. in London in a vessel belonging to the plaintiff, and carried to Russia. Subsequently the goods in question, not having been cleared within a given time after their arrival at the port of destination, were sold in accordance with Russian law, and realised only sufficient to meet the claims of the custom-house officials. Thereupon the plaintiff brought an action to recover from the defendants payment of freight and charges due to him, on the ground that the property in the bill of lading and goods had passed to the defendants within the meaning of the Bills of Lading Act:—*Held*, by FIELD, J., upon further consideration, that the transaction between the defendants and N. was one of mere pawn or pledge, by which no sufficient property passed to render the defendants liable for freight and charges incurred by the shipowner in the carriage of the goods. *Burdick* v. *Sewell*, 428

—— *charter-party: bill of lading: incorporation of terms of charter-party: inconsistent terms: demurrage: port of discharge*]—By a charter-party made between the plaintiff and the defendants it was stipulated that the liability of the defendants should cease "as soon as the cargo is on board the vessel holding a lien upon the cargo for freight and demurrage." The bills of lading contained the words "he or they paying freight and all other conditions as per charter-party." The defendants were the owners and receivers of part of the goods the subject of one of the bills of lading, having indorsed the said bill of lading to indorsees for value as to the other part of such goods. By reason of delay in discharging the goods of which the defendants were owners and receivers, the vessel was delayed five days beyond the lay days, and the plaintiff claimed demurrage for that delay:—*Held*, that the words, "he or they paying freight and all other conditions as

per charter-party," did not operate to incorporate conditions of the charter-party inconsistent with the other terms of the bill of lading, and that the conditions in the charter-party were incorporated in the bill of lading as far as they applied to demurrage at the port of loading, but did not extend to absolve the defendants, as owners and receivers of the goods, from liability for demurrage at the port of discharge. *Gullichsen* v. *Stewart Brothers*, 648

—— *charter-party: carriage of deck cargo "at merchant's risk": loss by jettison: general average contribution*]—The plaintiffs chartered a vessel, of which the defendants were owners, to load a cargo of deals at Finnklippen, in Sweden, and deliver them in London. It was a term of the charter-party that "the vessel should be provided with a deck cargo, if required, at full freight, but at merchant's risk." A quantity of timber was loaded on the deck of the vessel, a portion of which was necessarily jettisoned and lost during the voyage in order to save the ship and the rest of the cargo. It was admitted that by reason of a custom to carry deck cargoes of timber on similar voyages, the plaintiffs were entitled to recover a general average contribution in respect of the jettison of the deck cargo, unless the defendants were protected by the terms of the charter-party:—*Held*, that the defendants were so protected, and that the words "at merchant's risk" excluded any right on the part of the plaintiffs to have a loss by jettison of a portion of a deck cargo made good by general average contribution. *Burton & Co.* v. *English & Co.*, 386

—— *charter-party: construction of: demurrage: detention by frost*]—It was agreed by charter-party between the plaintiff and the defendants that the plaintiff's ship should proceed to Cardiff East Bute Dock, and there load from the agents of the freighters a full and complete cargo of about 1,700 tons of rail iron: detention by frost, floods, riots and strikes of workmen, accidents to machinery or quarantine, not to be reckoned as lay days. There are two docks at Cardiff—the East and West Bute Docks—which are connected by a short canal, and also by a railway which runs along the quays round both of the docks. The West, but not the East, Bute Dock was connected by a junction canal with another canal—the G. Canal. There are five or six manufacturers of rail iron at Cardiff, all of whom, with the exception of C. & Co., have wharves either in the East or West Bute Docks; and who were accustomed to load vessels in the East Bute Dock either from the quays or from lighters alongside the vessels. C. & Co., the agents of the freighters, had their wharf for the deposit of iron on the G. Canal, and, in order to load a vessel in the East Bute Dock, were accustomed to bring their iron in lighters from their wharf on the G. Canal along the junction canal into the West Bute Dock, thence along the short canal into the East Bute Dock, where the vessel to be loaded was berthed. The whole cargo of iron was deposited at C. & Co.'s wharf in anticipation of the arrival of the plaintiff's ship. On her arrival the ship was berthed in the East Bute Dock, but the loading by means of lighters was interrupted for fifteen days by a frost, which covered with ice the junction canal leading from C. & Co.'s wharf to the West Bute Dock. In an action for demurrage,—*Held*, that the exception as to detention by frost applied only when the iron had arrived at the place named in the charter-party where the ship was to be loaded—namely, the East Bute Dock; and the defendants, therefore, would not be protected from liability to pay demurrage where the detention was occasioned by frost which rendered impassable the junction canal leading from C. & Co's wharf into the West Bute Dock; for the conveyance of the iron in lighters through the canal was not part of the act of loading. *Kay* v. *Field and Co.* (App.), 17

Hudson v. *Ede* (37 Law J. Rep. Q.B. 166) distinguished. Ibid.

—— *charter-party: "if sufficient water": demurrage: bill of lading: holder by way of security*]—A condition in a charter-party that the ship shall "discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," means that she is to discharge in the dock ordered, if there is sufficient water at the time of giving the order. *Allen* v. *Coltart*, 686

Liability for demurrage under a bill of lading imposed on the holder by way of security only who presented the bill and demanded delivery. Ibid.

—— *marine insurance: barratry leading to seizure: warranty free from seizure: cause of loss*]—A policy of marine insurance, in the ordinary Lombard Street form, enumerated among the perils insured against "barratry of the master," and contained a warranty "free from capture and seizure and the consequences of any attempts thereat." The ship was seized by Spanish revenue authorities for smuggling (the barratrous act of the master), and considerable sums were spent by the owners in procuring her release. In an action brought against the insurers to recover the sums so spent,—*Held*, that the loss was one occasioned by capture or seizure within the meaning of the warranty, and was not recoverable as a loss by barratry. *Cory & Sons* v. *Burr* (H.L.), 657

The statement in *Arnould's Marine Insurance*

(5th ed. p. 773), "Loss by barratry seems to form an exception to the general rule of '*causa proxima, non remota spectatur*,'" questioned. Ibid.

Ship and Shipping (continued)—*marine insurance: general average: port of refuge: expenses of warehousing and reloading and port charges*]—When a vessel goes into a port of refuge in consequence of an injury, whether such injury be the subject of general or of particular average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges in leaving the port, are the subject of general average. *Svensden* v. *Wallace Brothers*, 397

—— *marine insurance: policy on goods: contract of sale: loss of ship: non-appropriation of goods at time of loss: vesting of property: insurable interest: "profits": terms of policy*]—The plaintiff claimed to recover from the defendant, an underwriter at Lloyd's, under a "floating" marine policy on "goods," in respect of certain sugar lost on the 4th of February, 1881, on a voyage from Hamburg to Bristol. The sugar so lost had been shipped in performance of two contracts entered into by D. & Co. (London merchants) with the plaintiff and B. & Co., as hereinafter mentioned: By the first contract, dated the 7th of January, 1881, D. & Co. agreed to sell to B. & Co. 200 tons of sugar of a certain quality, to be shipped from Hamburg to Bristol, at 21*s.* 9*d.* per cwt. net f. o. b., and for January delivery at Hamburg, payment by cash in London in exchange for bill of lading. By the second contract, dated the 12th of January, 1881, D. & Co. agreed to sell to the plaintiff a similar quantity at a like price upon identical terms. D. & Co. were not aware until after the loss that B. & Co. had entered into the contract of the 7th of January for the purpose of enabling them to execute a contract previously made by them with the plaintiff on the same day for the sale of 200 tons of sugar at an advanced price; neither was the plaintiff aware that D. & Co. were the shippers of the 200 tons which he had contracted to take from B. & Co. The plaintiff, immediately after making the above contracts with B. & Co. and D. & Co. respectively, entered into binding contracts for the sale of the identical quantities of sugar agreed to be sold to him, and upon identical terms, except that the sale was at an advanced price, which left the plaintiff a clear profit of 10½*d.* per cwt. D. & Co advised their Hamburg forwarding agents that they had sold 400 tons of sugar for Bristol, and directed them to obtain and ship the necessary number of bags to that port, and to send the bills of lading to London as soon as possible. The whole of the sugar not having arrived at Hamburg at the time of the departure of the steamer, D. & Co's. forwarding agents at Hamburg shipped 3,900 bags only, and advised D. & Co. of this short shipment, proposing to send the 100 bags short shipped by the next steamer. The 3,900 bags so shipped were consigned to "Order, Bristol," and the agents, in accordance with the ordinary course of business between themselves and D. & Co., duly forwarded the bills of lading indorsed in blank to certain bankers in London, who were instructed to deliver them to D. & Co. against cash payment of the amount of the invoices, being the price paid by D. & Co.'s agents to the manufacturers upon delivery. No appropriation was, or indeed could be, made of any specific bags under the above contracts at the time of shipment, but the whole 3,900 bags were shipped in one undistinguished mass, consigned simply "Order, Bristol." With this sugar on board, the ship left Hamburg on the 3rd of February, and on the following day went down with her cargo. Before intelligence of the loss, D. & Co., in due course, took up the bills of lading, and then proceeded to apportion the 3,900 bags, appropriating 2,000 of such bags to B. & Co., and the remaining 1,900 to the plaintiff, and making out the invoices accordingly, and so as to comply with the terms of each contract. The invoices were then posted by D. & Co.; but, prior to that time, both they and the plaintiff had had intelligence of the loss of the sugar. Thereupon the plaintiff, anticipating that the 200 tons of sugar coming to him under his contract with D. & Co. might have been despatched on board the ship, although without any specific advice of such shipment, declared on the ship under his floating policy in respect of these 200 tons. Upon receipt of the invoices, the plaintiff and B. & Co. respectively paid D. & Co. for the amounts named in such invoices, and obtained the bills of lading of the sugar invoiced to them under their respective contracts. Thereupon B. & Co. made out and forwarded his invoice to the plaintiff, who paid what was due from him to B. & Co., and received in return the bills of lading for the 2,000 bags so invoiced. The plaintiff then also declared upon his floating policy for this further loss:—*Held*, upon the above facts, that the plaintiff had no property or insurable interest in the sugar at the time of the loss, but that he had an insurable interest in "profits," the loss of which, however, could not be recovered under a policy on "goods." *Stock* v. *Inglis*, 30

—— *marine insurance: "seizure": taking without intent to keep*]—By a policy on a vessel the owners warranted her free "from capture and seizure." The vessel was forcibly taken possession of for the purpose of plundering the cargo, and in consequence became a constructive total loss:—*Held*, that the loss was a loss by "seizure" within the meaning

of the warranty, although the taking possession was without any purpose of keeping the vessel. *Johnston & Co. v. Hogg*, 343

—— See BILL OF LADING; CARRIER.

Shorthand Notes. See PRACTICE.

Slander—*counsel: advocate: defamatory words uttered by advocate: privilege of advocate engaged in judicial enquiry*]—The protection given by the law to an advocate with respect to defamatory words uttered by him as an advocate in the course of a judicial enquiry with reference to the subject-matter of that enquiry is absolute and unqualified. No action, therefore, can be maintained against him for such words, even though they are irrelevant and are spoken maliciously and without reasonable cause. *Munster* v. *Lamb* (App.), 726

—— *words not actionable without special damage: insufficiency of damage alleged: remoteness*]—The plaintiff, in a statement of claim in an action for damages for slander for defamatory words, not in themselves actionable, spoken of him by the defendant, alleged that the defendant was a member of a club for which the plaintiff had been rejected, that there had been a proposal to alter the rules as to the election of members to the club, that after this proposal had been made the defendant had falsely and maliciously spoken the words complained of, by which he "induced or contributed to induce a majority of the members of the club to retain" certain regulations under which the plaintiff had been rejected when a candidate for membership of the club, "and thereby prevented the plaintiff from again seeking to be elected to the said club," whereby he "lost the advantage which he would have derived from again becoming a candidate with a chance of being elected," and suffered in his reputation and credit. On demurrer to this statement of claim,—*Held*, that the words not being in themselves actionable, the statement of claim did not disclose any cause of action, for that there was no allegation of any sufficient legal special damage; nor was the alleged damage the natural, direct and reasonable consequence of the words spoken. *Chamberlain* v. *Boyd* (App.), 277

—— *words imputing criminal act: offence not necessarily indictable*]—An action for slander will lie for imputing to the plaintiff a criminal offence, although the offence be not the subject of an indictment. *Webb* v. *Bevan*, 544

Solicitor—*bill of costs: delivery and payment of: application for delivery of bill more than twelve months after payment: 6 & 7 Vict. c. 73. s. 41*]—The provisions of 6 & 7 Vict. c. 73. s. 41, which provide that "the payment of any such bill as aforesaid" is not to preclude the referring of the bill for taxation, provided that the application for such reference be made within twelve calendar months after payment, do not refer only to bills of costs duly signed, but to all bills of costs mentioned in the Act, and therefore an unsigned bill which has been paid cannot be referred for taxation more than twelve months after payment. *In re Sutton and Elliott* (App.), 752

—— See ATTACHMENT; BANK OF ENGLAND NOTE; HUSBAND AND WIFE; PRACTICE.

Solicitor and Client. See PRACTICE.

Solicitor and Proctor—*unqualified person acting as: proceedings to obtain probate: action for penalties: 23 & 24 Vict. c. 127. s. 26*]—The defendants, law stationers, not qualified to act as solicitors or proctors, received from solicitors in London and in the country wills to copy and engross, and, acting on instructions from the solicitors, took the wills and engrossments, and other documents necessary for obtaining probate, to the Probate Registry at Somerset House, and afterwards paid the fees and received the probate. The solicitors' names were used, and any difficulty which arose was referred to them. The defendants charged the solicitors a messenger's fee only for the time of the clerk employed in attending at the Probate Registry:—*Held*, that the defendants did not act as proctors, within the meaning of 23 & 24 Vict. c. 127, s. 26. *The Law Society of the United Kingdom* v. *Waterlow*. *The Same* v. *Skinner (executor of Blake, who carried on business as Shaw and Blake)* (H.L.), 674

Special Damage. See ACTION.

Sporting Rights. See CONFLICT OF LAWS.

Stakeholder. See VENDOR AND PURCHASER.

Stoppage in transitu. See VENDOR AND VENDEE.

Subrogation. See FIRE INSURANCE.

Superannuation. See PRISONS ACT.

Superfluous Lands. See RAILWAY COMPANY.

Surface Support. See MINES.

Surrender. See LANDLORD AND TENANT.

Surveyor. See BUILDING CONTRACT.

Taxation. See PRACTICE.

Tort. See CARRIER.

Trespass—*escape of cattle: property adjoining highway*]—An ox belonging to the defendant, while being lawfully driven along a highway in a town, escaped, without any negligence on the part of the defendant or the drover, into a shop of the plaintiff adjoining the highway, and there did damage:—*Held*, that the defendant was not liable. *Tillett* v. *Ward*, 61

Trial. See PRACTICE.

Trust. See ATTACHMENT OF DEBTS.

Ultra Vires. See RAILWAY COMPANY.

Vendor and Purchaser—*fraudulent purchase by bankrupt: non-completion of purchase: deposit money paid to stakeholder: forfeiture: following money: title of trustee in bankruptcy*]—W. having secretly realised the greater part of his available property and effects, absconded with the proceeds. W. was subsequently adjudicated a bankrupt, and on the 4th of October, 1882, the plaintiff was appointed a trustee of the estate. On the 10th of October W. entered into an agreement, in an assumed name, with F. for the purchase of certain house property, and paid to the defendant, as stakeholder under the agreement, a certain sum by way of deposit, which it was admitted formed part of the proceeds of the secret realisation. The agreement provided, *inter alia*, that the deposit money should be forfeited to the vendor if the purchaser neglected or failed to complete the purchase. W. was shortly afterwards arrested and convicted as an absconding bankrupt, and the purchase of the property was consequently never completed. It was admitted that both the defendant and F. had acted throughout *bona fide* in the ordinary course of business, and that the non-completion of the agreement was not caused by any default on the part of F. The plaintiff having claimed to have the deposit money paid over for the benefit of the bankrupt's estate,—*Held*, that, inasmuch as it was of the essence of the contract that the deposit money should be forfeited if the purchase was not completed, such money belonged to F. and could not be followed by the trustee of the bankrupt's estate. *Collins* v. *Stimson* 440

—— *sale of real property: accidental misstatement as to extent of property: completion of purchase: right to compensation: fraud*]—After the purchaser of real estate has taken a conveyance, and the purchase-money has been paid, no action can be maintained for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to breach of some contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. *Jolliffe* v. *Baker*, 609

In the conveyance to a purchaser the land sold was described as two parcels, each defined in the most particular manner by metes and bounds, and other details, and each "as containing by estimation one and a half acres or thereabouts." Subsequently to the conveyance the lands were measured, and the two parcels together amounted to only 2a. 1r. 12p.:—*Held*, that this misdescription as to quantity did not amount to a breach of any warranty, so as to entitle a purchaser to maintain an action for damages against the vendor. Ibid.

It is a question of fact whether the parcels have or have not, in truth and in fact, been estimated to contain the quantity stated or thereabouts, the answer to which will mainly depend on whether the error is so small as to lead to the assumption that it might have been so estimated, or so great as to make the estimate an irrational or impossible one. Ibid.

—— See FIRE INSURANCE.

Vendor and Vendee—*unpaid vendor: stoppage in transitu: end of the transit: constructive possession: agent of vendee to receive and forward goods on fresh journey*]—The vendee of certain goods directed the vendors to forward them by rail from B. to G. to the order of the defendants, who were shippers of goods, and who had received instructions from the vendee to receive the goods and then to forward them to Rouen. The ultimate destination of the goods was not communicated to the vendors. On the arrival of the goods at G. the railway company gave notice to the defendants that after the expiration of a certain time they would hold the goods no longer as carriers, but only as warehousemen. After the expiration of the notice, and while the goods were still in the hands of the railway company, the vendee filed a petition for liquidation. The defendants, by order of the vendors, stopped the goods *in transitu* and returned them to B. In an action by the trustee in liquidation of the vendee to recover the value of the goods,—*Held*, that as between the vendors and the vendee, the right to stop the goods was at an end when the goods had arrived at G., and when the notice given by the railway company had expired; for the goods were then in the constructive possession of the vendee,

the defendants being the appointed agents of the vendee to receive and forward the goods upon the fresh journey to Rouen. *Kendall Trustee, &c.*, v. *Marshall, Stevens & Co.* (App.), 313

Vestry—*election of way-wardens: separate townships: poll: mandamus*]—At an election of way-wardens for a parish containing eleven townships, the names of the candidates for each township were put separately to the meeting, and the candidate in whose favour the shew of hands was, declared duly elected for that particular township, the successful candidate for the first township being declared before the election for the second was commenced, and so on. After the eleven way-wardens had been elected, an elector demanded a poll for those townships which had been third and fourth in order:—*Held*, that the demand was too late, the election for each township being a separate and distinct election. *Reg.* v. *The Vicar of St. Asaph*, 671

Vestryman. See METROPOLIS LOCAL MANAGEMENT.

Vicar. See CHURCH AND CLERGY.

Wagering. See CONTRACT.

Warehouse. See BILLS OF LADING.

Warranty. See SHIP AND SHIPPING.

Water. See RIPARIAN OWNER.

Water Company—*duty to supply pure water: water poisoned in consumer's service pipe: waterworks act*, 1874, *s.* 35] The corporation of H. were empowered under a private Act, with which were incorporated the Waterworks Acts, 1847 and 1863, to supply water for domestic use from specified sources. M. had been supplied for some years from one of the corporation's mains, through a lead service pipe laid down by the corporation at the expense and upon the application of M. and his landlord. By section 66 of their Act the corporation were entitled to prescribe the material to be used for service pipes, and at the time when the service pipe to M.'s house was laid the material might either be lead or cast-iron. No objection was made by M. to his service pipe being made of lead. The service pipe when laid belonged to the consumer. M., having been attacked with a severe illness, which, it was admitted, arose from the water supplied to him by the corporation having become contaminated with lead absorbed from his service pipe, brought an action against the corporation to recover damages for the injuries he had sustained. It was admitted that the material used for M.'s service pipe was that ordinarily used and best adapted for the purpose, and that the water while in the main from which M.'s supply was taken was pure and wholesome. By section 35 of the Waterworks Act, 1847, "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the Special Act, who shall be entitled to demand a supply and shall be willing to pay water-rate for the same":—*Held*, that M. had no cause of action against the corporation, as the responsibility of the corporation for the condition of the water supplied to M. terminated at their mains. *Milnes* v. *The Mayor, &c., of Huddersfield*, 64

—— *water-rate, how calculated: actual amount on which assessment to poor-rate is computed: annual value: 7 Geo. 4. c.* cxl. *s.* 27: 15 & 16 *Vict. c.* clvii. *ss.* 46 *and* 57]—A water company was required by its special Act to supply water to inhabitants of dwelling-houses at certain rates, and it was provided that the rates should be payable "according to the actual amount of the rent where the same can be ascertained, and, where the same cannot be ascertained, according to the actual amount or annual value upon which the assessment to the poor's rate is computed in the parish or district." A later special Act altered the rates to be paid per cent., varied the mode of supply in certain details, and enacted that the company might charge, "where the annual value of the dwelling-house" did not exceed a certain sum, a percentage "on such value." This Act also enacted that, except as expressly provided therein, "this Act shall not repeal, alter, interpret or in any manner affect" the provisions of the earlier Act. *Dobbs* v. *The Grand Junction Waterworks Co.* (App.), 90

In a case where the occupier of a house supplied with water by the company was lessee for a long term at a ground rent, so that the actual amount of the rent could not be ascertained,—*Held* (reversing the judgment of the Queen's Bench Division), that the water-rate must be calculated on the amount of the gross estimated rental appearing in the poor-rate assessment, and not on the net rateable value; that the later Act did not repeal the earlier Act, and that the words "annual value" in the later Act meant the same as the words "actual amount or annual value upon which the assessment to the poor's rate is computed" in the earlier Act. Ibid.

—— water-rate, how calculated: "annual rent": "annual value": Waterworks Clauses Act,

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